IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. COREY ROBERT FENTON, Defendant-Appellant.	SUPREME COURT NO. 22-1681

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SAMANTHA GRONEWALD, JUDGE
(TRIAL, POSTTRIAL, AND SENTENCING)

APPELLANT'S REPLY BRIEF AND ARGUMENT

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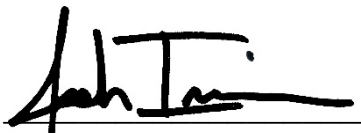
CERTIFICATE OF SERVICE

On the 25th day of September, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Corey Fenton, No. 6273399, Iowa Medical and Classification Center, 2700 Coral Ridge Avenue, Coralville, IA 52241.

APPELLATE DEFENDER'S OFFICE



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JI/lr/09/23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The district court erred in overruling Fenton's objection to a photographic exhibit, because its probative value was substantially outweighed by the danger of needlessly presenting cumulative evidence and of unfair prejudice.

Authorities

State v. Henderson, 696 N.W.2d 5, 10–11 (Iowa 2005)

II. The evidence was insufficient to establish anything of value was given to, promised to, or received by anyone in exchange for a sex act or sexually explicit performance, or that Fenton coerced, enticed, or recruited anyone for the same.

A. The evidence was insufficient to establish a quid pro quo dimension to any of the conversation between Fenton and Lowe.

Iowa Code § 710A.1

B. The evidence was insufficient to establish Fenton enticed, coerced, or recruited anyone to perform a commercial sex act, or attempted to do so.

Iowa Code § 710A.2A

State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974)

STATEMENT OF THE CASE

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on or about September 6, 2023. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. The district court erred in overruling Fenton's objection to a photographic exhibit, because its probative value was substantially outweighed by the danger of needlessly presenting cumulative evidence and of unfair prejudice.

Fenton does not argue the photo at issue was irrelevant; he argues its slight probative value was substantially outweighed by the danger of unfair prejudice. Appellant's Brief, pp. 20–24. Fenton did not deny the photo's existence, he denied having sent it. See (Exhibit 10 Interview at 19:14–20:01). The jury saw the conversation with police where Fenton was shown the photo and he denied being the sender. Viewing the photo itself could not get the jury any closer to

evaluating his denial, because it does not include any identifying features linked to Fenton. The only probative value the photo could have was with regard to the intent to engage in a sex act element; that element was well-covered by the Facebook conversation.

The dispute at trial was not centered around that element, it was about the offer-in-exchange element. It is the lack of evidence supporting that element which demonstrates this error was not harmless. The evidence related to the offer element was far from overwhelming, and relied on the State's repeated efforts to misconstrue it as not requiring a quid pro quo dimension. The jury's guilty verdict, despite the lack of evidence of that element, indicates it acted on "something other than the established propositions in the case . . . ." See State v. Henderson, 696 N.W.2d 5, 10–11 (Iowa 2005) (citations omitted). The photo at issue was needlessly cumulative, substantially more prejudicial than probative, and

the State has not established its admission was harmless error.

Conclusion

The district court erred in overruling Fenton's objection to exhibit 6, because its probative value was substantially outweighed by the danger of needlessly presenting cumulative evidence and the danger of unfair prejudice. Fenton's conviction should be vacated and the case remanded for new trial.

II. The evidence was insufficient to establish anything of value was given to, promised to, or received by anyone in exchange for a sex act or sexually explicit performance, or that Fenton coerced, enticed, or recruited anyone for the same.

A. The evidence was insufficient to establish a quid pro quo dimension to any of the conversation between Fenton and Lowe.

Fenton has never claimed this offense requires proof of anything resembling an express contract. But the statutory language requiring proof of a sexually explicit performance or sex act "for which anything of value is given, promised to, or received" requires proof of a quid pro quo dimension. See Iowa

Code § 710A.1. In other words, the State was required to prove something it claims Fenton offered—a shower, an Uber ride, marijuana, food, or clothing—was offered in exchange for a sex act or sexually explicit performance, as opposed to flirtatious comments or attempts to facilitate the meeting. It failed to do so.

The discussions of payment for a shower as a location for sex or an Uber ride to get there were not offers in exchange for sex. There was no evidence indicating a shower or Uber ride were things of value the imaginary Neveah wanted in exchange for a sex act. The fact there was never even any understanding of who would pay for either further establishes there was no quid pro quo aspect; they were discussions about facilitation, not payment. Any conclusion the discussion of payment for a shower or an Uber ride constituted offers in exchange for a sexually explicit performance or sex act is not supported by substantial evidence.

Fenton never offered marijuana in exchange for a sex act; that part of the conversation was about what the two might do after having sex, after Lowe asked. (Exhibit 7 Facebook Conversation pp. 26–27) (Ex. App. p. 32). No sexual activity was premised, expressly or implicitly, on Fenton providing marijuana.

Nor was the discussion of clothes or food an offer in exchange for sex. Lowe, not Fenton, brought up the idea that "Girls like food and clothes lol". (Exhibit 7 Facebook Conversation p. 63) (Ex. App. p. 68). Fenton responding he had "no problem spoiling a likl" was a continuation of the flirtatious exchange initiated and driven by Lowe. See (Exhibit 7 Facebook Conversation p. 63) (Ex. App. p. 68). It was not an offer in exchange for sex; if anything, it was an attempt by Lowe to coerce, entice, or solicit Fenton as argued below.

None of the instances pointed to the State, including its new claim on appeal that Fenton saying he has money after Lowe suggested he go make some, constitute substantial

evidence Fenton offered Lowe something of value in exchange for a sexually explicit performance or sex act. See Appellee's Proof Brief p. 27. Because the evidence was insufficient to establish this element, Fenton's conviction should be vacated and the case remanded for dismissal.

B. The evidence was insufficient to establish Fenton enticed, coerced, or recruited anyone to perform a commercial sex act, or attempted to do so.

Iowa Code section 710A.2A targets those who "entice, coerce, or recruit" juveniles (or police posing as juveniles) to engage in commercial sexual activity. Iowa Code § 710A.2A. When police do the enticing, coercing, or recruiting, they flip the statute and transform it into an entrapment tool. See State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974) ("Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."). When

police are pursuing and guiding the interaction, as was the case here, the responses fall outside the conduct covered by section 710.2A because the suspect has not enticed, coerced, recruited, or attempted to do so.

The evidence reveals Fenton was interested in sex with no quid pro quo dimension involved, which Lowe encouraged and agreed to early on in the conversation. See (Exhibit 7 Facebook Conversation pp. 116–119) (Ex. App. pp. 121-124). But any attempts to entice, coerce, or recruit for commercial sexual activity as alleged by the State all came from Lowe. Lowe brought up Fenton bringing him food, Lowe asked what Fenton would do for a threesome and vaguely suggested "Girls like food and clothes lol", Lowe indicated he wanted to smoke marijuana with Fenton, and ultimately Lowe offered to pay for both the Uber ride and the shower rental. (Exhibit 7 Facebook Conversation pp. 9, 27, 47, 63) (Ex. App. pp. 14, 32, 47, 68). Because Lowe, not Fenton, was the consistent driving force behind the interactions the State claims amounted to

commercial sexual activity, the evidence was insufficient to establish Fenton attempted to coerce, entice, or recruit Lowe for that activity.

Conclusion

The evidence was insufficient to establish Fenton offered anything of value in exchange for commercial sexual activity, and was also insufficient to establish he attempted to entice, coerce, or recruit any person to perform the same. His conviction should be vacated and the case remanded for dismissal.

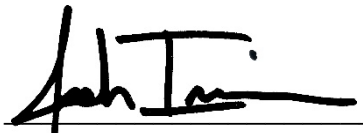
ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $1.90, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 1,248 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Dated: *9/25/23*

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