IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, Plaintiffs, vs. JAMES WILLIAM YOUNG, Defendant.	No. 3:08-cr-00122-JAJ **ORDER**

This matter comes before the court pursuant to the defendant's April 29, 2009, Motion for a New Trial and Request for Oral Argument [Dkt.52]. The defendant moves the court to vacate the defendant's judgment and grant a new trial pursuant to Federal Rule of Criminal Procedure 33. On April 30, 2009, the government filed a response in opposition the defendant's motion [Dkt. 53]. For the reasons set out below, the defendant's motion is denied.

I. BACKGROUND

On December 12, 2008, the defendant was charged with one count of Attempted Enticement of a Minor to Engage in Illicit Sexual Activities in violation of 18 U.S.C. 2422(b). A jury trial commenced on April 13, 2009. Prior to and throughout the trial, the defendant timely requested submission of two instructions to the jury relating to the affirmative defenses of abandonment (Jury Instruction No. 16) and entrapment (Jury Instruction No. 15). On April 15, 2009, the court denied the defendant's request to submit Jury Instruction Nos. 15 and 16. That same day, the jury returned a verdict of guilty against the defendant.

II. FEDERAL RULE OF CRIMINAL PROCEDURE 33

Federal Rule of Criminal Procedure 33(a) states, "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. "The authority to grant a new trial 'should be exercised sparingly and with caution.'" United States v. Cole, 537 F.3d 923, 926 (8th Cir. 2008) (quoting

United States v. Sturdivant, 513 F.3d 795, 802 (8th Cir. 2008)). The court may "weigh the evidence and evaluate the credibility of the witnesses . . . The jury's verdict must be allowed to stand unless the evidence weighs heavily enough against the verdict such that a miscarriage of justice may have occurred." United States v. Garcia-Hernandez, 530 F.3d 657, 663 (8th Cir. 2008) (quoting Sturdivant, 513 F.3d at 802).

The defendant argues a new trial is warranted because the court improperly denied his requests to submit Jury Instruction Nos. 15 and 16 to the jury. The defendant contends that he was prejudiced by the court's decision because the jury would have probably acquitted the defendant of the crime charged had the court submitted either Jury Instruction No. 15 or No. 16 to the jury. The government argues that a new trial is not warranted because the court properly denied the defendant's requested jury instructions, and the defendant was not prejudiced by the denial.

III. ANALYSIS

The "interests of justice" do not warrant a new trial for the defendant because the court properly denied the defendant's requests for jury instructions on abandonment and entrapment. "The district court has 'broad discretion in formulating jury instructions.'" United States v. Aldridge, 561 F.3d 759, 764 (8th Cir. 2009) (quotation omitted). A defendant is entitled to a theory-of-defense instruction that is timely requested, supported by the evidence, and correctly states the law. United States v. Claxton, 276 F.3d 420, 423 (8th Cir. 2002) (citation omitted). The defendant timely requested Jury Instruction Nos. 15 and 16. However, as the court stated at trial, the evidence did not support submission of the abandonment or entrapment instructions to the jury.

To convict a defendant of attempting to entice a child to engage in criminal sexual activities, the government is required to prove the following elements beyond a reasonable doubt:

> (1) that the defendant used a facility of interstate commerce, such as the internet or the telephone system; (2) that the defendant knowingly used the facility of interstate commerce with the intent to persuade or entice a person to engage in

> illegal sexual activity; and (3) that the defendant believed that the person he sought to persuade or entice was under the age of eighteen.

United States v. Pierson, 544 F.3d 933, 939 (8th Cir. 2008). In the context of § 2422(b), "[t]he elements of attempt are (1) intent to commit the predicate offense, and (2) conduct that is a substantial step toward its commission." United States v. Spurlock, 495 F.3d 1011, 1014 (8th Cir. 2007) (citation omitted).

A. Abandonment Instruction

The evidence showed that the defendant chatted with "Emily" between the dates of November 4, 2008, and November 12, 2008. "Emily" was actually Detective Shia Cruciani, a member of the Iowa Internet Crimes Against Children federal task force and DeWitt police officer. Cruciani used the screen name "erj94erj94"and represented that she was a 14-year-old female. In these chats, the defendant initiated discussions of sexual activity with "Emily," including oral sex and sexual intercourse, and also made arrangements to meet her. The defendant also exchanged emails with "Emily," and arranged to meet her at a hotel room at the Super 8 motel in DeWitt on November 13, 2008. The defendant told "Emily" he would try to bring bubble bath for her to the meeting. He also told her he would park his car in the motel parking lot and leave a note on the car identifying which room he was in.

On November 13, 2008, the defendant reserved a hotel room at the Super 8 motel with his credit card. The defendant drove to Dewitt on November 13, 2008. The evidence showed that the defendant entered the Super 8 motel, attempted to pay for the room with two credit cards, both of which were declined, asked the clerk for the location of the nearest ATM, and drove to the ATM. The defendant then used his cell phone to cancel the hotel reservation. The defendant spotted a decoy officer that was dressed in clothing that "Emily" told the defendant she would be wearing on that day. The decoy officer testified that the defendant honked and yelled at her from his car; the defendant denied doing so. The defendant was subsequently arrested by police officers. In the defendant's car, officers found a handwritten note with one word at the top,"Emily," and a bottle of

baby wash. On the defendant's person, officers found a condom.

At trial, the defendant's theory was that by cancelling the hotel reservation on November 13, 2008, he "abandoned" the substantial step required for conviction under Section 2422(b). [Dkt. 52, p. 2]. He argued that the "abandonment" of the substantial step demonstrated that he did not have the intent required in the second element of the offense. [Dkt. 52, p. 2]. To support his theory of abandonment, the defendant cites Model Penal Code § 5.01(4) and U.S. v. Dworken, 855 F.2d 12 (1st Cir. 1988).[1]

The defendant requested the following instruction regarding the defense of abandonment:

> One of the issues in this case is whether the defendant abandoned his attempt. If the defendant abandoned his attempt he must be found not guilty. The government has the burden of proving beyond a reasonable doubt that the defendant did not abandon his attempt.
>
> When the actor's conduct would otherwise constitute an attempt it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.
>
> Renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another by similar objective or victim.

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[1] In his brief, the defendant states, "Moreover, Defendant's requested instruction on abandonment was timely submitted and stated the law correctly as articulated by the Model Penal Code and the Eighth Circuit's decision in U.S. v. Dworken, 855 F.2d 12, 20 (8th Cir. 1988)." [Dkt. 52, p. 9]. For clarification, Dworken is a case that was decided by the First Circuit Court of Appeals, not the Eighth Circuit. United States v. Dworken, 855 F.2d 12, 20 (1st Cir. 1988).

Had the court submitted the requested instruction, the jury would be permitted to do the following: find that the defendant possessed the requisite intent and committed a substantial step, thereby completing the crime, but acquit him nonetheless based on his later cancellation of the hotel reservation. While the Eighth Circuit has not addressed abandonment as a defense to the completed crime of attempt, other circuits that have addressed it have explicitly rejected it. See United States v. Wales, 127 Fed. Appx. 424, 432 (10th Cir. 2004) (unpublished) (" . . . [N]either this circuit nor any other circuit to have addressed the issue has held that abandonment or renunciation may constitute a defense to the completed crime of attempt . . ."); United States v. Crowley, 318 F.3d 401, 410-11 (2d Cir. 2003) ("The only other circuits that have formally addressed the question have rejected the defense as a matter of federal law.) (citing United States v. Shelton, 30 F.3d 702, 706 (6th Cir. 1994); United States v. Bussey, 507 F.2d 1096, 1098 (9th Cir. 1974)). In Shelton, the Sixth Circuit stated:

> We decline to follow the approach of the Model Penal Code and Tennessee law, and hold that withdrawal, abandonment and renunciation, however characterized, do not provide a defense to an attempt crime. As noted the attempt crime is complete with proof of intent together with acts constituting a substantial step towards commission of the substantive offense. When a defendant withdraws prior to forming the necessary intent or taking a substantial step toward the commission of the offense, the essential elements of the crime cannot be proved. At this point, the question whether a defendant has withdrawn is synonymous with whether he has committed the offense. After a defendant has evidenced the necessary intent and has committed an act constituting a substantial step toward the commission of the offense, he has committed the crime of attempt, and can withdraw only from the commission of the substantive offense.

30 F.3d at 706.

The Eighth Circuit has addressed the abandonment defense to an attempt crime on at least two occasions, United States v. Ball and United States v. Joyce. 22 F.3d 197 (8th Cir. 1994); 693 F.2d 838 (8th Cir. 1982). In Ball, the Eighth Circuit merely stated that

the defense of abandonment typically applies to attempt crimes, and that the defense was not available because the defendant was not charged with an attempt crime. Joyce is more instructive. In Joyce, the defendant was charged with and convicted of attempt to possess cocaine with intent to distribute.[2] 693 F.2d at 839. On appeal, the defendant argued that there was insufficient evidence to establish that he committed a substantial step necessary for conviction. Id. at 840-41. The Eighth Circuit agreed with the defendant, reversing the defendant's conviction for attempt to possess cocaine with intent to distribute. Id. at 843. The Eighth Circuit stated, "Whatever intention Joyce had to procure cocaine was abandoned prior to the commission of a necessary and substantial step to effectuate the purchase of cocaine." Id. at 841. This statement is implicitly consistent with statements regarding the abandonment defense made by the Sixth, Ninth, and Tenth Circuit Courts of Appeals.

Here, the jury could have found that at the point that the defendant cancelled the hotel reservation, he had already taken several substantial steps, thereby completing the crime of attempt. The defendant's reservation of the hotel room with his credit card on November 13, 2008, could have constituted a substantial step. See United States v. Dickson, 149 Fed. Appx. 543, 544 (8th Cir. 2005) (unpublished) (Evidence showed that the defendant charged with violating 18 U.S.C. 2422(b) took a substantial step by initiating internet conversation with a person he believed to be a minor female, trying to persuade her to engage in sexual activity, *arranging to meet her for that purpose*, and waiting for her at arranged time and place when arrested) (emphasis added); see also United States v. Gladish, 536 F.3d 646, 649 (7th Cir. 2008) ("[The substantial step] can be taking other preparatory steps, such as making a hotel reservation . . ."). The evidence at trial showed that the defendant took actions besides making the hotel reservation, such as internet chatting, initiating internet chatting, trying to persuade a minor to engage in sexual

[2] The defendant in Joyce was also charged with and convicted of traveling in interstate commerce to facilitate unlawful activity. 693 F.2d at 839. This conviction was also reversed by the Eighth Circuit Court of Appeals. Id. at 843.

activity, planning with minor on a time and place to meet for that purpose, and driving to the arranged meeting place, that have been found by courts to constitute substantial steps.[3] Because the requested instruction would have permitted the jury to acquit the defendant after finding that he completed the crime, the court properly denied the instruction.

B. Entrapment Instruction

"The defense of entrapment has two elements (1) government inducement of the crime, and (2) the defendant's lack of predisposition to engage in criminal conduct." United States v. Abumayyaleh, 530 F.3d 641, 646 (8th Cir. 2008) (citation omitted). Entrapment is a question of fact generally left to the jury; however, in order to warrant the instruction, the defendant must show "sufficient" evidence that the government induced him to commit the offense. United States v. Kendrick, 423 F.3d 803, 807 (8th Cir. 2005) (citation omitted).

> In order to be entitled to an entrapment instruction, a defendant must produce some evidence that the government induced him to commit an offense. If the defendant makes this showing, the burden shifts to the prosecution to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime and entrapment may become a question of fact for the jury to decide.

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[3] See Spurlock, 495 F.3d at 1014 (citation omitted) ("We conclude . . . that [the defendant's] conversations with [minor girls'] purported mother were a substantial step toward that end."), but see Gladish, 536 F.3d at 650 (the defendant's mere internet chat room statements to a purported minor female - that he wanted to kiss her breasts and thighs and wanted her to perform oral sex - did not constitute a substantial step because they did not evidence the defendant's intent to meet with the minor); Dickson, 149 Fed. Appx. at 544 (The defendant committed a substantial step by initiating conversation with purported minor, trying to persuade her to engage in sexual activity, making arrangements to meet for that purpose, and waiting for her at the arranged time and place at time of arrest); United States v. Patten, 397 F.3d 1100, 1104 (8th Cir. 2005) ("There is clear authority for the government's position that Patten's act of driving to the arranged meeting place in West Fargo was relevant evidence of a substantial step.); Gladish, 536 F.3d at 650 ("The substantial step can be making arrangements for meeting the girl, as by agreeing on a time and place for the meeting . . . It can be taking preparatory steps, such as making a hotel reservation, purchasing a gift, or buying a bus or train ticket, especially one that is nonrefundable.") (citations omitted).

United States v. Zimmerman, 509 F.3d 920, 927-28 (8th Cir. 2007) (internal citations omitted). "The defendant carries the initial burden of presenting some evidence that he or she was induced by government agents to commit the offense." Abumayyaleh, 530 F.3d at 646 (internal quotation marks omitted). The defendant must produce "sufficient evidence" from which a reasonable jury could find entrapment, which means that the defendant must show "that the government agents implanted the criminal design in [his] mind [] and induced [him] to commit the offense." Kendrick, 423 F.3d at 807 (internal quotation marks omitted).

At trial, the defendant's theory was that he was entrapped by Cruciani. In his motion, the defendant contends that the internet chats between Cruciani and the defendant contained sufficient evidence of inducement to warrant a jury instruction on entrapment. [Dkt. 52, p. 4]. The defendant also contends that the court erred in denying the entrapment instruction by requiring the defendant to carry both the burden of production and the burden of persuasion. [Dkt. 52, pp. 4-6]. In response, the government argues that the defendant failed to show there was sufficient evidence of entrapment to warrant a jury instruction.

The defendant's theory of entrapment was not supported by the evidence presented at trial. The defendant failed to provide sufficient evidence that Cruciani induced him to commit the crime. The online chats between the defendant and "Emily" show that defendant believed "Emily" was 14 and that he initiated those portions of the conversations that turned sexual in nature. [Gov. Ex. 3, Lines 15, 352]. The chats show that the defendant brought up the idea of an in-person meeting between himself and "Emily." [Gov. Ex. 3, Lines 42, 44, 121, 175]. The subsequent emails between the defendant and "Emily" demonstrated that the defendant made arrangements with "Emily" to meet her by telling her that he could pick her up at a time and location of her choice and that he could reserve a hotel room for the two of them. [Gov. Ex. 4]. The evidence showed that the defendant, not "Emily," broached the topic of sexual activity and pursued an in-person meeting between the two of them.

Furthermore, the evidence at trial demonstrated that the defendant was predisposed to commit the crime. "If the defendant exhibits any predisposition to engage in the criminal conduct, the district court need not instruct the jury on entrapment." Kendrick, 423 F.3d at 807 (internal quotation marks omitted). The evidence showed that prior to chatting with "Emily," the defendant had recently engaged in sexually-explicit chats on the internet with persons he believed to be minors on several occasions. [Gov. Ex. 6]. The chats also suggested that the defendant had made arrangements and traveled in an attempt to meet a minor for sex on occasions besides his involvement with "Emily." [Gov. Ex. 6]. Based on this evidence, the defendant exhibited the same behaviors on prior occasions not involving a law enforcement officer as he did when Cruciani was posing as "Emily."

Finally, the court required only that the defendant carry the burden of production and properly concluded that the defendant failed to meet that burden. At trial, the court correctly articulated that the defendant must show "sufficient evidence" of inducement to warrant the instruction. The court stated that if the defendant met his initial burden, the government would then have the burden to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. Here, the court found that the defendant did not meet his initial burden to show "sufficient evidence" of inducement, thus, the burden to show the defendant's predisposition never shifted to the government. The defendant claims, however, that the court required him to meet the burden of production because of the court's statement that the defendant's three character witnesses were not "substantial evidence" of lack of predisposition. [Dkt. 52, p. 4]. That statement by the court did not place the burden of production on the defendant; rather it was a comment on the amount of predisposition evidence submitted by the defendant. The court finds the defendant's argument that he was required to meet both the burdens of production and persuasion to be without merit.

IV. CONCLUSION

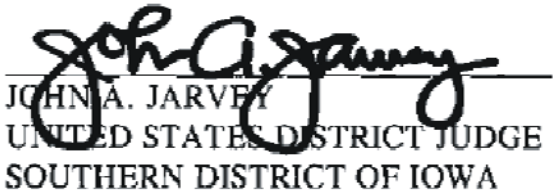
The court properly denied the defendant's request for an abandonment instruction because the theory was not supported by the evidence. Based on the lack of sufficient evidence of inducement by law enforcement officers, the court properly denied the defendant's request for a jury instruction on entrapment. The court finds that "the interests of justice" do not require a new trial of this matter.

Upon the foregoing,

IT IS ORDERED

That defendant's April 29, 2009, Motion for a New Trial and Request for Oral Argument [Dkt. 52] is denied.

DATED this 13th day of May, 2009.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA