IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-1681
Polk County No. FECR355616

STATE OF IOWA,
Plaintiff-Appellee,

vs.

COREY ROBERT FENTON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SAMANTHA GRONEWALD, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal by Corey Fenton challenging his conviction, judgment, and sentence following a guilty verdict of solicitation of commercial sexual activity in violation of Iowa Code section 710A.2A.

Course of Proceedings

The State accepts the defendant's course of proceedings. Iowa R. App. P. 6.903(3).

Facts

From November 2021 to January 2022, 36-year-old Corey Fenton engaged in Facebook conversations with someone he believed to be a 15-year-old named Neveah Roberts. Trial Tr. vol. 1 170:7–15, 172:3–7; State's Trial Ex. 7 (Facebook conversation); Ex. App. 6–167. Fenton and "Neveah" planned via Facebook Messenger to meet up for sex at the Flying J in Altoona, Iowa. State's Trial Ex. 7 (Facebook conversation), at 85–86; Ex. App. 90–91. However, Fenton was

unaware that the Facebook profile he believed to be that of a 15-year-old girl was, in fact, created and run by Detective David Lowe with the Altoona Police Department.[1] Trial Tr. vol. 1 166:16–167:4. At Fenton's criminal trial, the jury heard a live reading of the entire 162-page Facebook conversation between Fenton and Neveah, which the State also displayed on a projector so the jury could view the photos within the chat. Trial Tr. vol. 1 174:1–16; State's Trial Ex. 7 (Facebook conversation); Ex. App. 6–167.

The Facebook page was a newly created sting operation designed to catch offenders who solicit minors for sex. Trial Tr. vol. 1 166:3–13. To carry out this sting, Detective Lowe had a female police officer pose for pictures that were digitally altered to make her appear younger. Trial Tr. vol. 1 153:1–10. These pictures included both basic photographs of the officer at home or at school and more provocative pictures of her in a bikini or in a tank top with her bra strap showing. Trial Tr. vol. 1 153:24–154:23, State's Trial Ex. 7 (Facebook conversation) at 7, 16, 61, 133; Ex. App. 12, 21, 66, 138. When Fenton

[1] The remainder of this brief will refer to the Facebook conversations as between Fenton and Neveah, with the understanding it was always Detective Lowe acting as Nevaeh Roberts.

requested a photo of Neveah, Detective Lowe would access a folder containing the digitally de-aged pictures and send one of the pictures to him. Trial Tr. vol. 1 154:11–15.

Detective Lowe explained that he prefers to let people add Neveah as a friend and then initiate contact with her, which is exactly what happened in this case. Trial Tr. vol. 1 168:25–169:6. Fenton and Neveah's initial conversations in late November were flirtatious yet reserved, but they quickly escalated into sexual and explicit exchanges. *See* State's Trial Ex. 7 (Facebook conversation) at 76–162; Ex. App. 81–167. Throughout these increasingly explicit conversations, Fenton knew that Neveah was a minor; not only did her Facebook profile state that she was fifteen, but also Neveah told Fenton multiple times that she was fifteen. Trial Tr. vol. 1 170:7–15, State's Trial Ex. 7 (Facebook conversation) at 153, 159; Ex. App. 158, 164. However, Neveah's age did not stop Fenton from pursuing her and as their conversations continued, Fenton repeatedly asked Neveah to "hang out." State's Trial Ex. 7 (Facebook conversation) at 88, 89, 95, 104, 109, 116, 119, 127, 152, 153, 155; Ex. App. 93, 94, 100, 109, 114, 121, 124, 132, 157, 158, 160.

By the beginning of December, Fenton asked Neveah if she wanted to have sex. State's Trial Ex. 7 (Facebook conversation) Dkt. at 117–18; Ex. App. 122–23. Neveah expressed interest but explained that they would have to be careful because her mom was strict, so they would have to find a way to meet up without her mom finding out. State's Trial Ex. 7 (Facebook conversation) at 116; Ex. App. 121. After Fenton's multiple unsuccessful attempts to "hang out" with Neveah, Neveah proposed an idea—she could skip school when her mom was gone on a business trip and the two of them could meet up to have sex. State's Trial Ex. 7 (Facebook conversation) at 87–88; Ex. App. 92–93. At this point, the two planned to meet up but needed to figure out where to do so–Fenton suggested his apartment, but Neveah explained that the location needed to be close to her home in case she needed to leave quickly. State's Trial Ex. 7 (Facebook conversation) at 75; Ex. App. 80. Fenton suggested they meet up at a Flying J truck stop in Altoona and rent a shower room. Trial Tr. vol. I 181:20–25; State's Trial Ex. 7 (Facebook conversation) at 75; Ex. App. 80.

By the end of December, Fenton began openly and explicitly propositioning Neveah for a wide variety of specific sexual acts, with the beginning portion of one such conversation reading as follows:

> Fenton: sup
>
> Neveah: what u
>
> Fenton: ?
>
> Neveah: whats u
>
> Neveah: up
>
> Fenton: my cock
>
> Neveah: Lol I bet that's true
>
> Fenton: lol
>
> Fenton: slide it in you
>
> Neveah: Haha someone is hornyyy [winking face emoji]
>
> Fenton: yes
>
> Fenton: bend over and do it
>
> Neveah: Is that what u would do 2 me?
>
> Fenton: one of the things
>
> Neveah: Tell me what u want 2 do
>
> Fenton: tell me what you want me to do
>
> Neveah: Idk
>
> Fenton: think/

Fenton: want your pussy ate?

Neveah: yeah that sounds good

Fenton: you can sit on my face

Fenton: you gonna swallow my cum?

Fenton: can we video chat?

State's Trial Ex. 7 (Facebook conversation) at 80–83; Ex. App. 85–88. Later during the same conversation, Fenton questioned Neveah about her experience with sex and other men and Neveah indicated that she had some experience. State's Trial Ex. 7 (Facebook conversation) Dkt. at 79–80; Ex. App. 84–85. As the conversation progressed, Fenton told Neveah he wanted to dominate her, telling her "youll be my good girl that listens" and asking "youll be my lil cum slut?" State's Trial Ex. 7 (Facebook conversation) at 77–78; Ex. App. 82–83.

A couple days later, Fenton sent the following series of messages to Neveah:

Fenton: ok bet after I eat your pussy youll be down to suck my cock

Neveah: U want that?

Neveah: How long do the showers last at flying j

Fenton: ive been in one for couple hours

Fenton: and yes i want to throat fuck you

Neveah: Have u had sex in them b4? I've never been

Neveah: U wanna throat fuck me?

Fenton: yeah

Fenton: lol yes

Neveah: Lol ok

Fenton: hows your gag reflex

Neveah: Never done that b4 either

Neveah: Good I guess haha [face with tears of joy emoji]

Fenton: so i can shove my cock down there no prob?

Neveah: Ya I guess so haha

Fenton: we will find out

State's Trial Ex. 7 (Facebook conversation) at 65–67; Ex. App. 70–72.

As these conversations progressed, Fenton also broached the idea of having a "threesome" with Neveah and one of her friends. State's Trial Ex. 7 (Facebook conversation) at 62–65, 76–77; Ex. App. 67–70, 81–82. Neveah told Fenton that her friend was also fifteen, to which Fenton responded, "id love a dbl bj" and asked for a picture of the other girl. State's Trial Ex. 7 (Facebook conversation) at 63–64; Ex. App. 68–69. Fenton also questioned whether Neveah's friend

wanted “throat fucked.” State’s Trial Ex. 7 (Facebook conversation) at 65; Ex. App. 70. During one of the discussions about a possible threesome, Fenton and Neveah had the following exchange:

> Neveah: What would u do 4 a threesome
>
> Fenton: what do i need to do lol
>
> Neveah: Idk. Girls like food and clothes lol
>
> Fenton: ok i have no prob spoiling a likl
>
> Fenton: lil

State’s Trial Ex. 7 (Facebook conversation) at 62–63; Ex. App. 67–68. In a later conversation, while the two were talking about meeting up, Neveah asked if he was going to bring her food:

> Neveah: U bringing me some food?
>
> Fenton: sure lol
>
> Fenton: this cock
>
> Fenton: jk
>
> Neveah: Haha! Yes plz
>
> Fenton: but fr

State’s Trial Ex. 7 (Facebook conversation) at 47; Ex. App. 52.

When Fenton learned that Neveah did not have money to rent a shower room, he assured her that he would rent the shower. State’s Trial Ex. 7 (Facebook conversation) at 43; Ex. App. 48. The day before

the planned meeting, Neveah asked Fenton what he would like to do after their time in the shower and he said "whatever" would be fine. State's Trial Ex. 7 (Facebook conversation) at 27; Ex. App. 32. Neveah asked what he liked to do, and Fenton told her he liked to smoke marijuana. State's Trial Ex. 7 (Facebook conversation) at 27; Ex. App. 32. Neveah questioned whether Fenton had any marijuana and he responded that he would have to get more. State's Trial Ex. 7 (Facebook conversation) at 26; Ex. App. 31. The two agreed that they would spend the afternoon smoking marijuana together after their time in the shower. State's Trial Ex. 7 (Facebook conversation) at 25–26; Ex. App. 30–31.

On January 7, the day of the meet up, Fenton told Neveah he was having car problems and was not sure if he was going to make it to the Flying J. State's Trial Ex. 7 (Facebook conversation) at 15–16; Ex. App. 20–21. After he told her he had failed in his attempts to get a ride, Fenton offered to pay for an Uber to bring her to his apartment, but she declined, again explaining that she needed to stay close to home in case her mom returned home. State's Trial Ex. 7 (Facebook conversation) at 13; Ex. App. 18. Fenton also said that if he paid for an Uber ride and the shower, he would not be able to pay for an Uber

ride to take him back home. State's Trial Ex. 7 (Facebook conversation) at 9; Ex. App. 14. Neveah told him that she had $20 so she could assist in paying for something and was already close to the Flying J. State's Trial Ex. 7 (Facebook conversation) at 9; Ex. App. 14. Hearing this, Fenton was convinced; he ordered himself an Uber ride to the Flying J and told Neveah to buy a shower from the clerk and wait upstairs. State's Trial Ex. 7 (Facebook conversation) at 4; Ex. App. 9. Neveah explained that she did not know how to rent the shower so Fenton told her to wait and he would do it when he got there. State's Trial Ex. 7 (Facebook conversation) at 3; Ex. App. 8.

Fenton arrived at the Flying J shortly after 1:30 p.m. and ran upstairs towards the shower where he believed Neveah was waiting for him. Trial Tr. 185:21–186:1. However, instead of Neveah, he found a team of agents and detectives waiting for him. Trial Tr. vol. 1 186:2–4.

Several days before the scheduled meetup at the Flying J, Detective Lowe had coordinated with the Altoona Police Department as well as agents from Internet Crimes Against Children Task Force Program (ICAC) for additional assistance. Trial Tr. vol. 1 184:11–185:3. Detective Lowe and another officer interviewed Fenton and

took him into custody. Trial Tr. vol. 2 24:10–12. The jury in Fenton's criminal trial heard a recording of that interview. *See* State's Trial Ex. 10 (Fenton interview).

At trial, Detective Lowe explained that there is a feature on Facebook that enables secret conversations, which Fenton utilized to make some messages he sent disappear after five seconds. Trial Tr. vol. 1 176:18–177:5, State's Trial Ex. 4 (secret message 1), Dkt. No. 59; Ex. App. 3, State's Trial Ex. 5 (secret message 2), Dkt. No. 60; Ex. App. 4. During one such secret conversation, Fenton sent Neveah a picture of his erect penis. Trial Tr. vol. 1 179:10–23, State's Trial Ex. 6 (Fenton's male genitals), Dkt. No. 61; Conf. App. 4. The State offered the picture at trial as State's Trial Exhibit 6, and the district court admitted it over Fenton's objection.

ARGUMENT

I. The District Court did not Abuse its Discretion in Overruling Fenton's Objection to State's Trial Exhibit 6 Because its Probative Value was not Outweighed by Either the Danger of Needlessly Presenting Cumulative Evidence or Unfair Prejudice.

Preservation of Error

Fenton objected to State's Trial Exhibit 6, alleging that it was needlessly cumulative and more prejudicial than probative. Trial Tr. vol. 1 158:15–159:3. Therefore, the State does not contest error

preservation for this issue. *See State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003) ("The preservation of error doctrine is grounded in the idea that a specific objection to the admission of the evidence be made known, and the trial court be given an opportunity to pass upon the objection and correct any error.").

Standard of Review

The Court reviews evidentiary rulings for an abuse of discretion. *State v. Fontenot*, 958 N.W.2d 549, 555 (Iowa 2021) (citing *State v. Paredes*, 775 n.W.2d 554, 560 (Iowa 2009)).

Merits

It is well established that "[t]rial courts have discretion in determining whether the value of pictures as evidence outweighs their grisly nature." *State v. Neiderbach*, 837 N.W.2d 180, 202 (Iowa 2013) (citing *State v. Hickman*, 337 N.W.2d 512, 516 (Iowa 1983)). Because the district court did not abuse its discretion when determining State's Trial Exhibit 6 should be admitted in this case, Fenton's challenge should fail.

Fenton first alleges that the relevance of State's Trial Exhibit 6 was minimal. *See* Appellant's Br. at 21. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be

without the evidence" and "the fact is of consequence in determining the action." Iowa R. Evid. 5.401. This is a relatively low bar, meaning that if evidence is excluded, it is often not due to its irrelevance. *See Neiderbach*, 837 N.W.2d at 238. Fenton was charged with solicitation of commercial sexual activity and therefore, the State was required to prove beyond a reasonable doubt that Fenton intended to engage in commercial sexual activity. *See* Jury Inst. No. 14, Dkt. No. 66; App. 13. The picture that Fenton took of his genitals and sent to a 15-year-old girl he was planning to meet up with for sex is relevant to that issue. Therefore, this argument should fail.

Fenton also alleges that the district court erred in admitting State's Trial Exhibit 6 because admitting the picture was needlessly cumulative since the jury was aware the picture existed. *See* Appellant's Br. at 22. Fenton further alleges that the probative value of the picture was outweighed by its prejudicial effect because allowing the actual picture into evidence could have triggered the jury's instinct to punish or improperly influenced the jury's view of the case. *See* Appellant's Br. at 22–23. These arguments should also fail.

To determine whether evidence should be excluded, the district court applies a two-part test. First, the court should "consider the probative value of the evidence." *State v. Cromer*, 765 N.W.2d 1, 8 (Iowa 2009) (citing *State v. Harmon*, 238 N.W.2d 139, 145 (Iowa 1976)). Second, the court should balance the probative value of the evidence against the danger of its prejudicial or wrongful effect on the jury. *Id.* Evidence will only be excluded if it is determined that "the probative value is substantially outweighed by a danger of unfair prejudice." *State v. Rodriquez*, 636 N.W.2d 234, 239–40 (Iowa 2001), Iowa R. Evid. 403.

Regarding the first prong of the test, and as argued above, State's Trial Exhibit 6 was probative of Fenton's intent to engage in commercial sexual activity. As to the second prong of the test, the evidence was not needlessly cumulative and the probative value of admitting the evidence is not substantially outweighed by the danger of its prejudicial effect on the jury. The evidence was not needlessly cumulative because the jury would not necessarily have known that Fenton actually sent a picture of his erect penis to Neveah by listening to Fenton's interview with the detectives, even if the recording of the interview likely alerted the jury to the fact that the detectives believed

Fenton sent such a picture to Neveah. Throughout the interview, Fenton was hesitant when pressed about whether he sent a picture of his erect penis to Neveah. State's Trial Exhibit 10 (Fenton interview) at 14:40–16:58, 19:14–20:01. State's Trial Exhibit 6 allowed the jury to confirm that Fenton sent a picture of his erect penis to Neveah.

Further, the probative value of the picture is not substantially outweighed by its prejudicial effect. Subject to the court's discretion, the State was able to choose which evidence to admit to in order to prove that Fenton intended to engage in commercial sexual activity. *See Neiderbach*, 837 N.W.2d at 203 (holding that a video that depicted a minor's injuries was not unfairly prejudicial when the video was a fair depiction of the minor's condition even if there was other evidence that would prove the injuries and be less likely to inflame the jury); *State v. Brown*, No. 98-1987, 200o WL 278548, at *4–5 2 (Iowa Ct. Appeals, March 15, 2000) (holding that the district court did not abuse its discretion in admitting pornography when it corroborated the victim's testimony and allowed the jury to understand the defendant's plan to sexually abuse a minor). After hearing from both the defense and the State, the district court weighed the probative value that the picture would provide to the jury

and compared it to the prejudicial effect a graphic picture might cause and determined that it was more probative than prejudicial. The district court did not abuse its discretion.

But even if the district court did abuse its broad discretion by admitting State's Trial Exhibit 6, any such error was harmless. To determine whether erroneously admitting an exhibit was harmless error, the Court looks to whether the error "injuriously affected" or "caused a miscarriage of justice" to the defendant. *See* Iowa R. Evid. 5.103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party."); *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008) ("When a nonconstitutional error is claimed, as in this case, the test is whether the rights of the objecting party have been 'injuriously affected by the error' or whether the party has 'suffered a miscarriage of justice.'" (quotation omitted)).

Fenton alleges that State's Trial Exhibit 6 called upon the jury to judge Fenton by his character, rather than presume his innocence. *See* Appellant's Br. at 23. This allegation lacks merit. Even without the photo, the evidence available to the jury included the live testimony of three law enforcement officers, the explicit 162-page

Facebook conversation upon which the entire criminal case rested, and the interview with Fenton, which together provided overwhelming evidence of Fenton's guilt. *See* Trial Tr. vol. 1 141:17–150:20, 151:9–157:8, 163:23–188:9, Trial Tr. vol. 2 21:17–34:17, State's Trial Ex. 7 (Facebook conversation), Ex. App. 6–167; State's Trial Ex. 10 (Fenton interview) at 14:40.

The district court did not err in overruling Fenton's objection to State's Trial Exhibit 6 because the probative value was not substantially outweighed by the danger of needlessly presenting cumulative evidence or the danger of unfair prejudice. Further, even if the district court did err, the error was harmless. Fenton's conviction should be affirmed.

II. Sufficient Evidence Proved Fenton's Guilt for Solicitation of Commercial Sexual Activity.

Preservation of Error

The State does not contest preservation of Fenton's challenge to the sufficiency of the evidence in light of *State v. Crawford*, 972 N.W.2d 189, 202 (Iowa 2022) ("A defendant's trial and the imposition of sentence following a guilty verdict are sufficient to preserve error with respect to any challenge to the sufficiency of the evidence raised on direct appeal.").

Standard of Review

The Court reviews sufficiency of the evidence challenges for corrections of errors at law. *State v. Ortiz*, 905 N.W.2d 174, 179 (Iowa 2017). A jury verdict binds an appellate court if substantial evidence supports the verdict. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). Evidence is substantial "if it could convince a rational jury of a defendant's guilt beyond a reasonable doubt." *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998) (citing *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993)). In reviewing the evidence, the Court should view it in the light most favorable to the state, "including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the evidence in the record." *State v. Blair*, 347 N.W.2d 416, 418–19 (Iowa 1984). The Court should "liberally construe the [factfinder's] findings to uphold, rather than defeat, the result reached." *Hutchison v. Shull*, 878 N.W.2d 211, 231 (Iowa 2016) (citing *State v. Dohlman*, 725 N.W.2d 428, 430 (Iowa 2006)).

Merits

In this case, Fenton was found guilty of solicitation of commercial sexual activity. Verdict Form (o5/10/2022), Dkt. No. 65;

App. 16. The jury was instructed on the elements of solicitation of commercial sexual activity as follows:

> 1. On or about January 7, 2022, the defendant does or attempts to do any of the following:
>
>   a. Entice;
>
>   b. Coerce; or
>
>   c. Recruit.
>
> 2. Another person who is either:
>
>   a. Under the age of eighteen (18); or
>
>   b. A law enforcement officer agent representing to be a person under the age of eighteen (18).
>
> 3. To engage in commercial sexual activity.

Jury Inst. No. 14, Dkt. No. 66; App. 13.

Fenton challenges the sufficiency of the evidence to establish the first and third elements of solicitation for commercial sexual activity. Fenton alleges that the conversations about renting a shower room, paying for an Uber ride, smoking marijuana, and buying food and clothing did not constitute an offer to provide something in exchange for sex. *See* Appellant's Br. at 28–32. Fenton also argues that Neveah entertained the idea to engage in a sex act before anything was offered. *See* Appellant's Br. at 28. Lastly, Fenton alleges

that he did not entice, coerce, or recruit Detective Lowe (posing as Neveah), or attempt to do so, because Neveah initiated the exchanges about Fenton providing food and other items. *See* Appellant's Br. at 34–35. However, the record contains substantial evidence to support the verdict against Fenton and therefore, the Court should reject his challenge.

A. Substantial Evidence Proved Fenton Promised Something of Value in Exchange for a Sex Act or Sexually Explicit Performance.

The evidence proved that Fenton promised to Neveah a number of valuable things in exchange for a sex act or sexually explicit performance. To help the jury understand the meaning of the term "commercial sexual activity," the court provided the following definition:

> "Commercial Sexual Activity" means any sex act or sexually explicit performance for which anything of value is given, promised to, or received by any person and includes, but is not limited to, prostitution, participation in the production of pornography, and performance in strip clubs.

Jury Inst. No. 15, Dkt. No. 66; App. 14; *accord* Iowa Code § 710A.1(1).

While Fenton argues that this instruction requires a quid pro quo exchange, the instruction does not require an explicit, contract-

like agreement between the parties. *See* Appellant's Br. at 28. Therefore, the jury only needed to find that something of value was given to, promised to, or received by Neveah for sex. At trial, Detective Lowe explained that Fenton offered numerous things to get Neveah to the Flying J, including offers to buy food and clothes, rent a shower, and bring marijuana. Trial Tr. vol. 2 25:2–26:21. And the Facebook conversation demonstrated that Fenton himself connected the idea that he had money he would bring to the table if Neveah was willing to offer sexual acts in exchange:

> Neveah: U seem depressed lol
>
> Fenton: idk lol
>
> Neveah: What's up
>
> Fenton: just bored
>
> Neveah: O i c
>
> Neveah: U should go make some money lol
>
> Fenton: why lol
>
> Neveah: idk always feels good to have a lil $
>
> Neveah: Been thinking abt u
>
> Fenton: i have some money and you have?
>
> Neveah: Ya lol
>
> Fenton: lol :

Fenton: :)

Neveah: [zany face emoji]

Fenton: i want that tongue

State's Trial Ex. 7 (Facebook conversation) at 70–72; Ex. App. 75–77.

Regarding Fenton's offer to buy food and clothes, Fenton asked what he needed to do to have a threesome with Neveah and her friend and Neveah told him that girls love food and clothes. State's Trial Ex. 7 (Facebook conversation) at 63; Ex. App 68. Fenton responded with, "ok I have no prob spoiling a [lil]." State's Trial Ex. 7 (Facebook conversation) at 62–63; Ex. App. 67–68. Neveah then asked, "U promise?" to which Fenton replied, "yeah for sure." State's Trial Ex. 7 (Facebook conversation) at 62; Ex. App. 67. These exchanges constitute an explicit promise of something of value in order to entice a 15-year-old girl (and her friend) to engage in sexual activity.

In another conversation, Fenton learned that Neveah did not have money to help rent a shower at the Flying J and Fenton told her "[I']ll get it no worries." State's Trial Ex. 7 (Facebook conversation) at 43; Ex. App. 48. Although Fenton later stated that he was short on money and might not be able to pay for an Uber ride to the Flying J as well as pay for a shower, he had already made the offer. State's Trial Ex. 7 (Facebook conversation) at 9; Ex. App. 14, *see* Jury Instr. No. 17,

Dkt. No. 66; App. 15. Further, on the day of the meet up, Neveah explained that she did not know how to rent a shower, and Fenton told her to wait and he would take care of it when he got there. State's Trial Ex. 7 (Facebook conversation) at 3; Ex. App. 8. This is another example of Fenton promising something of value in order to have sex.

Finally, on the day of the meet up, Fenton offered to pay for an Uber ride for Neveah to get to his apartment in order to have sex with him because his car would not start and he was unable to drive to the Flying J. State's Trial Ex. 7 (Facebook conversation) at 12–15; Ex. App 17–20.

Fenton argues that Neveah entertained the idea of having sex prior to anything of value being offered, but although it is true that sex was discussed early on in the conversations, Fenton had not yet succeeded in scheduling a meet up and continued to make offers in hopes of getting sex from Neveah. The jury was entitled to decide whether something of value was promised to, given to, or received by Neveah in exchange for sex and decided that something had been promised to her. A combination of Detective Lowe's testimony and the 162-page conversation between Fenton and Neveah provided substantial evidence to support the jury's decision that Fenton

promised Neveah multiple things of value in order for her to have sex with him.

B. Substantial Evidence Proved Fenton Attempted to Entice, Coerce, or Recruit Neveah.

The evidence also established that Fenton attempted to entice, coerce, or recruit Neveah. Again, a combination of Detective Lowe's testimony and the Facebook conversation provided the jury a basis for determining whether Fenton attempted to entice, coerce, or recruit Neveah. To make clear what this element required, the jury was provided the following instruction:

> Concerning Instruction No. 14, the phrase "enticed, coerced, or recruited, or attempted to entice, coerce, or recruit, a person to engage in commercial sexual activity" refers to any verbal statement, act, or conduct which invites a person to be a partner in a sex act for money or other thing of value, regardless of whether a sex act occurred or a person made an actual payment of any kind.
>
> The request, solicitation, or acceptance does not have to be in any particular form of words. It can arise from a gesture or other expression which indicates a sex act was to occur.

Jury Instr. No. 17, Dkt. No. 66; App. 15.

While Fenton alleges that it was Neveah who attempted to entice, coerce, or recruit him rather than the other way around, Fenton repeatedly asked Neveah to "hang out" and agreed to

Neveah's requests for things of value such as food and clothing. *See* State's Trial Ex. 7 (Facebook conversation) at 63, 88, 89, 95, 104, 109, 116, 119, 127, 152, 153, 155; Ex. App. 68, 93, 94, 100, 109, 114, 121, 124, 132, 157, 158, 160. Jury Instruction number 17 explained that the "request, solicitation or acceptance does not have to be in any particular form of words." App. 15. It is evident that Fenton's intentions throughout his conversations with Neveah were to agree to any and all of her requests and make offers and promises in order to convince her not only to have sex with him but also to engage in a specific range of more aggressive sexual activities an inexperienced 15-year-old girl might be otherwise unwilling to participate in.

Fenton knew that if he agreed to provide things of value to a teenage girl, it would increase his chances in persuading her to have sex with him. *See State v. Grady*, No. 08-1915, 2010 WL 2602169, at *1 (Iowa Ct. Appeals, June 30, 2010) (holding that a jury could find the defendant attempted to entice a thirteen-year-old boy when the defendant persisted in asking the minor to get into the vehicle, volunteered to drive him anywhere, and offered him twenty dollars). The jury would have understood that 36-year-old Fenton knew that he was dealing with a 15-year-old girl. Trial Tr. vol. 1 170:7–15, State's

Trial Ex. 7 (Facebook conversation) at 153, 159; Ex. App. 158, 164. The jury saw and heard evidence Fenton promised that he would give Neveah and her friend food or clothes in order to have a "threesome." State's Trial Ex. 7 (Facebook conversation) at 63; Ex. App. 68. The jury was entitled to infer that if Neveah asked for something in return for hanging out and having sex, and then Fenton agreed to what she asked for, Fenton made those assurances to attempt to coerce, entice, or recruit her into having sex with him.

From the evidence presented, the jury reasonably determined that Fenton engaged in solicitation for commercial sexual activity when he initiated a Facebook conversation with someone who he believed was a 15-year-old girl and attempted to entice, coerce, or recruit her to engage in sexual activities by offering numerous things of value, including food, clothes, a shower, and an Uber ride. Because the State provided substantial evidence to support Fenton's conviction for solicitation of commercial sexual activity and the Court should affirm Fenton's conviction.

III. The District Court Applied the Incorrect Standard When Evaluating Fenton's Motion for New Trial.

Preservation of Error

Fenton filed a motion for new trial, arguing that the verdict was contrary to the law or evidence in violation of Iowa Rule of Criminal Procedure 2.24(2)(b)(6). Motion for New Trial (06/16/2022), Dkt. No. 72; App. 17–18. The district court applied a sufficiency of the evidence standard when denying the motion. Order Denying Defense Motions (08/19/2022), p. 1, Dkt. No. 86; App. 20. Therefore, the State does not contest error preservation. *See State v. Ellis*, 578 N.W.2d 655, 759 (holding that when the court applies the wrong standard, the decision should be reversed and remanded for the district court to apply the correct standard).

Standard of Review

The Court should review the district court's ruling that a verdict was not contrary to the weight of the evidence for an abuse of discretion. *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016). An abuse of discretion will be found only if the district court's decision was exercised "on grounds clearly untenable or to an extent clearly unreasonable." *Ary*, 877 N.W.2d at 702 (citing *Nedved v. Welch*, 585 N.W.2d 238, 239–40 (Iowa 1998)).

Merits

When determining whether to grant a motion for new trial, the district court considers whether the verdict was contrary to the weight of the evidence. *Ary*, 877 N.W.2d at 706. A verdict is contrary to the weight of the evidence when "a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.* (quoting *State v. Shanahan*, 717 N.W.2d 121, 135 (Iowa 2006)). When applying the weight of the evidence standard, the district court must consider "whether more 'credible evidence' supports the verdict rendered than supports the alternative verdict." *Ary*, 877 N.W.2d at 706 (citing *State v. Ellis*, 578 N.W.2d 655, 658–658 (Iowa 1998)).

The weight-of-the-evidence standard is broader than the sufficiency of the evidence standard because it allows the court to consider the credibility of the witnesses. *Id.* (citing *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006). The weight standard is also different from the sufficiency of the evidence standard because it "essentially concedes that the evidence supports a jury verdict" and therefore, the district court is not required to view the evidence in light most favorable to the verdict winner. *Ary*, 877 N.W.2d at 706; *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). Thus, a district

court can only grant a motion for a new trial if it finds that the "evidence preponderates heavily against the verdict rendered." *Ary*, 877 N.W.2d at 706.

When denying Fenton's motion for a new trial, the district court explained that "in reviewing challenges to the sufficiency of evidence supporting a guilty verdict, courts consider all of the evidence viewed in light most favorably to the State, including all reasonable inferences that may be fairly drawn from the evidence." Order Denying Defense Motions (08/19/2022), p. 1, Dkt. No. 86; App. 20. Given the language used, it appears the district court applied a sufficiency of the evidence standard, as opposed to a weight of the evidence standard.

Because the State concedes that the district court applied the incorrect standard when evaluating Fenton's motion for new trial, the case should be remanded for reconsideration of the motion under the correct standard.

IV. The District Court Imposed an Illegal Sentence by Ordering Fenton to Complete the Sex Offender Treatment Program While Incarcerated.

Preservation of Error

The State does not contest preservation of Fenton's challenge that the district court imposed an illegal sentence. *See State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009) (explaining that a defendant may challenge an illegal sentence at any time).

Standard of Review

The Court reviews sentencing decisions for corrections of errors at law. *See State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). The Court should "not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure." *Id.* (citing *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998)).

Merits

Finally, Fenton alleges that the district court did not have the authority to order him to participate in the sex offender treatment program and therefore imposed an illegal sentence. *See* Appellant's Br. at 42. The State concedes this point.

The authority to require a defendant to participate in a sex offender treatment program lies within the Iowa Department of Corrections. *Dykstra v. Iowa District Court for Jones County*, 783

N.W.2d 473, 478–479 (Iowa 2010). In a recent unpublished opinion, the Iowa Court of Appeals vacated a portion of a sentencing order requiring a criminal defendant to complete SOTP as a part of his sentence, noting the State itself conceded on appeal that the district court was without the authority to require SOTP, rendering that portion of the sentence illegal. *State v. Washington*, Case No. 18-2092, 2021 WL 815865, at *2 (Iowa Ct. Appeals, March 3, 2021).

Because the Iowa Department of Corrections has the authority to require Fenton participate in the program, and the district court does not, the district court erred when it ordered Fenton to complete the sex offender treatment program. The State agrees this portion of the sentencing order should be vacated.

CONCLUSION

For the reasons stated above, Fenton's conviction should be affirmed but the case should be remanded for the court to apply the correct standard regarding his motion for new trial. Further, the portion of Fenton's sentence requiring him to complete the sex offender treatment program should be vacated.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

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