

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-830

COMMONWEALTH

vs.

GERALD F. GRANT.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the Superior Court, the defendant, Gerald F. Grant, was convicted of enticement of a child under age sixteen.¹ He appeals claiming that the evidence was insufficient. We affirm.

Background. The jury could have found the following facts. The victim, Alice (a pseudonym), met the defendant around her freshman year of high school through her childhood friend, Brian (a pseudonym).² Brian went to the defendant's house to do yard

¹ The defendant was found not guilty of rape of a child with force, dissemination of harmful matter to a minor, unnatural acts on a child under age sixteen, and a count of enticement of a child under age sixteen involving a different victim than the count of conviction.

² Brian was the named victim in the indictments on which the defendant was acquitted.

work and help him out. Alice was age fourteen or fifteen at the time.

Thereafter, Alice and Brian walked to the defendant's house and asked him for rides to places such as the mall, the store, or another friend's house. The defendant either brought Alice and Brian into his house while he finished getting ready, or the trio got directly into the car. Alice estimated that she and Brian went to the defendant's house between a couple times per week and every other week for a couple of months.

Soon, the defendant asked Brian about his sexuality and offered him money, and ultimately paid Brian for photographs of his nude classmates.³ The defendant asked Brian to find pornographic websites, including ones depicting bestiality. Brian complied. The defendant also purchased alcohol and electronic cigarette vape liquid for Brian, at Brian's request.

Initially there was no discussion about Alice providing anything in exchange for the rides. However, the defendant eventually asked her for stories about her own sexual activity. He also asked Alice, who was fifteen years old at the time, for nude photographs of her and her friends every time that she saw him. The defendant specifically asked Alice for photographs of nude "boobs," "ass[es]," and "puss[ies]." The defendant made

³ The defendant knew that Brian was sixteen years old when their relationship ended.

these requests while Alice and Brian were with the defendant, either at his house or in his car.

Alice felt uncomfortable with the defendant's requests and tried to find photographs from the Internet on her cell phone, rather than giving the defendant photographs of her or her friends. Alice showed the defendant these images while she and Brian were at the defendant's house or in his car. Alice also made up stories to tell the defendant in response to his requests, rather than speak from personal experience. The defendant then tried to kiss Alice; he also put his hand on her lower back and thigh, and he asked her if she was going to "treat him good." Uncomfortable with the defendant's gestures, comments, and requests, Alice began to sit in the back seat of his car. Eventually, for the same reason, Alice stopped getting rides from the defendant.

Discussion. On a claim of insufficient evidence, we view the evidence in the light most favorable to the Commonwealth to determine "whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). The Commonwealth must prove beyond a reasonable doubt that (1) the

defendant enticed, (2) a child under the age of sixteen,⁴ or whom he believed to be under the age of sixteen, (3) to enter, exit, or remain within a dwelling or vehicle, (4) with the intent that he or another person would violate one of several enumerated statutes or any offense that has as an element the use or attempted use of force. Commonwealth v. Hall, 80 Mass. App. Ct. 317, 322 (2011). Here, the applicable enumerated statute is possession of child pornography.⁵ See G. L. c. 272, § 29C. At trial, the defendant argued only that the enticement element was insufficient. Nonetheless, we review the evidence as to the other elements to ensure that the verdict was not based on legally insufficient evidence that would create a substantial miscarriage of justice. See Commonwealth v. McGovern, 397 Mass. 863, 867-868 (1986).

1. Enticement. The defendant contends that the evidence of enticement was insufficient, particularly where there was no evidence of a particularized time and place. Enticement is defined as luring, inducing, persuading, tempting, inciting,

⁴ The defendant does not challenge the sufficiency of this element and the record confirms that Alice was younger than sixteen years of age.

⁵ As to this element, the defendant contends that the requested photographs did not constitute a lewd exhibition of a child's genitals, pubic area, buttocks, or breast, in violation of G. L. c. 272, § 29C (vii). He also contends that the evidence was insufficient to prove that he knew or had reason to know that the children in the requested photographs would be under the age of eighteen.

soliciting, coaxing, or inviting. G. L. c. 265, § 26C (a). See Commonwealth v. Disler, 451 Mass. 216, 222-224 (2008) (interpreting enticement statute). Indeed, entice means to invite, as that word is commonly accepted and readily understood, which is precisely what occurred here. See id. Here, the defendant lured Alice into his home and car. He invited Alice into his home while he finished getting ready to drive her, and asked Alice for photographs of her and her friends. He made gestures and comments to Alice that were sexual in nature. In this way, the defendant enticed Alice to enter his home and car with the intention of violating G. L. c. 272, § 29C. Moreover, the defendant's home and car were the only places where Alice interacted with the defendant, and these were the only places to which the defendant invited Alice for the purpose of soliciting possession of child pornography. Contrast Hall, 80 Mass. App. at 322-325 (no "child enticement" where victim was not "lured" to "enter, exit, or remain" in any specified area to take nude photographs of herself).

2. Intent to possess child pornography. Next, the defendant argues that there is no evidence to prove that he intended to possess any form of content from Alice, let alone child pornography. He contends that the intended perpetrator cannot be the victim. However, the defendant ignores the "another person" language set forth in the statute. Here, the

evidence was sufficient to prove that the defendant intended both that he himself and another person -- Alice -- possess child pornography. He did so by asking Alice for photographs of her and her friends' genitalia and breasts. That the defendant did not succeed in his attempts to induce Alice to provide child pornography to him is of no moment. See Disler, 451 Mass. at 222 (statute does not require agreement, reliance, or action by recipient of enticement).

3. Knowledge that child depicted is under age eighteen. Proof that a defendant reasonably should have known a child's age "may often take the form of related criminal conduct (involving children) with which a defendant is charged; people or Web sites with whom the defendant has contacts; . . . testimony as to admissions made by the defendant to others in the past; or the content of other evidence . . . found in the defendant's possession." Commonwealth v. Kenney, 449 Mass. 840, 857 (2007). Here, the jury could have found that the defendant knew that Alice and her friends were no more than sixteen years old. The defendant met Alice through Brian, whom he knew was under age eighteen and a classmate of Alice. Also, the defendant drove Alice and Brian and purchased alcohol and electronic cigarette vape liquid for them. And, the defendant told his step-granddaughter that he knew that Brian, Alice's best friend, was only sixteen. Accordingly, the jury could

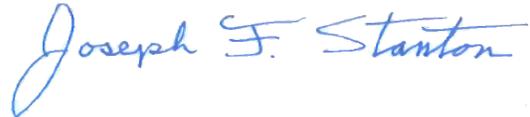
reasonably infer that, when the defendant asked for pictures of Alice's friends, he intended to be provided with pictures of children under eighteen years of age.

4. Lewd exhibition. Finally, the defendant contends that there was insufficient evidence that the requested photographs were lewd. We are not persuaded. The defendant requested photographs of specific body parts using graphic language, all of which were intended to be the focal point of the visual depiction. And, while nudity is not dispositive of this issue, the defendant specifically asked that the photographs depict nude female genitalia, buttocks, and breasts. See Commonwealth v. Sullivan, 82 Mass. App. Ct. 293, 302-303 (2012). This evidence was corroborated by the defendant's requests for pornographic websites involving bestiality, his solicitation of information regarding Alice's and Brian's sexual experiences, and the manner in which he touched Alice. As additional corroborating evidence, two photographs found on the defendant's computer were introduced in evidence; both photographs depicted

lewd exhibitions of an adult female's genitalia, buttocks, and breasts. Id.

Judgment affirmed.

By the Court (Blake, Shin & Ditekoff, JJ.⁶),



Clerk

Entered: August 3, 2020.

⁶ The panelists are listed in order of seniority.