COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP82-CR **Cir. Ct. No. 2007CF734**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. JACQUES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed*.

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. A jury found John L. Jacques guilty of using a computer to facilitate a child sex crime. *See* WIS. STAT. § 948.075(1r) (2009-10).[1] The primary witness at trial was the police officer who posed as a thirteen-year-old girl in an internet chat room and engaged in on-line chats with Jacques. Jacques contends that police entrapped him. The jury was provided with a printed transcript of the chats, and the transcript depicted numerous emoticons, sent by both the officer and Jacques.[2] In this pro se appeal, Jacques contends that the State withheld exculpatory evidence, namely, a computer application that would have permitted the jury to view the emoticons in an animated fashion, as they appeared while the chats were taking place. Jacques asserts that the animated emoticons are "clear evidence of enticement and encouragement" by the officer. In a related argument, Jacques contends that his trial attorney was ineffective for not ensuring that the jury would be able to view the animated emoticons. Jacques's arguments are both undeveloped and unpersuasive. Therefore, we affirm.

BACKGROUND

¶2 As part of an undercover sting operation, police officer Crystal Sedevie created on-line profiles of two thirteen-year old girls and entered "romance" internet chat rooms. Sedevie's on-line personas were "Ashliee" and "Annie." Jacques initiated contact with both girls by sending an instant message.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] An "emoticon" is a "group of keyboard characters … that typically represents a facial expression or suggests an attitude or emotion and that is used especially in computerized communications" such as e-mail or instant messaging. *See* ***U.S. v. Cochran***, 534 F.3d 631, 632 n.1 (7th Cir. 2008).

On-line chats between Jacques and Sedevie, posing as "Ashliee" and "Annie," took place over roughly a two-month period. At trial, a printed transcript of the on-line chats was introduced into evidence and copies were provided to the jury. During an early chat with "Annie," Jacques told her he had "naughty" pictures of himself and "Annie" replied by sending an emoticon of a blushing smiley face. After Jacques sent her a link to the pictures, "Annie" again responded with a blushing smiley face emoticon. Over time, Jacques escalated the sexual nature of the chats. Jacques masturbated in front of a webcam and gave "Annie" explicit instructions on how to masturbate. At several points in the chats, "Annie" responded to Jacques's sexual-in-nature statements by sending various smiley face emoticons. Ultimately, Jacques asked if he could meet "Annie" and if she would spend the night at his apartment. "Annie" agreed, and when Jacques arrived for the meeting, he was arrested.

DISCUSSION

¶3 Jacques's theory of defense at trial was entrapment. "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). Jacques had the burden to show by a preponderance of the evidence that he was induced to commit the crime. ***State v. Schuman***, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999). If Jacques met that burden of persuasion, the State then had the burden to prove beyond a reasonable doubt that Jacques was predisposed to commit the crime. *See* ***id.*** The jury was instructed on the entrapment defense but, as the guilty verdict indicates, the jury found that Jacques had not been entrapped.

¶4 As noted above, the jury was provided with a transcript of the on-line chats between Jacques and Sedevie, posing as "Ashliee" and "Annie." In those printed transcripts, the various emoticons appear in static form, as opposed to the animated versions that appeared on Jacques's computer screen while the chats were happening. Jacques contends that the State failed to disclose to the defense a computer application which would have fully displayed the emoticons in their animated forms, forms which Jacques asserts would have showed that he was entrapped. Jacques does not, however, support his position with any legal authority. Therefore, we need not address it. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶5 Nonetheless, we reject the argument on its merits. Due process requires the prosecution to turn over "evidence favorable to an accused upon request … where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). To establish a ***Brady*** violation, a defendant must show that: (1) the State suppressed evidence within its possession at the time of trial; (2) the evidence was favorable to the defendant; and (3) the evidence was material to a determination of the defendant's guilt or punishment. ***Id.*** Evidence is material when there is a reasonable probability that its disclosure would have led to a different result in the proceeding. ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991).

¶6 At one point in his brief-in-chief, Jacques identifies the undisclosed application as a "Yahoo® decoder." Jacques also states that the defense could have "acquired, at no cost (down-loaded from the internet), a computer application such as 'gifcon' which displays on a computer screen each image of any animated GIF one at a time, in color, magnified if desired." Thus, it appears that Jacques is

acknowledging that the computer application needed to animate the emoticons for the jury was readily available to the defense. If true, then the evidence could not have been suppressed by the State within the meaning of ***Brady***.

¶7 More importantly, Jacques could not show that the non-disclosed animated emoticons were material to his entrapment defense. We fail to see how viewing the emoticons as animations would have led the jury to conclude that he was the victim of "*excessive* incitement, urging, persuasion, or temptation" by Sedevie. *See* ***State v. Hilleshiem***, 172 Wis. 2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992). Our confidence in the outcome is not undermined because the jury did not view animated emotions.

¶8 Jacques makes essentially the same argument in an ineffectiveness-of-trial-counsel context. He faults his trial attorney for not adequately "pursu[ing]," on cross-examination, Sedevie's "use of the smiling face and blushing face animations." Again, Jacques does not cite to any legal authority to support his claim and, consequently, we need not consider his argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶9 Moreover, even if we were to consider Jacques's claim, it would fail. To establish an ineffective assistance of counsel claim, a defendant must show both that trial counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). With respect to the prejudice prong, the defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶10 For the reasons stated above, Jacques could not show that he was prejudiced by his attorney's actions. Jacques asserts that his attorney "neglect[ed] to explore … that [the emoticons] are in reality color animations." There is no possibility that additional questioning about the display of the emoticons' animated features would have persuaded the jury to accept Jacques's entrapment defense. Sedevie's use of the various emoticons was revealed in the transcripts and the static emoticons were clearly visible to the jury. We fail to see how the addition of computer animation to the emoticons would have altered the jury's determination.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.