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NOVEMBER 9, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	Supreme Court No. 20180244
vs.	)	
	)	District Court No. 09-2017-CR-04007
Bhim Kumar Rai,	)	
	)	
Defendant-Appellant.	)	

Appeal from the February 23, 2018, Order Denying Suppression and the May 10, 2018, Criminal Judgment
East Central Judicial District
the Honorable Wade L. Webb, Presiding

APPELLEE'S BRIEF

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[¶5] II. Whether the district court appropriately denied the Defendant's Fifth Amendment claim because sufficient competent evidence supported the findings that the Defendant received a clear and understandable Miranda warning and knowingly, voluntarily, and intelligently waived his rights.

[¶6] III. Whether competent evidence allowed the jury to reasonably infer the Defendant committed patronizing.

[¶7] **STATEMENT OF CASE**

[¶8] The Defendant appeals from an order denying suppression of evidence and from a criminal judgment entered after a jury found him guilty of patronizing a minor for commercial sexual activity ("patronizing"). The Defendant argues the district court erred in concluding that a search did not occur when a detective placed the Defendant's phone in airplane mode and in finding that (1) his phone was not searched until a warrant was issued, (2) he received a clear and understandable Miranda warning, and (3) he knowingly, voluntarily, and intelligently waived his Miranda rights. The Defendant also challenges the sufficiency of the evidence supporting his conviction at trial.

[¶9] The State asserts that sufficient competent evidence supported the district court's findings and conclusion at the suppression hearing. Placing the phone in airplane mode did not constitute a search because no contents of the phone were revealed. Competent evidence supports the finding that the phone was not searched until after a warrant was obtained; officers testified that is what happened. Competent evidence supported the findings that the Defendant received a clear and understandable Miranda warning and he knowingly, voluntarily, and intelligently waived his Miranda rights; the Defendant communicated effectively in his numerous text messages and during an approximately thirty-eight minute interview. In addition, competent evidence allowed the jury to reasonably infer the Defendant committed patronizing. The State requests this Court affirm the order denying suppression and the judgment.

[¶10] STATEMENT OF FACTS

[¶11] A. The Police Operation

[¶12] Targeting persons who used the internet to arrange sexual encounters with minors, Fargo Police ran an undercover operation in September 2017. (Tr. 27:22-28:3, 29:4-17.) On backpage.com, police posted an ad depicting a female and describing her as having a "gorgeous body" and loving to give "amazing service" that left persons "breathless." (Tr. 29:21-31:15; Index # 56.) The female depicted was an adult police officer holding a phone that obstructed her face. (Tr. 31:4-15.) Because of backpage.com restrictions, the female's age was listed as 18, and no reference was made to sexual activity. (Tr. 34:22-25, 37:7-13.) The ad included a phone number for interested persons ("suspects") to send text messages to the female. (Tr. 33:12-17.) Officers, posing as a female under age eighteen, would respond to the suspects. (Tr. 33:12-17.) If discussions led to a suspect offering to give money to engage in sexual activity with another whom the suspect believed was a minor female, a meeting would be arranged at the Hilton in south Fargo. (Tr. 32:19-24, 33:12-34:15.) During the operation, messages were sent from sixty-two unique phone numbers to the number listed in the ad. (Tr. 39:1-4.) Of those sixty-two unique phone numbers, two persons agreed to meet with up with the female. (Tr. 39:5-7.)

[¶13] **B. The Defendant's Interest and Text Messages**

[¶14] One of the two persons agreeing to meet up with the female was the Defendant. (Tr. 39:8-9.) He sent text messages to the number listed on the ad, inquiring whether the female was in Fargo and available. (Index # 57 at 15:33:11, 15:38:54.) Detective Frank Mendez, posing as a fourteen year-old girl ("the fourteen year-old girl") responded to the Defendant's text messages. At three or more points during the exchange, the fourteen year-old girl referred to her age. (Index # 57 at 16:16:30, Index # 58 at 16:42:05, Index # 62 at 19:03:52 and 19:05:06.) The Defendant himself sent more than 100 texts to the fourteen year-old girl. (Index #'s 57-64.)

[¶15] When the Defendant sent a text indicating he was looking to dance or hang out (Index # 57 at 15:44:58, 15:45:05), the fourteen year-old girl said that she was looking for money (Index # 57 at 15:47:04). The Defendant replied, asking what the price was. (Index # 57 at 15:49:13.) Shortly later, the Defendant asked for a "pussy pic." (Index # 57 at 15:57:38.) The fourteen year-old girl asked how long the Defendant wanted to "pound dis 14 yr pussy[.]" (Index # 57 at 16:16:30.) The Defendant exchanged additional sexual messages with the 14 year-old girl, inquiring "wht abt without condoms" (Index # 58 at 16:28:32) and "haw big dick fite in ur pussy" (Index # 60 at 17:33:39). The Defendant twice more asked for pussy pics. (Index # 58 at 16:37:39, Index # 59 at 17:15:51.) The Defendant agreed to pay money to the fourteen year-old girl (Index # 61 at 17:40:29), including $100 (Index # 62 at 18:49:12), and learned the meeting

place, room 205 at the Hilton (Index # 59 at 16:55:15, Index # 61 at 17:44:16, Index # 63 at 19:22:38).

[¶16] At one point, the Defendant indicated that if the fourteen year-old girl did not send a picture, he was done. (Index # 61 at 17:47:16.) About forty-five minutes later, the fourteen year-old girl sent a message inquiring "have you changed your mind yet… i got an opening." (Index # 61 at 18:30:55.) Within two minutes, the Defendant responded, "nop" (Index # 61 at 18:32:28), but then seconds later said, "if u send me address I ill be there" (Index # 61 at 18:32:43). The Defendant again agreed to pay money to the fourteen year-old girl. (Index # 62 at 18:49:12, 19:01:35.) Additional discussion about the fourteen year-old girl's age took place. (Index # 62 at 19:03:08 – 19:14:42.) The Defendant commented "ur to much younger" (Index # 63 at 19:08:22) and "its alout do with 14 yer" (Index # 63 at 19:08:33). When the fourteen year-old girl said she could "pretend" to be any age the Defendant wanted, the Defendant indicated he did not understand. (Index # 63 at 19:09:18, 19:11:43.) After the fourteen year-old girl explained what that meant, the Defendant indicated "okey" and "not now… u can do with other glys". (Index # 63 at 19:12:35 – 19:14:59.) The fourteen year-old girl, responded, "have a good night honey." (Index # 63 at 19:17:07.) Within two minutes, the Defendant sent the message: "i will be there at 8 :pm." (Index # 63 at 19:18:32.)

[¶17] **C. The Defendant's Flight from the Hotel Room and Interview**

[¶18] A short while later, police apprehended the Defendant after he fled from outside room 205 at the Hilton. (Tr. 82:24-83:10.) The Defendant had a cellphone and $100 cash, but no wallet. (Tr. 83:16-20, 97:20-22, 98:16-20.) Detectives Josh Loos and Mike Lovejoy met with the Defendant in a hotel room. (Tr. 97:23-99:17.) Other officers were present in the room, but only Detectives Loos and Lovejoy interviewed the Defendant. (Mot. Tr. 17:24-18:17.)

[¶19] Detective Loos advised the Defendant of his Miranda rights, calmly explaining that the Defendant had the right to remain silent; that anything he said would be used against him in court; that he had the right to an attorney and if he could not afford an attorney, one could be appointed to represent him free of charge; that the Defendant could stop questioning at any time; and that the Defendant could answer some or none of the detective's questions - "whatever [he] want[ed] to do." (Index # 24 at 01:00.)

[¶20] When asked if he would talk with the detectives, the Defendant indicated he would. (Index # 24 at 01:26.) The Defendant was nervous, and the detectives worked to calm him. (Index # 24.) Detective Loos explained that the Defendant appeared to understand and freely chose to speak with the detectives. (Mot. Tr. 18:24-19:3.) The detectives never yelled at the Defendant or degraded him. (Index # 24.)

[¶21] The Defendant explained that he was twenty-six years-old, married, had a child, and worked at Fargo Assembly. (Index # 24 at 11:53, 12:18, 20:27.)

Throughout the discussion, the Defendant claimed he had no intent to engage in sexual activity. (Index # 24 at 07:33, 22:10, 25:43, 26:53.) The Defendant was asked for the passcode to his phone, and he provided it. (Index # 24 at 14:55.) Detective Chris Mathson used the passcode to place the phone in airplane mode. (Mot. Tr. 36:4-24.) Neither Detective Mathson nor any other officer looked at any information in the Defendant's phone until after a search warrant was obtained. (Mot. Tr. 17:12-15, 37:17-23.) From the police computer, Detective Mathson had the chat log of the messages sent between the Defendant and the fourteen year-old girl. (Mot. Tr. 37:17-20.)

[¶22] The Defendant's discussion with detectives lasted approximately thirty-eight minutes. (Index # 24.) Although the Defendant claimed to speak only "a little bit" of English, Detective Loos explained that the Defendant appeared to understand the detectives during the interview. (Mot. Tr. 16:12-18, 18:18-19:3, 23:7-10.) The Defendant tracked and answered many questions. (Index # 24.) During the few times the detectives were not certain the Defendant understood a question, they would rephrase it to ensure he did. (Mot. Tr. 24:11-16.)

[¶23] **D. The Defendant's Motion to Suppress**

[¶24] A few months later, the Defendant filed a motion to suppress evidence, claiming officers had unlawfully searched his phone and no valid waiver of his Miranda rights occurred. (Defendant's Motion to Suppress, Feb. 2, 2018.) The State opposed the motion. (Response to Motion to Suppress, Feb. 14, 2018.)

[¶25] After a hearing, the district court denied the Defendant's motion. (App. 11.) The Court found the testimony of Detectives Loos and Mathson credible (Mot. Tr. 44:16-18), the Defendant received a clear and understandable Miranda warning (Mot. Tr. 44:15-16), the Defendant comprehended the warning (Mot. Tr. 45:13-18), and the Defendant – "throughout the interview" - effectively communicated in English (Mot. Tr. 45:20-23). Using the totality of the circumstances – which included the Defendant's numerous text messages to the fourteen year-old girl and his lengthy discussion with detectives - the court found that the Defendant had knowingly, voluntarily, and intelligently waived his Miranda rights. (Mot. Tr. 46:6-14.) The court concluded that Detective Mathson's placing the Defendant's phone in airplane mode did not constitute a search and found that no search occurred until after a warrant was later issued. (Mot. Tr. 47:2-10.)

[¶26] **E. The Jury Trial**

[¶27] A jury trial took place in May 2018. (App. 3.) Detectives Loos and Mendez explained the roles they played in the operation and what had happened. (Tr. 46-79, 95-139.) A chat log from a police computer showing all the text messages between the Defendant and the fourteen year-old girl was admitted into evidence. (Index #'s 57-64.) A recording of the Defendant's discussion with Detectives Loos and Lovejoy was also admitted into evidence. (Index # 67.) The jury returned a verdict of guilty of patronizing. (App. 12.) The Defendant appealed. (App. 15.)

[¶28] **LAW AND ARGUMENT**

[¶29] The Defendant claims (1) the district court erred in finding that officers did not search his phone until after a warrant was issued and in concluding that placing the phone in airplane mode was not a search, (2) the district court erred in finding that the Defendant received an understandable Miranda warning and knowingly, voluntarily, and intelligently waived his Miranda rights, and (3) insufficient evidence existed to support his conviction for patronizing. The State contests each claim.

[¶30] I. **The district court appropriately denied the Defendant's Fourth Amendment claim that his phone was unlawfully searched because it correctly concluded that placing the phone in airplane mode was not a search and because sufficient competent evidence supported the finding that the Defendant's phone was not searched until after a warrant was issued.**

[¶31] A district court's decision on a suppression motion will be upheld "if, after conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence." State v. Montgomery, 2018 ND 20, ¶ 4, 905 N.W.2d 754. The standard gives great deference to the district court because it has the opportunity to observe the witnesses and assess their credibility. Id.

[¶32] Sufficient competent evidence supported the district court's finding that officers did not search his phone until after a search warrant was obtained. Detective Mathson testified that he used the passcode to simply put the phone in

airplane mode and did not search the phone until a search warrant was issued. (Mot. Tr. 36:4-24.) Detective Loos testified that no officer used information directly from the Defendant's phone during the interview of the Defendant. (Mot. Tr. 17:12-15.) Officers had no reason to quickly search the Defendant's phone; they had access - from the police computer system - to the complete log of messages between the Defendant and the fourteen year-old girl. (Mot. Tr. 37:17-20.) The district court found the officers credible. Its findings should be upheld.

[¶33] Besides making supportable findings, the district court correctly concluded that placing the phone in airplane mode was not a search. That conduct is a reasonable way to preserve the information on the phone. See United States v. Smith, 715 F.3d 1110, 1118 (8th Cir. 2013). The conduct does not involve accessing the contents of the phone, and thus is not a search. Id; see generally United States v. Place, 462 U.S. 696, 701 (1983) ("[T]he Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents[.]").

[¶34] Even if putting the phone in airplane mode was considered a search, there was no resulting fruit of the poisonous tree, i.e., no evidence to suppress. See State v. Gregg, 2000 ND 154, ¶ 39, 615 N.W.2d 515 ("Any evidence obtained as a result of illegally acquired evidence must be suppressed as 'fruit of the poisonous tree' unless an exception to the warrant requirement applies."). The attenuation exception to suppression accordingly would apply. State v. Gregg, 2000 ND 154, ¶ 41, 615 N.W.2d 515 ("[S]uppression is not warranted unless 'the

challenged evidence is in some sense the product of illegal governmental activity.'").

[¶35] II. **The district court appropriately denied the Defendant's Fifth Amendment claim because sufficient competent evidence supported the findings that the Defendant received a clear and understandable Miranda warning and knowingly, voluntarily, and intelligently waived his rights.**

[¶36] The adequacy of a Miranda warning is a factual issue for the district court to decide based on the circumstances. State v. Johnson, 531 N.W.2d 275, 279 (N.D. 1995). The ultimate question is: "Did the defendant receive a clear and understandable warning[.]" State v. Webster, 2013 ND 119, ¶ 10, 834 N.W.2d 283 (internal quotations omitted).

[¶37] Sufficient competent evidence showed that the Defendant received a clear and understandable warning. The recording of the interview memorialized the plain manner in which Detective Loos advised the Defendant of each of his rights. (Index # 24 at 1:00.) Further, Detective Loos explained that the Defendant appeared to understand the conversation, and the recording of the interview shows that he did track the conversation well. (Mot. Tr. 16:12-18, 18:18-19:3, 23:7-10; Index # 24.) Still further, the Defendant had sent more than 100 text messages in English and had successfully arranged to meet with the fourteen year-old girl. (Index #'s 57-64.) Based on the circumstances, the district court's findings that the Defendant received a clear and understandable Miranda warning and comprehended it should be upheld.

[¶38] Like the giving of the Miranda warning, whether a defendant's waiver is made voluntarily, knowingly, and intelligently is a factual issue dependent on the totality of the circumstances. State v. Webster, 2013 ND 119, ¶ 7, 834 N.W.2d 283. Two elements that should be focused on when considering the totality of the circumstances are (1) the characteristics and conditions of the defendant when the statements were made, including age, sex, race, education level, physical and mental condition, and prior interactions with police; and (2) the setting in which the statements were made, including the length and conditions of detention, police attitude toward the defendant, and the varied pressures that "sap the defendant's powers of resistance or self-control." State v. Hunter, 2018 ND 173, ¶ 22, 914 N.W.2d 527.

[¶39] Sufficient competent evidence showed that the Defendant voluntarily, knowingly, and intelligently waived his rights. The clear and understandable warning helps support the Defendant's waiver. Beyond that, the characteristics and conditions of the Defendant supported waiver. At twenty-six years of age with a wife, child, and employment (Index # 24 at 11:53, 12:18, 20:27); the Defendant was not a youth with little life experience. The Defendant's nervousness was understandable, given that he had just been caught in an undercover sting, and the officers worked to calm him down. The setting also supported waiver. The Defendant was not brought to the police station; instead, his discussion with police occurred at a room in the Hilton where he had intended to meet up with the fourteen year-old girl. (Tr. 97:23-99:17.) Moreover, only two

officers interviewed the Defendant. (Mot. Tr. 17:24-18:17.) And both treated the Defendant respectfully, never yelling at him or using derogatory language. (Index # 24.) While the detectives at times challenged the Defendant's veracity, his ability to maintain a false exculpatory story (that he had no sexual intent) shows that he retained his "powers of resistance and self-control (Index # 24 at 7:33, 21:14, 25:43, 26:53.) Finally, the interview lasted only approximately 38 minutes, and that time included periods at the beginning and end where officers simply explained the process to the Defendant. (Index # 24.) Based on the totality of the circumstances, the district court's finding that the Defendant knowingly, voluntarily, and intelligently waived his Miranda rights should be upheld.

[¶40] **III. Competent evidence allowed the jury to reasonably infer the Defendant committed patronizing.**

[¶41] In reviewing an insufficient evidence claim, this Court determines whether there is competent evidence allowing the jury to reasonably infer guilt. State v. Bauer, 2010 ND 109, ¶ 7, 783 N.W.2d 21 (citations omitted). "The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict." State v. Truelove, 2017 ND 283, ¶ 7, 904 N.W.2d 342 (citation omitted). This Court does not "reweigh conflicting evidence or judge the credibility of witnesses." Id.

[¶42] For the offense of patronizing charged against the Defendant, the State had to prove that he "g[ave], agree[d] to give, or offer[ed] to give anything

of value to a minor or another person so that an individual may engage in commercial sexual activity with a minor." N.D.C.C. § 12.1-41-06(1)(b).

[¶43] Competent evidence supported the jury's verdict of guilty of patronizing. The fourteen year-old girl referenced her age multiple times (Index # 57 at 16:16:30, Index # 58 at 16:42:05, Index # 62 at 19:03:52 and 19:05:06), and at one point, the Defendant even had an extended conversation about her age (Index # 62 at 19:03:08 – 19:14:42). The Defendant sent multiple sexual messages to the fourteen year-old girl, repeatedly asking for a "pussy pic" (Index # 58 at 16:37:39, Index # 59 at 17:15:51) and inquiring "wht abt without condoms" (Index # 58 at 16:28:32) and "haw big dick fite in ur pussy" (Index # 60 at 17:33:39). Further, the Defendant agreed to give $100 per hour to the fourteen year-old girl. (Index # 62 at 18:49:12.) Still further, the Defendant actually went with $100 cash to the agreed upon meeting place (Room 205 at the Hilton) and fled from officers. (Tr. 82:24-83:20, 97:20-22, 98:16-20.)

[¶44] The Defendant's claim that he proved the affirmative defense of entrapment is a challenge to the jury's finding that entrapment did not occur. A law enforcement officer perpetrates entrapment:

> for the purpose of obtaining evidence of the commission of a crime, the law enforcement agent induces or encourages and, as a direct result, causes another person to engage in conduct constituting such a crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

N.D.C.C. § 12.1-05-11(2). As with sufficiency of evidence claims, review of the challenged finding requires affording the "reasonable inferences most favorable to the verdict to see if substantial evidence exists to warrant a conviction." State v. Schmidt, 2011 ND 238, ¶ 7, 807 N.W.2d 593.

[¶45] The jury reasonably found that the Defendant failed to prove entrapment. The fact that the posted ad depicted an adult with her face obstructed and listed her age as eighteen does not constitute entrapment. That conduct would not persuade or induce a crime to be committed by person other than one who is ready to commit it. The alleged ineffectiveness of the operation bolsters the lack of entrapment; only two persons went to the Hilton despite messages sent to the ad from sixty-two unique phone numbers. Further, and as previously discussed, the fourteen year-old girl referenced her age multiple times and the Defendant acknowledged it. Nor does the text message, "have you changed your mind yet…i got an opening" constitute entrapment. Entrapment as a matter of law may occur when an officer's conduct is "outrageous" and shocks the conscience of the court. See State v. Schmidt, 2011 ND 238, ¶ 11, 807 N.W.2d 593. The conduct here "merely afford[ed] [the Defendant] an opportunity to commit an offense[.]" See N.D.C.C. § 12.1-05-11(2). The jury's finding should be upheld.

[¶46] CONCLUSION

[¶47] The district court's order denying suppression and the Defendant's conviction should be upheld. The district court correctly concluded that placing the Defendant's phone in airplane mode was not a search, and sufficient competent evidence supported its findings that (1) the Defendant's phone was not searched until after a warrant was issued, (2) the Defendant received an understandable Miranda warning and comprehended it, and (3) the Defendant knowingly, voluntarily, and intelligently waived his rights. Further, competent evidence allowed the jury to reasonably infer the Defendant committed patronizing.

Respectfully submitted this 9th day of November, 2018

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[¶48] CERTIFICATE OF SERVICE

[¶49] A true and correct copy of the foregoing document was sent by e-mail on the 9th day of November, 2018 to: Kiara C. Kraus-Parr at kiara@kpmwlaw.com.

Reid A. Brady, NDID# 05696