

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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Appeal No. 2009AP1977-CR

Cir. Ct. No. 2008CF452

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TUSHAR S. ACHHA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 ANDERSON, J. Tushar S. Achha appeals from his conviction for using a computer to facilitate a child sex crime. The first issue he raises is the contention that he received ineffective assistance of trial counsel. He did not present this issue to the trial court before filing this appeal and we decline to

address the issue. The second issue is his contention that the evidence is insufficient to negate his primary defense that he was entrapped by a police officer taking advantage of Achha's ignorance of American culture. We reject this contention because the evidence establishes beyond a reasonable doubt that Achha was trolling the Internet to initiate a sexual relationship. Therefore, we affirm his conviction.

¶2 “On the Internet, Nobody Knows You’re a Dog,” is the caption of a cartoon that appeared in *The New Yorker* magazine in 1993.¹ The cartoon accentuates the almost complete anonymity Internet users enjoy. For Achha, a twenty-nine-year-old engineer from India, living and working in Fond du Lac, it allowed him to start a relationship with thirteen-year-old “Niki Smith” from Waukesha. Over a period of sixteen days, Achha and Niki communicated with each other about sex and arranged for Achha to drive to Waukesha to meet Niki at a McDonald’s for the purpose of engaging in sexual activity. But the anonymity of the Internet is a two-way street. Niki was actually Carol Stuhlman-Roberts, an undercover Waukesha county sheriff’s detective posing as a thirteen-year-old girl.

¶3 On April 23, 2008, Stuhlman-Roberts was conducting an Internet sting operation to detect and apprehend individuals who would try to arrange to have sex with a child under the age of sixteen. As part of this sting, she developed a profile of a thirteen-year-old Waukesha girl named Niki Smith, whose interests included horses, shopping and hanging out with friends. Stuhlman-Roberts posted

¹ Coleen M. Barger, *On the Internet, Nobody Knows You’re a Judge: Appellate Courts’ Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417 & n.2 (2002).

this profile on Yahoo!² and entered a chat room³ for Wisconsin using the screen name⁴ “niki8135.” Her practice was to log into a chat room but not to participate until someone contacted her. Within minutes of logging into the chat room, Achha contacted her by instant messaging.⁵

¶4 Initially, Achha established that Niki was thirteen years old and then asked, “u like guys???”⁶ Niki responded that she liked older guys and had been

² “The largest and most comprehensive information portal on the Web. Along with Web search, news, sports and weather, Yahoo! offers e-mail, instant messaging, travel, auctions, classified ads, discussion groups, Web hosting and numerous other services.” *Yahoo! The Free Dictionary*, <http://encyclopedia2.thefreedictionary.com/Yahoo!> (last visited Dec. 8, 2010).

³ *United States v. John Mitchell*, 353 F.3d 552, 554 n.2 (7th Cir. 2003) states:

A chat room is a place on the world wide web where Internet users with common interests can sign on to communicate in real time. Generally, when users enter a chat room they see a list of other persons (usually known by pseudonyms) who have also signed on to the chat room site. To “chat,” users type a message which can be seen almost immediately by all of the other persons “present” in the chat room. They may, in turn, respond.

⁴ “A screen name is an appellation used to identify oneself in a chat room or when sending instant messages to another computer user. Although it can be the user’s real name, it is more often a pseudonym.” *Mitchell*, 353 F.3d at 554 n.3.

⁵ At *The Free Dictionary*, <http://encyclopedia2.thefreedictionary.com/instant+messaging> (last visited Dec. 8, 2010), instant messaging is explained as:

Exchanging text messages in real time between two or more people logged into a particular instant messaging (IM) service. Instant messaging is more interactive than e-mail because messages are sent immediately, whereas e-mail messages can be queued up in a mail server for seconds or minutes. However, there are no elaborate page layout options in instant messaging as there are with e-mail. The IM text box is short, and pressing the enter key often sends the text. IM is designed for fast text interaction.

⁶ As the 7th Circuit did in *Mitchell*, 353 F.3d at 555 n.4, we will not use “[sic]” to indicate errors or mistakes in the original texts of the messages because real time conversations in Internet chat rooms and through instant messenger services are most often informal and involve typographical errors, shorthand, symbols and abbreviations.

with a forty-five year old. Achha then launched into an explicit Internet chat in which he bragged about his physical attributes and prowess.

¶5 Niki invited Achha to come to Waukesha and estimated it was one hour away from Fond du Lac. Achha asked if they could have a physical relationship if he came, and Niki replied, “my mom goes away for the weekends up north w/ her bf a lot. she is going this week end.” Achha asked her for a photograph and she uploaded four photos while instant messaging.⁷ Achha responded that he liked the photos and proceeded to upload one photo of himself.

¶6 Achha then asked Niki if they could have a date. She said, “sure,” and asked for a phone number that she could call him at for the coming weekend. He readily gave her his number. Niki asked “wen is a good time to call u? I have to use my friends fone cuz u r long distance”; she went on to explain, “yes wen is a good time to call u? I get done w/ school at 3pm so I could call u after that. im certain my mom is going up north this week end so it wood b good.” Achha complained that he would be tired on Friday evening because he would be working until 5 p.m. Niki asked if he would be staying the night, and he replied in the affirmative. She then asked him to bring condoms and beer. He revealed he was from India and did not know how to buy condoms and she replied he should go to Walgreens. Achha wrote that he would get the beer and condoms. The IM chat ended with Achha asking Niki about when she last had sex and complaining about his lack of recent activity. His final comment was to again brag about his physical attributes.

⁷ Stuhlman-Roberts uploaded three childhood photos of the wife of a Waukesha county police lieutenant and, by mistake, a childhood photo of a civilian employee.

¶7 The next day, April 24, 2008, Niki called Achha to tell him that her mother was not going away until the following weekend and that is when they should meet. Achha agreed.⁸ The brief phone call ended with the parties exchanging kisses.

¶8 On April 25, 2008, Achha and Niki instant messaged to work out plans for the following Friday. Niki messaged that her mother would be gone at least until Saturday evening, and if her boyfriend went with her mother, she would be gone until Sunday. She told Achha that they would meet at a McDonald's right off I-94 that was near her home. Achha said this would be a great experience for him; Niki replied it would be for her, but she would be a little shy and would need one or two beers to loosen up. She asked if her age would bother him and Achha replied there would be no problem if she was physically developed. He bragged again about his physical attributes and wondered if he would hurt her. Niki assured him, "we wont kno til we try rite??" And if it did not happen, they could do other things. To which Achha responded that if he was excited, he might not be able to stop himself.

¶9 Achha recounted for Niki that when he was sixteen, he missed a chance for a physical relationship, and if he did not have a relationship with her, he would regret the missed opportunity. He again boasted about his physical prowess and she said to "bring many condoms I don't want to get pregnant." Answering a question from Achha, Niki reported that she had just finished her period. Yet again Achha told her about his physical attributes and prowess. He

⁸ During telephone conversations, Niki was portrayed by Shari Ackeret, a civilian payroll clerk in the sheriff's department because she had a younger sounding voice than twenty-year veteran Stuhlman-Roberts.

then told her that he was a vegetarian and asked her to have appropriate vegetarian foods in the house, including milk and sugar which he liked in breaks between intimacy.

¶10 There were no substantive instant messaging during the following week. On the morning of May 2, 2008, Achha messaged Niki asking her to call him. During the phone call, they decided that they could not meet that night, and Achha spending Saturday night was out of the question. They agreed to meet the following weekend. Niki told him there were hotels in the area, but her home was the best place to be together. They had a brief instant message exchange later in which Achha wrote, “We will MAKE it in the next week.”

¶11 The next computer chat they had was on May 5, 2008, when Achha asked if she really wanted a physical relationship with him, and he reported that he had watched a video concerning a twenty-six-year-old male who had chatted with a thirteen-year-old girl on the computer and then went to the girl’s home where police and the media were waiting and he was arrested and put in jail. Niki responded that they would meet at McDonald’s and he would drop her one block from her house and then he could come a few minutes later. She told him not to worry.

¶12 Niki and Achha had a phone conversation on May 8, 2008, during which she assured him that she really wanted him. They agreed to meet the next day at the McDonald’s near Niki’s house. Later that evening, they computer chatted about the next evening and meeting at McDonald’s, and Niki reminded him to bring condoms and beer. Achha messaged that he was more than someone who was interested in sex, that he also liked to chat.

¶13 They had two brief phone conversations on Friday. When Achha got to the McDonald's restaurant, he was arrested in the parking lot. A search of his car uncovered a box of condoms and a bag with clothing. Achha gave a written statement in which he claimed he believed he was chatting with another adult and that he or she was lying about being thirteen, and he came to Waukesha to see the adult he had been conversing with. He allowed that if the person actually was a thirteen-year-old girl, he was going to use the opportunity to help her.

¶14 Achha was charged with one count of using a computer to facilitate a child sex crime in violation of WIS. STAT. §§ 948.075(1r) and 939.50(3)(c) (2005-06).⁹ Achha's motions to suppress his statements and evidence seized during the search of his vehicle were denied. At the conclusion of a two-day trial, the jury instructions included the standard entrapment instruction, WIS JI—CRIMINAL 780, and Achha was convicted on the sole count of the Information. The trial court sentenced him to five years of initial confinement and five years of extended supervision. Achha appeals pro se.¹⁰

¶15 As with the majority of pro se appeals, it is difficult to ferret out Achha's issues. He complains that his trial counsel provided him with ineffective assistance of counsel by not vigorously pursuing an entrapment defense. We also believe that he is generally challenging the sufficiency of the evidence.

⁹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¹⁰ After his initial brief was filed, Achha wrote this court on January 12, 2010, seeking to discharge his appointed counsel. This letter prompted counsel to move to withdraw, and after we warned Achha of the difficulties and disadvantages of self-representation, we granted that motion on February 4, 2010.

¶16 Both of Achha’s issues spring from his claim that he is the victim of entrapment by law enforcement.

Stuhlman Roberts framed me, because she had an advantage over me—my ignorance. I would like to use word *framed* over the word *entrapped*. In entrapment, defendant had always a choice not to be entrapped. He knows he shouldn’t do this thing, because it is legally prohibited; even he has been incited by someone. He has an idea if it doesn’t work the way it plan to be, then he will be in big trouble. But I have been framed; I had no idea which law I was violating and how much greater trouble it would cause for me. I had been framed to violate Wis. Stat. §948.075 step-by-step by taking advantage of my ignorance. I wasn’t even violating the statu[t]e ... by just showing indifference to Niki’s age while chatting on internet.

¶17 “Entrapment is a defense available to a defendant who has been induced by law enforcement to commit an offense which the defendant was not otherwise disposed to commit.” *State v. Pence*, 150 Wis. 2d 759, 765, 442 N.W.2d 540 (Ct. App. 1989). Our supreme court has adopted a subjective test to determine the origin of the defendant’s intent. *Id.* “The subjective test focuses on the reason for the defendant’s state of mind which led to the intent to commit the crime, *i.e.*, whether the police conduct affected or changed a particular defendant’s state of mind.” *Id.*

¶18 Entrapment, however, necessarily admits the act charged. *State v. Monsoor*, 56 Wis. 2d 689, 696, 203 N.W.2d 20 (1973). “Once entrapment becomes an issue, all essential elements of the crime are taken as having been proved beyond a reasonable doubt.” *State v. Saternus*, 127 Wis. 2d 460, 480, 381 N.W.2d 290 (1986). All that remains is the question of the State’s “bad conduct” and the “origin of the intent” to commit the crime. *Id.*

¶19 *Ineffective Assistance of Counsel.* We will not address this issue because Achha has failed to preserve his challenge to trial counsel's performance. Achha waived this issue by not raising it in a WIS. STAT. RULE 809.30(2)(h) postconviction motion. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). He also failed to procure a trial court hearing on the claim of which trial counsel must be notified, *State v. Simmons*, 57 Wis. 2d 285, 297-99, 203 N.W.2d 887 (1973), and his attendance procured if possible, *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶20 *Sufficiency of the Evidence.* We now turn our attention to Achha's challenge to the sufficiency of the evidence. In reviewing the sufficiency of the evidence, we may not reverse the trier of fact unless the evidence, viewed in the light most favorable to the outcome of the proceeding, is so deficient that, as a matter of law, no reasonable fact finder could have reached the same result. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The test is whether this court can conclude that the trier of fact could, acting reasonably, be convinced of the defendant's guilt by evidence it had a right to believe and accept as true. *Id.* It is the function of the trier of fact—not the appellate court—to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from it. *Id.* at 506.

¶21 There are four elements to the crime of using a computer to facilitate a child sex crime in violation of WIS. STAT. § 948.075(1r):

1. The defendant used a computerized communication system to communicate with an individual.
2. The defendant believed or had reason to believe that the individual was under the age of 16 years.

3. The defendant used a computerized communication system to communicate with the individual with intent to have sexual (contact) (intercourse) with the individual.
4. The defendant did an act, in addition to using a computerized communication system, to carry out the intent to have sexual (contact) (intercourse).

WIS JI—CRIMINAL 2135 (footnotes omitted).

¶22 The State has more than met its burden on all four elements. First, Stuhlman-Roberts testified that she was conducting an Internet sting and had entered a chat room operated or maintained by Yahoo! and she and Achha communicated using the Yahoo! chat feature. Second, Achha asked if she was really thirteen years old and Niki replied, “yes I am.” Almost immediately, Niki asked, “cool do you like 13 yr olds.” Third, during their first Internet chat, and after learning that Niki had been with an older man, Achha asked if she had sex with him and then asked, “can we have sex??” He also bragged about his physical attributes and prowess. Before the first chat ended, they agreed that Achha would come to Waukesha, and he agreed that he would buy condoms. In subsequent Internet chats and phone calls, Niki and Achha planned on Achha coming to Waukesha to have sex with Niki.

¶23 The final element of the offense is that the “defendant did an act, in addition to using a computerized communication system, to carry out the intent to have sexual (contact) (intercourse).” WIS JI—CRIMINAL 2135. This element requires that the act be something *other than* using a computerized communication system. *State v. Olson*, 2008 WI App 171, ¶11, 314 Wis. 2d 630, 762 N.W.2d 393. The State presented evidence that after several Internet chats with Niki to plan a trip to Waukesha, Achha had several phone calls with her, he drove from Fond du Lac to Waukesha, and he purchased condoms before going to the

McDonald's in Waukesha. We conclude a reasonable jury would be convinced of Achha's guilt by evidence it had a right to believe and accept as true. *See Poellinger*, 153 Wis. 2d at 507.

¶24 Giving Achha the benefit of the doubt, we read his brief not to directly challenge the sufficiency of the evidence; rather, he appears to challenge the sufficiency of the evidence to negate his defenses of (1) entrapment and (2) fantasy/role playing.¹¹ “Entrapment is a defense to a charge when the ‘evil intent’ and the ‘criminal design’ of the offense originate in the mind of the government agent, and the defendant would not have committed an offense of that character except for the urging of the government.” *State v. Hilleshiem*, 172 Wis. 2d 1, 8, 492 N.W.2d 381 (Ct. App. 1992).

[T]he law permits law enforcement officers to engage in some inducement, encouragement, or solicitation in order to detect criminals. Thus, entrapment will only be established if the law enforcement officer used *excessive* incitement, urging, persuasion, or temptation, and prior to the inducement, the defendant was not already disposed to commit the crime. In the context of narcotics transactions, merely seeking or offering to buy drugs is not the kind of inducement which establishes entrapment.

Id. at 9 (citations omitted).

¶25 We have summarized the explicit chat room transcripts and the recorded telephone calls and it shows that Achha had only one thing on his mind: sex with a thirteen-year-old girl. He steered every conversation toward sex, he

¹¹ Achha could not directly challenge the sufficiency of the evidence. As we previously noted, the entrapment defense admits that all essential elements of the crime are taken as having been proved beyond a reasonable doubt. *State v. Saternus*, 127 Wis. 2d 460, 480, 381 N.W.2d 290 (1986).

bragged about his prowess and physical attributes, he asked Niki if she could handle his prowess and physical attributes, he asked whether she had been with other older men, he constantly sought to arrange a meeting with Niki for the sole purpose of engaging in sexual relations with a thirteen year old. The evidence establishes that Achha was trolling the Internet for girls with the goal of inducing one to have sex with him.

¶26 The evidence establishes that Stuhlman-Roberts did nothing more than provide an opportunity for Achha to achieve his goal. The fact that the State's agent cultivates a friendship, as a thirteen-year-old girl, with an adult male does not constitute entrapment. *State v. Bjerkaas*, 163 Wis. 2d 949, 956, 472 N.W.2d 615 (Ct. App. 1991). The evidence here showed Stuhlman-Roberts did nothing more than permit Achha to believe he had the opportunity to have sex with a thirteen-year-old girl. The evidence does not allow the inference that Achha was an otherwise innocent person unfairly induced to commit that crime.

¶27 A theme running through Achha's brief is that Stuhlman-Roberts entrapped him by taking advantage of his ignorance of American culture; he stresses that he did not know that thirteen-year-old girls flirted on the Internet. He asserts that she knew he was from India, she knew he was ignorant about purchasing condoms, and she used this knowledge to lure him into a trap. Achha's explicit chats, bragging about his prowess and physical attributes, belies this theme. Likewise, his frank and graphic inquiries about Niki's physical development and sexual experience disprove his claimed ignorance.

¶28 Finally, in a written statement at the time of his arrest and in his testimony, Achha claims he believed he was chatting with an adult and not a thirteen year old and that the adult was lying about his or her age to fool him. He

drove to Waukesha with a pack of condoms believing that he might have been chatting with a prostitute and they would go on a sight-seeing tour after which they would have sex. The evidence we have detailed sinks this argument. He used his real name as a screen name, he disclosed where he lived and his employment, he sent Niki an actual photograph of himself, he expressed concern that Niki would turn him over to law enforcement, and he drove to Waukesha with condoms and an overnight bag. None of this evidence can be viewed as supporting Achha's claim. His assertion that if Niki was actually a thirteen-year-old girl he would counsel her to get help is so implausible it does not merit discussion.

¶29 *Conclusion.* We affirm Achha's conviction for using a computer to facilitate a child sex crime. He has failed to preserve his claim that he received ineffective assistance of trial counsel. The evidence overwhelmingly supports the jury's conclusion that Achha was guilty and, without a doubt, it negates his defenses that he was entrapped and was only engaged in role playing with an adult.¹²

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¹² Achha asks for a variety of forms of relief that can best be described as imposing limitations of Internet sting operations; we will not address his requests because they are without merit. Even if they had any merit, we are powerless to change the law. *Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997).

