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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1972**

State of Minnesota,
Respondent,

vs.

Daniel John Mallet,
Appellant.

**Filed January 19, 2021
Affirmed
Gaïtas, Judge**

Ramsey County District Court
File No. 62-CR-18-5477

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

John Choi, Ramsey County Attorney, Jeffrey A. Wald, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gaïtas,
Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Daniel John Mallet challenges his convictions of engaging in electronic communication relating to or describing sexual conduct with someone believed to be a child and solicitation of someone believed to be a child to engage in sexual conduct,

arguing that the evidence was insufficient to support the jury's guilty verdicts. Specifically, he argues that the trial evidence did not support the jury's rejection of his entrapment defense. Additionally, in a pro se supplemental brief, Mallet alleges that his convictions should be reversed because the investigating agent did not fully comply with law enforcement standards in selecting a profile photo for the phony online account used in the investigation and because the photos appeared to be of adults. We conclude that sufficient evidence supports the jury's verdicts and that Mallet has not shown plain error affecting his substantial rights. We affirm.

FACTS

In January 2018, in the days leading up to the Super Bowl in Minneapolis, the Minnesota Human Trafficking Investigator's Task Force led an undercover operation to detect individuals soliciting minors for sexual encounters. A team of Minnesota Bureau of Criminal Apprehension (BCA) agents posed as minors on various websites and social media platforms. Using accepted law enforcement standards for such operations, agents tried to passively converse with potential solicitors, allowing solicitors to propose in-person meetings for sexual encounters.

One agent created a profile on "Grindr," a location-based application used by men seeking relations with other men. The profile was titled "New to this" and included a stock photograph of a person riding a bike in protective gear and a helmet that concealed the person's face. The profile description created by the agent stated: "Super discreet and normally don't start conversations. visiting from North Dakota"; "Height 5'8"; "Weight 155 lbs"; "Body Type Slim." No age was provided for this fictional person. The posting

attracted Mallet's attention, and he initiated an online conversation. Mallet and the agent continued to communicate regularly for the next nine days.

The agent identified himself to Mallet as "Seth." On the first day of their conversation, Mallet stated that he was looking for a "f--k buddy or a friend with benefits situation" and asked about Seth's intentions. Seth—the agent—responded that he was a 15-year-old from North Dakota, stating, "I'm younger and not experienced and leave tomorrow." Mallet, who was actually age 44, told Seth that he was 35 years old. He inquired about Seth's sexual orientation and preferences while discussing his own. Seth replied, "Well I haven't done much. I will be 16 in August so I am not out in school." He also told Mallet that other users were offended that he was using the Grindr application at his young age. Mallet was not discouraged, however, and continued the conversation. He described for Seth, in explicit detail, the specific sexual acts he preferred and chatted about his sexual history. Mallet and Seth also discussed commonplace topics like weightlifting, work, and school. At the end of their first day of online communication, Mallet told Seth that they "should keep in touch . . . in case you want or need someone to talk to," suggesting that Seth add him as a "favorite" contact on Grindr.

The next day, the agent, still purporting to be Seth, messaged Mallet, "Morning." Then, the conversation picked up from the day before. Mallet again described his sexual preferences to Seth, including specific positions, in graphic detail. Mallet told Seth that it would be "hot to be your first." He said that Seth could come visit "once your 16, hopefully all the time." Mallet continued to discuss things he wanted to do with Seth and other sexually charged topics before asking, "When do you turn 16?" Seth replied, "August."

“Nice, wishing it was February though,” Mallet responded. As the conversation progressed, Mallet stated, “I’ll show you everything you need . . .” while discussing sexual acts he wished to perform with Seth. Seth told Mallet, “I’m 15 and haven’t done anything before. Need you to help me out.”

Mallet and Seth eventually discussed meeting in person. Mallet asked Seth how much time they would have together before raising the suspicions of Seth’s aunt, who was hosting Seth, and discussed logistics of meeting up. During the course of this discussion, Mallet expressed hesitation about Seth’s age. The agent, playing the role of Seth, responded, “I am not worried about it.” Mallet inquired, “Sure your not 16?” Seth replied, “I am 15 but I’m good if u are.” Mallet explained his reservations and eventually told “Seth” they could not meet up because that would be illegal. Mallet said that he hoped “August will come fast.”

But after a short break in the conversation, Mallet re-initiated the contact. Mallet messaged about the sexual acts he wanted to perform with Seth, before again discussing the idea of meeting in person. Mallet did not follow through with the idea of meeting in person and ultimately the conversation trailed off that evening.

Two days later, the agent messaged Mallet pretending to be Seth, and stating that he was back in town. This led to another sexually explicit conversation, directed by Mallet. Mallet eventually said that he would have a car from a rideshare service pick Seth up at 7:00 p.m. Seth suggested having a neighbor give him a ride to meet Mallet, but ultimately they did not follow through.

The agent greeted Mallet the next day, stating, “Morning,” which led only to a brief conversation. The next day, the agent wrote Mallet again, asking, “Are u not interested[?]” Mallet said that he had been busy with work and the two discussed weekend plans. One day later, Mallet contacted Seth. The conversation quickly turned to how and when they could meet one another in person. Mallet asked, “Will you have time, without raising any suspicions?” He added, “I cant promise sex but [at] least we can meet up and chill.” But then Mallet described the sexual acts he wished to perform with Seth in explicit detail.

The profile that the agent had created for Seth was shut down the next day. He believed that another user had reported the account because the user was only 15 years old, and the application requires users to be age 18 or older. The agent created a new profile and messaged Mallet, “Hey its Seth. Got booted.” The agent also stated, “Yeah apparently being 15 years old and on here is bad.” Mallet responded, “Lol, well it is bad,” and suggested that Seth say that he was older than he was to avoid being reported again. Mallet soon steered the conversation toward sexual acts before raising the idea of meeting in person. He asked for a photograph of Seth’s face, sent a picture of his own, and then sent photographs of male models in their underwear. Mallet suggested meeting at a gas station near his house. Seth agreed, and said he would get a ride from a neighbor. They planned to wear specific clothing and meet at the gas station that evening.

Mallet proceeded to the gas station. He was arrested on his way there.

The state charged Mallet with electronic communication about sexual conduct with someone believed to be a child in violation of Minn. Stat. § 609.352, subd. 2a(2) (2016) (count one), and solicitation of someone believed to be a child to engage in sexual conduct

in violation of Minn. Stat. § 609.352, subd. 2 (2016) (count two). Mallet pleaded not guilty and had a jury trial.

In a pretrial motion, Mallet claimed that he was entrapped by the agent and requested a jury instruction on entrapment. The district court reserved ruling on the request until the end of the trial. During the trial, the state called two BCA agents as witnesses, including the agent who played the role of Seth, and offered exhibits containing screenshots of Seth's profile and the communications between Mallet and the agent. After the presentation of evidence, the district court granted Mallet's request for an entrapment instruction, and included the instruction with the court's final charge to the jury. Mallet's attorney argued in closing that the agent's persistent contacts were evidence of entrapment and that the jury should find that Mallet was entrapped by the state.

The jury returned guilty verdicts on both counts. At sentencing, the district court stayed execution of a 15-month prison sentence, placing Mallet on supervised probation for three years and ordering him to serve 60 days in jail as a condition of probation.

Mallet appeals.

DECISION

I. The evidence at trial was sufficient to support Mallet's convictions notwithstanding his entrapment defense.

Mallet argues that the evidence does not support the jury's rejection of his entrapment defense, and in turn, his convictions. "To determine whether sufficient evidence exists to support a jury verdict, [appellate courts] view the evidence in a light most favorable to the verdict and assume the fact-finder disbelieved any testimony conflicting with that verdict." *State v. Balandin*, 944 N.W.2d 204, 213 (Minn. 2020)

(quotation omitted). A verdict will not be overturned “if, giving due regard to the presumption of innocence and to the prosecution’s burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense.” *Id.* (quotation omitted); *see State v. Bauer*, 776 N.W.2d 462, 469 (Minn. App. 2009) (applying sufficiency-of-evidence standard in reviewing jury’s rejection of entrapment defense), *aff’d on other grounds*, 792 N.W.2d 825 (Minn. 2011).

To guide our analysis on the sufficiency of the evidence, we first consider the law of entrapment. Minnesota courts have recognized the entrapment defense for many years. “It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime.” *State v. Poague*, 72 N.W.2d 620, 625 (Minn. 1955) (emphasis omitted) (quoting *Newman v. United States*, 299 F. 128, 131 (4th Cir. 1924)). Thus, “[w]hen the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.” *Id.*

This state, like most others, applies a subjective test when examining the propriety of an entrapment defense. *State v. Grilli*, 230 N.W.2d 445, 452-53 (Minn. 1975). This test consists of two elements: (1) inducement and (2) criminal predisposition. *Id.* at 455-56 (citing *Sherman v. United States*, 356 U.S. 369, 373, 78 S. Ct. 819, 821 (1958)). On the first element, the defendant bears the burden of production: “the defendant must raise the defense by showing by a fair preponderance of the evidence—either through cross-

examination of the state’s witnesses or through defense testimony—that the government induced the commission of the crime.” *State v. Vaughn*, 361 N.W.2d 54, 57 (Minn. 1985); *State v. Charlton*, 338 N.W.2d 26, 29 (Minn. 1983). If the defense makes a threshold showing of inducement, the burden shifts to the state on the second element to prove that the defendant was predisposed to commit the crime charged beyond a reasonable doubt. *Grilli*, 230 N.W.2d at 456.

A. Inducement

As to the element of inducement, “the evidence must show that the state did something more than merely solicit the commission of a crime”—conduct more akin to “persuasion, badgering, or pressure” must occur. *State v. Olkon*, 299 N.W.2d 89, 107 (Minn. 1980).¹ Merely supplying a defendant with the opportunity to commit a crime is not enough to establish that the government actor induced the crime. *Vaughn*, 361 N.W.2d at 57.

Mallet argues that the agent “clearly induced [him] to commit offenses he would not otherwise have committed by improper pressure[,] badgering and persuasion.” He claims that the agent’s “actions in continually reaching out to [him] and re-initiating contact over a period of days exerted improper pressure . . . to commit the charged offenses.” Mallet likens his case to *State v. Johnson*, arguing that his burden of production is satisfied by the state’s own evidence, which shows that he was “eventually overcome by the

¹ As we have noted in the past, “[t]hat the district court instructed the jury on [appellant]’s entrapment theory does not establish that the evidence is of sufficient weight to meet [appellant]’s burden of proof on the inducement element. Rather, it merely indicates that some evidence exists in support of inducement.” *Bauer*, 776 N.W.2d at 470.

[agent]’s persuasion” after initially declining to meet Seth in person. 511 N.W.2d 753, 755-56 (Minn. App. 1994) (concluding that trial court erred by refusing to instruct the jury on entrapment because evidence showed inducement and the state failed to prove defendant’s predisposition for drug transactions), *review denied* (Minn. Apr. 19, 1994).

The state counters that the evidence on the nature and extent of Mallet’s conversation with Seth shows that Mallet was not induced. The state maintains that the agent merely “provided an opportunity for [Mallet] to commit his crimes,” which, under the caselaw, cannot establish a threshold showing of inducement.

After thorough review, we conclude that Mallet failed to make a threshold showing of inducement. We recognize that the jury received evidence of the agent’s attempts to re-engage Mallet during lapses in the conversation throughout the nine-day period. And we accept that Mallet may have viewed certain messages from Seth as provocative. For example, the agent would send responses to Mallet such as “I really like u”; “You really got me all excited”; “That sounds hot”; “Are u not interested?”² But this evidence alone does not show inducement. Rather than showing improper inducement, we determine that the agent’s conduct afforded Mallet the opportunity to engage in crime.

The district court gave an instruction on the entrapment defense that conforms to the standard jury instruction. 10 *Minnesota Practice*, CRIMJIG 7.02 (2018). As part of

² The prosecutor even drew attention to the nature of the agent’s messaging during trial by asking the agent on direct examination, “Now as you’re engaging in this chat with the defendant, and, you, know, some of the responses that you provide could be considered a bit flirtatious. Is that allowed under [Internet Crimes Against Children] standards?” The agent testified that such responses are allowed because agents “need to pretend to be interested for the conversation to continue in the way that the adult is driving it to continue” and the agent’s responses might suggest a lack of interest.

that instruction, the district court advised the jury that “the fact that the government agent has provided what appears to be a favorable opportunity is not a defense.” *See Kind Heart Daycare, Inc. v. Comm’r of Human Servs.*, 905 N.W.2d 1, 12 n.5 (Minn. 2017) (“[T]he fact that government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment.” (quotation omitted)); *see Vaughn*, 361 N.W.2d at 57. The jury received a full copy of the messages between Mallet and Seth and heard testimony from the agent about his rationale for sending specific messages. From this evidence, the jury reasonably could have found that, although the agent gave Mallet various opportunities to solicit a 15-year-old, Mallet was not badgered, persuaded, or pressured into planning an in-person meeting to engage in sexual conduct. To the contrary, the agent repeatedly reminded Mallet that Seth was underage, which did not deter Mallet from pursuing highly sexualized conversations and, ultimately, setting up a meeting.

We also reject Mallet’s invitation to apply *Johnson* as controlling authority in this case. *See Johnson*, 511 N.W.2d at 753. Unlike the defendant’s acquiescence in *Johnson*, there was plenty of evidence here showing that Mallet consistently initiated sexual conversations with Seth, and that Mallet was the one who pushed an in-person meeting and planned it. *See id.* at 755-56 (reasoning that defendant’s own testimony showed he had no desire to purchase drugs from informant during “reverse-sting” operation).

Because the agent’s conduct did not rise to the level of “persuasion, badgering, or pressure”—even though some messages may have been provocative or flirtatious in nature—we conclude that the jury had a sufficient basis to find that Mallet was not induced to commit the offenses. *Olkon*, 299 N.W.2d at 107.

B. Criminal Predisposition

Even if Mallet satisfied his burden of showing inducement, the state's evidence, which established his predisposition to commit the offenses beyond a reasonable doubt, was sufficient to overcome the entrapment defense. Predisposition may be shown through (1) the defendant's active solicitation to commit the crime, (2) prior criminal convictions, (3) prior criminal conduct not resulting in conviction, (4) criminal reputation, or (5) any other adequate means. *Grilli*, 230 N.W.2d at 452; *Olkon*, 299 N.W.2d at 107-08. Mallet's criminal past is not at issue. Rather, his predisposition hinges on "evidence that [he] readily responded to the solicitation of the commission of a crime by the state." *Olkon*, 299 N.W.2d at 108 (explaining that the state may prove predisposition with evidence of the defendant's ready response to the state's initial solicitation); see *In re Welfare of G.D.*, 473 N.W.2d 878, 883-84 (Minn. App. 1991).

We conclude that Mallet's ready participation in the conversation and the consistent, sexualized nature of his messages to a person he believed to be 15-year-old boy, is sufficient proof that Mallet was predisposed to engage in sexualized communications with, and solicitation of, a child.³ The evidence reveals that Mallet initiated contact with Seth,

³ Both parties argue that the sufficiency of the evidence should be reviewed under the traditional standard of review; neither suggests that the circumstantial-evidence test applies. And caselaw shows that sufficiency-of-the-evidence appeals that focus on entrapment defenses may be reviewed under the traditional standard. *Bauer*, 776 N.W.2d at 469. Still, when a conviction rests on mixed evidence, meaning some elements proven by direct evidence and other elements proven by circumstantial evidence alone, appellate courts apply the circumstantial-evidence test. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016); *State v. Porte*, 832 N.W.2d 303, 309-10 (Minn. App. 2013), review denied (Minn. June 16, 2015). Under that test, appellate courts review the circumstances proved by the state at trial and consider whether any rational hypothesis inconsistent with guilt could reasonably co-exist. *Porte*, 832 N.W.2d at 310. Because the evidence of Mallet's

continued communicating with Seth despite his young age, insistently discussed his sexual preferences in graphic detail, usually singlehandedly steering the discussion toward sex; and consistently expressed a desire to meet in person.

In sum, the evidence reasonably permitted the jury to reject Mallet's entrapment defense. There was sufficient evidence from which the jury could find that Mallet was not induced and that he was predisposed to commit the crimes charged beyond a reasonable doubt.

II. The claims raised in Mallet's pro se supplemental brief do not require reversal of his convictions.

Mallet also filed a pro se supplemental brief on appeal. In his brief, he alleges that portions of testimony from the BCA agent are inconsistent. Specifically, he points out that the BCA agents testified that photographs used to create decoy profiles "have to come from an employee of law enforcement," yet the BCA agent who posed as Seth testified that he used a "stock photo" found online as a profile picture. Thus, Mallet asserts that the agent

predisposition is arguably purely circumstantial, the circumstantial-evidence test may apply. *See Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (defining circumstantial evidence). But even if applied here, our decision is unaffected. Having considered the circumstances proved, and after giving proper deference to the jury's verdicts and its rejection of evidence inconsistent with the verdicts, all rational inferences consistently point to Mallet's guilt and remain inconsistent with any rational hypothesis to the contrary. The evidence of Mallet's ready, consistent, and vehement participation in the nine-day conversation with Seth establishes his criminal disposition for sexualized electronic communications with, and solicitation of, a 15-year-old. Thus, all rational inferences from the evidence establish Mallet was still predisposed to commit the crimes charged. Because the evidence leaves no room for any other reasonable conclusion, applying the circumstantial-evidence test here leads to the same result: sufficient evidence supports the jury's finding that Mallet was not entrapped.

did not “follow proper protocol as he was trained in and therefore was never able to give the believable impression of being an underage individual on an adult’s only application.”

To the extent that Mallet’s argument is raising a trial error, Mallet did not object to any such error during the trial and does not articulate a legal basis for that error in his supplemental brief. In reviewing errors that were not preserved by an objection, we apply the plain-error standard of review. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Here, Mallet does not specify any legal grounds for a claim of error or cite any legal authority supporting his position. *See Adams v. Harpstead*, 947 N.W.2d 838, 847 (Minn. App. 2020) (“It is axiomatic that an assignment of error on mere assertion, unsupported by argument or authority, is forfeited and need not be considered unless prejudicial error is obvious on mere inspection.” (quotation omitted)), *review denied* (Minn. Oct. 1, 2020). Thus, we find that no plain error occurred.

Mallet’s pro se supplemental brief might also be interpreted as adding support for his sufficiency-of-the-evidence challenge. We note, however, that the jury had an opportunity to review the evidence highlighted by Mallet and ultimately found him guilty. Again, when reviewing the sufficiency of the evidence, we must “view the evidence in a light most favorable to the verdict and *assume the fact-finder disbelieved any testimony conflicting with that verdict.*” *Balandin*, 944 N.W.2d at 213 (emphasis added). In doing so, we conclude that sufficient evidence supports the jury’s verdicts, and we therefore affirm Mallet’s convictions.

Affirmed.