

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 20-3547

United States of America,

Plaintiff - Appellee,

v.

Japher Yosuf Rajab,

Defendant - Appellant.

Appeal from United States District Court
for the District of South Dakota - Western

Submitted: October 18, 2021

Filed: January 14, 2022

Before COLLOTON, ERICKSON, and STRAS, Circuit Judges.

COLLOTON, Circuit Judge.

Japher Rajab was convicted of attempting to entice a minor using the internet. *See* 18 U.S.C. § 2242(b). On appeal, Rajab argues that there was insufficient evidence to support his conviction, in part because the object of his enticement was an adult undercover officer rather than an actual minor. He also contends that the

indictment failed to state an offense, and that the district court¹ should have instructed the jury that proof of an actual minor was required. We reject these arguments and affirm the judgment.

I.

Evidence at trial showed that Rajab used a messaging software application called MeetMe to communicate with a purported minor named “Lucy.” Lucy’s profile on the MeetMe application, however, was operated by a special agent of the Department of Homeland Security who played the role of Lucy. Lucy’s profile said that she was nineteen years old, but in messages to Rajab, she informed Rajab that she was actually fifteen years old. Rajab responded, “Your age isn’t a problem.” In later messages, Rajab expressed doubt that Lucy was actually fifteen years old, but Lucy reiterated that she was indeed fifteen years old.

During his conversation with Lucy, Rajab sent explicit messages detailing sexual acts in which he sought to engage with Lucy. The conversation transitioned from MeetMe to text messages, and Rajab began using the Talkatone software application to send messages. Rajab eventually arranged to meet Lucy at a local little league park, and he promised to bring condoms.

At the designated meeting place, surveillance officers observed the vehicle that Rajab had described to Lucy. Officers arrested Rajab, seized his cellular phone, and searched his vehicle. Inside the console of the vehicle, they found two condoms. On Rajab’s phone, they located the messages that Rajab had exchanged with Lucy in the MeetMe and Talkatone applications. In the internet search history on Rajab’s phone, they found queries asking, “Do police set up stings on Meet?” and “Can police post

¹The Honorable Jeffrey L. Viken, United States District Judge for the District of South Dakota.

an ad online for prostitution and then arrest?" During an interview with investigators, Rajab confirmed that he had sent the messages to Lucy, but claimed that he did not believe that she was actually fifteen years old.

A grand jury charged Rajab with attempting to entice a minor using the internet, in violation of 18 U.S.C. § 2422(b). A jury found Rajab guilty, and the district court sentenced him to 120 months' imprisonment and five years of supervised release.

II.

Rajab argues on appeal that the indictment failed to state an offense because it did not allege that the person with whom he was communicating about sexual acts was under the age of eighteen or that he engaged in sexual activity with a minor. He did not raise this challenge before trial, and “[w]hen an indictment is challenged after jeopardy attaches, it is upheld unless it is so defective that by no reasonable construction can it be said to charge the offense.” *United States v. White*, 241 F.3d 1015, 1021 (8th Cir. 2001) (internal quotations omitted).

Rajab’s argument fails because the charged offense does not require the involvement of an actual minor. The statute forbids enticing, or *attempting to entice*, any individual under the age of eighteen to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense. 18 U.S.C. § 2422(b). An attempt is accomplished when the offender intends to commit the substantive offense and takes a substantial step toward its commission. *United States v. Young*, 613 F.3d 735, 742 (8th Cir. 2010). Even where an undercover officer is playing the role of a minor, an offender commits the crime of attempted enticement under § 2422(b) where he intends to entice a minor and engages in substantial conduct toward that end. *United States v. Helder*, 452 F.3d 751, 756 (8th Cir. 2006). The statute does not require proof that an offender succeeded in enticing anyone to

engage in sexual activity. Evidence that a defendant arranged to meet a minor at a certain time or place and traveled to the designated meeting location is sufficient to support a conviction. *Young*, 613 F.3d at 743. We therefore conclude that the indictment adequately stated an offense.

For similar reasons, there was no error in the district court's instructions to the jury. For the first time on appeal, Rajab challenges the court's instructions that “[d]irect communication with a child is unnecessary,” and that “[t]he government must only prove Mr. Rajab believed that he was communicating with someone who could arrange for the child to engage in unlawful sexual activity.” R. Doc. 67, at 8. The instructions accurately state the law, and there is no plain error, because the statute does not require direct communication with a minor. Evidence of attempting to entice a minor through an intermediary may be sufficient to establish a violation. *United States v. Willins*, 992 F.3d 723, 728 (8th Cir. 2021); *United States v. Spurlock*, 495 F.3d 1011, 1014 (8th Cir. 2007).

Rajab also challenges the sufficiency of the evidence supporting his conviction. The elements of § 2422(b), as charged in this case, require proof that the defendant (1) knowingly used a facility of interstate commerce, such as the internet or the telephone system, (2) with the intent to entice a person to engage in illegal sexual activity, and (3) believed that the person he sought to entice was under the age of eighteen. *United States v. Hensley*, 982 F.3d 1147, 1154 (8th Cir. 2020). The attempt charge required proof that the defendant intended to commit the offense of enticing a minor and took a substantial step in furtherance of that offense. *Id.*

Rajab maintains that the government failed to prove the use of a facility of interstate commerce to commit attempted enticement. Officers testified, however, that Rajab communicated with Lucy through the MeetMe software application, and that they found messages between Rajab and Lucy in the Talkatone software application on Rajab's cellular phone. Another officer testified that the MeetMe and

Talkatone applications send all communications through the internet, which is a facility of interstate commerce. A reasonable jury thus could find that Rajab used a facility of interstate commerce to communicate with Lucy.

The record also shows sufficient evidence that Rajab intended to entice Lucy to engage in sexual activity while believing that she was a minor. The undercover agent playing the role of Lucy testified that Rajab sent explicit messages to Lucy and described sexual acts in which he wanted to engage with her. When arranging to meet Lucy in person, Rajab promised to bring condoms with him, and officers found two condoms in the console of Rajab's vehicle when they arrested him. The agent also testified that when Lucy told Rajab that she was fifteen years old, Rajab responded that her "age isn't a problem." Rajab later questioned Lucy's age, but she reiterated several times that she was fifteen years old, and Rajab continued with his attempted enticement. A reasonable jury could infer that Rajab believed that Lucy was fifteen years old and that he intended to entice her to engage in sexual activity.

A reasonable jury also could conclude that the sexual activity in which Rajab sought to engage with Lucy is illegal under state law. South Dakota criminalizes sexually penetrating an individual who is at least three years younger than the perpetrator and who is between the ages of thirteen and sixteen years old. S.D. Codified Laws §§ 22-22-1(5), 22-22-2. South Dakota also proscribes engaging in sexual contact with an individual under the age of 16 when the contact is made by a perpetrator aged sixteen years or older. S.D. Codified Laws §§ 22-22-7, 22-22-7.1. Rajab was forty-one years old, and he sent messages to Lucy expressing a desire to engage in both sexual penetration and sexual contact with her. This evidence supports a finding that Rajab intended to entice Lucy to engage in "illegal sexual activity."

Finally, there was ample evidence that Rajab took a substantial step in furtherance of enticing Lucy. He arranged to meet Lucy at a local park, and traveled to the park while equipped with condoms suitable for use in sexual activity. Those actions are sufficient to establish a substantial step and a completed attempt. *Young*, 613 F.3d at 743. The record thus supports a reasonable finding that Rajab attempted to entice a minor in violation of § 2242(b).

* * *

The judgment of the district court is affirmed.

APPENDIX B

Case 5:19-cr-50109-JLV Document 14 Filed 08/14/19 Page 1 of 2 PageID #: 27

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

CR 19-50109

Plaintiff,

v.

JAPHER YOSUF RAJAB,

REDACTED INDICTMENTAttempted Enticement of a Minor
Using the Internet
(18 U.S.C. § 2422(b))

Defendant.

Forfeiture

The Grand Jury charges:

On or about August 6, 2019, at Rapid City, in the District of South Dakota, the defendant, Japher Yosuf Rajab, did use a facility and means of interstate commerce, that is, a cellular phone and computer attached to the internet, and did use a phone connected to a cellular network, to attempt to knowingly persuade, induce, entice, and coerce an individual who had not yet attained 18 years of age to engage in sexual activity for which the defendant, Japher Yosuf Rajab, could be charged with a criminal offense and criminal offenses, namely, rape in the fourth degree, in violation of South Dakota Codified Law § 22-22-1(5), and felony sexual contact with a child under sixteen, in violation of South Dakota Codified Law §§ 22-22-7 and 22-22-7.1, all in violation of 18 U.S.C. § 2422(b).

FORFEITURE ALLEGATION

1. The allegations contained in this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18 U.S.C. § 2428.

2. Pursuant to 18 U.S.C. § 2428, upon conviction of an offense in violation of 18 U.S.C. § 2422, the defendant, Japher Yosuf Rajab, shall forfeit to the United States of America (1) any property, real or personal, used or intended to be used to commit or to facilitate the commission of the offense; and (2) any property, real or personal, constituting or derived from, any proceeds obtained, directly or indirectly, as a result of the offense. The property to be forfeited includes, but is not limited to, the following:

Samsung, SM-S367VL, IMEI: 352069106438335, Black

3. If any of the property described above, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third party;
- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by 18 U.S.C. § 2461(c).

A TRUE BILL:

NAME REDACTED

Foreperson

RONALD A. PARSONS, JR.
UNITED STATES ATTORNEY

By: 

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

* * * * *

UNITED STATES OF AMERICA, Plaintiff, * CR No. 19-50109
vs. * JURY TRIAL, DAY 1
JAPHER RAJAB, * DECEMBER 9, 2019
Defendant. *

* * * * *

TRANSCRIPT OF JURY TRIAL, DAY 1

BEFORE THE HONORABLE JEFFREY L. VIKEN,

U.S. CHIEF DISTRICT COURT JUDGE

APPEARANCES:

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Official Court Reporter
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Phone: (605) 399-6007.
Sheri.Nothelphim@sdd.uscourts.gov

1 Q. No. I mean formally, when you're setting up one of
2 your undercover profiles, do you give her a first name, a
3 middle name, and a last name, or is it less formal than
4 that?

5 A. I think it -- I don't know a hundred percent, but I
6 believe I gave her a first name of Lucy and then a last
7 name as well. I don't remember offhand.

8 Q. Okay.

9 A. I think it was Finn. Sorry. F-I-N-N.

10 Q. Okay. As far as the age verification, getting into
11 that, so you enter in a date of birth, and it has to be
12 over the age of 18. Are there any other limitations? Do
13 you have to show a driver's license or an ID or something
14 along that line that corroborates or proves that that date
15 of birth is actually, in fact, true?

16 A. No.

17 Q. And so you selected 19 as the age for this Lucy
18 profile?

19 A. Yes, I did.

20 Q. Sir, I'm approaching with what have been previously
21 marked as Exhibits 1, 2, and 3. I'll put this one off to
22 the side for a second. I will ask you to first direct
23 your attention to number 1, if you would, please.

24 What is that?

25 A. That's the profile created on MeetMe.

1 Q. Okay. The one you were just talking about with Lucy?

2 A. That's correct.

3 Q. And other than being in printed-out form, does that
4 fairly and accurately depict the way that that profile
5 that you set up during the 2019 operation appeared?

6 A. Yes.

7 MS. COLLINS: Your Honor, at this time I would
8 move for admission of Exhibit Number 1.

9 THE COURT: Any objection?

10 MS. ALBERTSON: No objection.

11 THE COURT: Exhibit 1 is received.

12 (Exhibit No. 1 was admitted.)

13 MS. COLLINS: Your Honor, may I display?

14 THE COURT: Yes, of course.

15 Q. BY MS. COLLINS: In a moment, it will build on the
16 screen next to you.

17 Now it should build on the screen next to you.

18 Okay. Do you see that?

19 A. Yes, I do.

20 Q. All right. So you indicated the name was Lucy. Is
21 that correct?

22 A. That's correct.

23 Q. And then this is all the information that you
24 inputted when you first initially set up this profile.
25 Correct?

012a

Verizon

12:38 AM

34%



Lucy

Edit

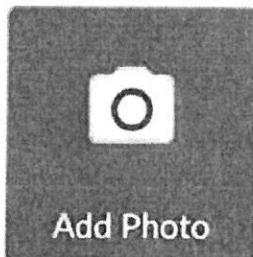


Lucy

19, Female, Rapid City, SD

Boost!

“ ”



Add Photo



About Me

Tell us something about yourself!



No Tags

Get better chats with tags!

Add tags!

Popularity

Average

Looking for

Friendship, Dating, Chat

Height

Body type

Fill out the rest of your profile to match the best
chat partners!

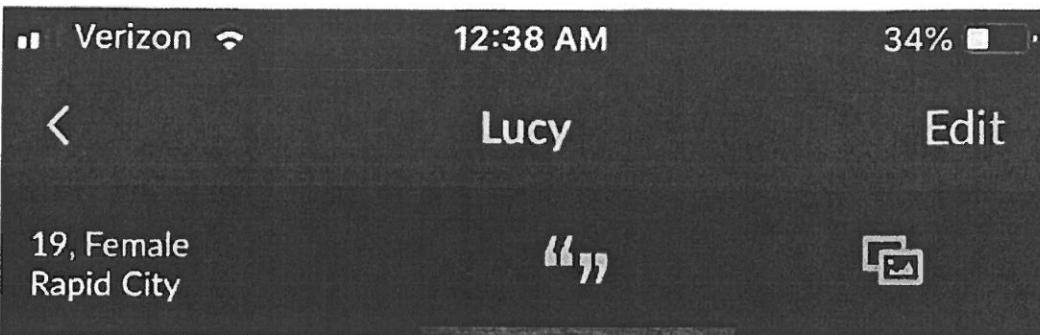
Edit Profile



EXHIBIT



013a



Tell us something about yourself!



No Tags

Get better chats with tags!

Add tags!

Popularity

Average

Looking for

Friendship, Dating, Chat

Height

Body type

Fill out the rest of your profile to match the best
chat partners!

Edit Profile



Lucy

Just now



Hit me up on KIK: LakeLucy15 if you wanna and let
me know you saw it on MM. 😊



Lucy



APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff, * CR No. 19-50109
*
* * *

vs.

JAPHER RAJAB, *
Defendant. *

* *

TRANSCRIPT OF JURY TRIAL, DAY 1

BEFORE THE HONORABLE JEFFREY L. VIKEN,

U.S. CHIEF DISTRICT COURT JUDGE

12 APPEARANCES:

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20 COURT REPORTER: SHERI L. NOT HELP HIM, RPR, CRR
Official Court Reporter
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Rapid City, South Dakota 57701
Phone: (605) 399-6007.
Sheri.Nothelphim@sdd.uscourts.gov

21

22

1 A. Yes. Once I start seeing that some of these
2 individuals are interested in engaging in some kind of
3 sexual activity with me, I'll screenshot the chats so I
4 can keep them as evidence.

5 Q. And just to be clear, you said to engage in sexual
6 activity with you. Are you posing as somebody else?

7 A. That's correct.

8 Q. Okay. So on the MeetMe profile, was she a minor?
9 Were you posing as a minor?

10 A. On the profile itself, I listed my age as 19 years
11 old. During the chats, I immediately tell them I'm 15 if
12 we're going to, you know, continue talking.

13 Q. And we'll get down to why you say you're 19 on the
14 profile in just a moment. Okay?

15 What do you do if somebody -- after you set
16 forth, "I'm 15 years old," what do you do if they go away
17 and they don't want to talk to you?

18 A. I cease talking to them. I just disengage and then
19 go on to the next person.

20 Q. And unless that person who leaves recontacts you, do
21 you ever contact that person again?

22 A. No.

23 Q. Did you use pictures that were associated with your
24 profile on MeetMe?

25 A. Yes, I did.

1 A. That's correct.

2 Q. All that you have to report is how many of these
3 chats result in an arrest. Correct?

4 A. That's correct.

5 Q. And that's part of why you're trying to figure out,
6 you know, are we just chatting here, am I wasting my time.
7 Right?

8 A. That's correct.

9 Q. Because you want people to get arrested.

10 A. That's correct.

11 Q. Okay. And you would agree with me that twice my
12 client asks, "Can I speak to you on the phone or in a
13 video chat"?

14 A. Yes.

15 Q. Okay. Obviously, if you had had a phone call with
16 Japher, you're a grown man. Correct?

17 A. Yes.

18 Q. And you don't use real-life women as bait in
19 these operations. Correct?

20 A. That's correct.

21 Q. So you can't offer an actual person to talk to?

22 A. No.

23 Q. And so he asked to verify who you are in that manner,
24 and you deny him that?

25 A. That's correct.

1 the chat. Correct?

2 A. Yes, ma'am.

3 Q. And that's something you know because you've done
4 these operations quite often?

5 A. Yes, ma'am.

6 Q. And just because generally on dating apps, not
7 everyone is truthful about their photographs. Correct?

8 A. That's correct.

9 Q. And Ms. Collins pointed out that you can actually
10 Google photos of young women, middle-age women, any sort
11 of women or men and just copy and paste them into these
12 chats?

13 A. Yes, ma'am.

14 Q. And so in anticipation of people disbelieving you,
15 you have stock photos of this young woman with a fork.
16 Correct?

17 A. That's correct.

18 Q. But my client doesn't want the fork or spoon photo,
19 does he?

20 A. No.

21 Q. He wants one with a TV remote.

22 A. That's correct.

23 Q. Because he's not really believing who you are, and he
24 wants a picture to verify. Correct?

25 A. I --