

IN THE COURT OF APPEALS OF IOWA

No. 8-104 / 06-2120
Filed April 9, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID WAYNE PACE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

David Wayne Pace appeals from his conviction for enticing away a minor.

REVERSED AND REMANDED WITH DIRECTIONS.

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Myers-Fangman, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

David Wayne Pace appeals from his conviction for enticing away a minor in violation of Iowa Code section 710.10(2) (2005). He contends the evidence only supports a conviction for the offense of attempted enticement in violation of section 710.10(3). Upon our review, we reverse and remand with directions to enter a finding of guilt for attempted enticement.

I. Background Facts and Proceedings.

On November 6, 2005, Black Hawk County Sheriff's Deputy Kent Smock was online in an Internet chat room under the assumed identity of a fifteen-year-old girl "Amber," when an individual by the screen name "cimarronriver" began chatting with the officer. Cimarronriver is the screen name for the defendant, Pace. Pace asked Amber how old she was, and Amber replied she would be sixteen in February. Pace invited Amber to join him for a private chat, and asked to see a photograph of her. Deputy Smock sent Pace an age-regressed image of Black Hawk County Deputy Sheriff Jane Wagner. Pace told Amber she was gorgeous. Pace informed Amber he was from Oklahoma but he would be in Iowa within two days because he had a job interview.

During the online chat, Pace and Amber discussed alcoholic drinks, including "screwdrivers," "slow screws," and "sex on the beach." Pace asked Amber if she was sexually active and how old she was when she lost her virginity. Pace told Amber that he wanted to get her "buzzed." Pace also said he wanted to meet her and "have some fun." Pace told Amber he was old enough to be her father at forty years old; Pace was actually fifty-two years old.

Pace asked Amber if she had a cell phone, and Amber said she did not; however, she told Pace she could give him her friend's cell phone number in order to reach her. Deputy Smock gave Pace the telephone number for Deputy Wagner's cell phone. The two discussed where they would meet, and Pace told Amber that his "hotel room [was] a good place to start."

Two days later, Pace contacted Amber by telephone. After several missed messages, Deputy Wagner, posing as Amber, spoke to Pace. Deputy Wagner and Pace spoke four times during the day and finalized their plans for meeting that night. In their final conversation, Pace said he had gotten lost and was at the Lone Star restaurant, and asked if they could meet at the restaurant instead. Soon after that conversation, sheriff's deputies found Pace in a car with an Oklahoma license plate in the Lone Star parking lot, and arrested him. Pace eventually told Deputy Smock that he believed Amber was sixteen years old.

Based on this incident, the State charged Pace with enticing away a minor. Pace appeared for arraignment on November 28, 2005, and entered a plea of not guilty. On February 1, 2006, Pace filed a motion to dismiss. The motion alleged, in part, that because no "minor" was the victim of this offense, Pace could not be convicted as charged. The court denied his motion. A jury trial commenced on October 17, 2006. At the close of the State's evidence, Pace moved for a directed verdict of not guilty. On October 19, 2006, the jury found Pace guilty as charged. On November 9, 2006, Pace filed a motion for new trial, a motion in arrest of judgment, and a motion for judgment notwithstanding the verdict. One of the grounds alleged in the motions was that the evidence was not sufficient to support the conviction because the minor was

a fiction created by an undercover officer. Pace's motions were overruled, and the district court sentenced him to serve a term of imprisonment not to exceed five years.

Pace now appeals.

II. Scope and Standards of Review.

We review sufficiency-of-evidence challenges for correction of errors at law. Iowa R. App. P. 6.4; *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). A verdict will be sustained if it is supported by substantial evidence. *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). We also consider legitimate inferences and presumptions that may reasonably be deduced from the evidence in the record, and we view the evidence in the light most favorable to the State. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005).

III. Discussion.

In this appeal, Pace emphasizes the distinction between the substantive crime of enticing away a minor, as provided in Iowa Code section 710.10(2),¹ and the crime of attempted enticement, as provided in section 710.10(3).² Given

¹ Section 710.10(2) provides:

A person commits a class "D" felony when, without authority and with the intent to commit an illegal act upon a minor under the age of sixteen the person entices away a minor under the age of sixteen, or entices away a person reasonably believed to be under the age of sixteen.

² Section 710.10(3) provides:

A person commits an aggravated misdemeanor when, without authority and with the intent to commit an illegal act upon a minor under the age of sixteen, the person attempts to entice away a minor under the age of sixteen, or attempts to entice away a person reasonably believed to be under the age of sixteen.

this distinction, Pace contends that the facts, which are not in dispute, amount only to attempted enticement because “no one was enticed or lured by defendant’s words or actions.”

We begin our discussion by noting that another panel of our court recently addressed the issue Pace presents on appeal. See *State v. Hansen*, No. 06-1735 (Iowa Ct. App. Aug. 8, 2007).³ In *Hansen*, our court vacated the defendant’s conviction for enticing away a minor and remanded to the district court with instructions for the entry of a finding of guilt for the offense of attempted enticement. *Hansen* is not a published opinion and therefore is not binding precedent; however, we agree with the statutory interpretation and legal analysis set forth in that opinion. Applying that analysis to the facts of this case, we conclude substantial evidence does not support Pace’s conviction for enticing away a minor.

As in *Hansen*, the defendant here asserts the “entices away” language in section 710.10(2) requires us to “look not only to the actions and conduct of the defendant but to the impact of those actions upon the victim.” Pace argues that because Deputies Smock and Wagner were not “enticed away” from their offices to the Lone Star restaurant because of the defendant’s blandishments, he has only attempted to entice away a person he reasonably believed to be a minor under the age of sixteen.

³ Our supreme court granted further review of the decision in *Hansen* on November 7, 2007.

In *State v. Osmundson*, 546 N.W.2d 907 (Iowa 1996), our supreme court, defined the term entice as used in the crime of attempted enticement in section 710.10. The court stated:

'Entice' is defined as 'to draw on by arousing hope or desire' or 'to draw into evil ways.' Synonymous words include 'allure,' 'attract,' and 'tempt.' Black's Law Dictionary defines 'entice' as '[t]o wrongfully solicit, persuade, procure, allure, attract, draw by blandishment, coax or seduce. To lure, induce, tempt, incite, or persuade a person to do a thing. Enticement of a child is inviting, persuading or attempting to persuade a child to enter any vehicle, building, room or secluded place with intent to commit an unlawful sexual act upon or with the person of said child.'

Osmundson, 546 N.W.2d at 909 (citations omitted). The State argues that based on the court's definition of enticement in *Osmundson*, Pace's actions satisfied each element of enticing away a child, and the jury properly convicted him. We disagree, for the reasons previously set forth in *Hansen*. There the court stated,

Where the charge . . . is enticement as opposed to attempted enticement, the definition in *Osmundson* makes it clear that there must be some response by the person being enticed. The completed act for enticement would be the actual persuasion of a minor, or one reasonably believed to be a minor, to enter any vehicle, building, room or secluded place with intent to commit an unlawful sexual act upon or with the person of said child.

In this case, although Pace attempted to meet with the purported fifteen-year-old to commit an illegal act,⁴ there is no evidence that a minor, or a person reasonably believed to be a minor, was lured into a vehicle, building, room, or secluded place. As this court concluded in *Hansen*, without such a response, Pace's action could only have amounted to the crime of attempted enticement.

⁴ A sexual act between a fifty-two-year-old man and a fifteen-year-old girl would constitute third-degree sexual abuse in violation of section 709.4(2)(c). Furnishing alcohol to a minor is prohibited by section 123.47(1).

We agree with Pace that the facts of this case do not support a conviction for enticing away a minor. Because Pace does not dispute that the facts support the conclusion that he attempted to entice away a minor under the age of sixteen or a person he reasonably believed to be a minor under the age of sixteen, we vacate the defendant's conviction, and remand with instructions to enter a finding of guilt for the offense of attempted enticement in violation of section 710.10(3).

REVERSED AND REMANDED WITH DIRECTIONS.