No. 126705

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, Second Judicial District,
Plaintiff-Appellant,	)	No. 2-17-0900
	)	
	)	There on Appeal from the Circuit
v.	)	Court for the Sixteenth Judicial
	)	Circuit, Kane County, Illinois,
	)	No. 15 CF 44
	)	
SHANE LEWIS,	)	The Honorable
	)	Linda S. Abrahamson,
Defendant-Appellee.	)	Judge Presiding.

PLAINTIFF-APPELLANT'S REPLY BRIEF AND RESPONSE TO REQUEST FOR CROSS-RELIEF

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIC M. LEVIN
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5029
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

E-FILED
12/28/2021 10:18 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

POINTS AND AUTHORITIES

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

ARGUMENT

I. Defendant's Ineffective Assistance Claim Is Meritless.

The appellate court erroneously found that defendant's trial counsel rendered ineffective assistance in the presentation of defendant's entrapment defense because defendant failed to show either that counsel's performance was constitutionally deficient or that he was prejudiced by counsel's alleged errors. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (identifying two prongs of ineffective assistance claim). Defendant's contrary arguments rest on a mistaken understanding of the law of entrapment and a failure to appreciate the strength of the People's evidence rebutting his defense, which was largely unaffected by counsel's alleged errors.

A. Defendant Suffered No Prejudice.

Defendant failed to demonstrate that he was prejudiced by counsel's alleged errors because — considering the strength of the People's case and the nature of counsel's alleged errors — no reasonable probability exists that, absent those alleged errors, the jury would not have rejected defendant's entrapment defense, by finding either that defendant was not induced to commit the offenses or that he was predisposed to do so.

1. An entrapment defense is defeated by proving *either* lack of inducement *or* predisposition.

Defendant's contention that the People cannot defeat an entrapment defense solely by proving that the defendant was not induced to commit the offenses, but must also prove that the defendant was predisposed to commit

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

the offenses, *see* Def. Br. 21-27,[1] is inconsistent with the plain language and structure of both the entrapment statute and the relevant pattern jury instruction and runs headlong into this Court's settled precedent.

The entrapment statute provides: "A person is not guilty of an offense if his or her conduct is incited or induced by a public officer . . . for the purpose of obtaining evidence for the prosecution of that person. However, this [defense] is inapplicable if the person was pre-disposed to commit the offense and the public officer . . . merely affords to that person the opportunity or facility for committing an offense." 720 ILCS 5/7-12. The pattern jury instruction similarly provides: "It is a defense to the charge made against the defendant that he was entrapped, that is, that . . . he was incited or induced by [a public officer] to commit an offense. However, the defendant was not entrapped if he was predisposed to commit the offense and [a public officer] merely afforded to the defendant the opportunity or facility for committing an offense." Illinois Pattern Jury Instructions (IPI), Criminal, No. 24-25.04. As the language and structure of these provisions reveal, and as this Court's precedent recognizes, the entrapment defense consists of two elements: "(1) that the State improperly induced the defendant to commit the crime and (2) that the defendant lacked the predisposition to commit the crime." *People v. Placek*, 184 Ill. 2d 370, 381 (1998).

---

[1] The People's opening brief and defendant's response brief and request for cross-relief are cited as "Peo. Br." and "Def. Br." All record citations follow the format used in the People's opening brief. *See* Peo. Br. 2 n.1.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

As with other affirmative defenses, a defendant who raises the defense of entrapment bears the initial burden of producing "slight evidence on each element of the defense." *People v. Wielgos*, 142 Ill. 2d 133, 136 (1991) (internal quotation marks omitted); *see* 720 ILCS 5/3-2(a) ("unless the State's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon"). If the defendant satisfies this burden of production, then "the State bears the burden to rebut the entrapment defense beyond a reasonable doubt, in addition to proving all other elements of the crime." *Placek*, 184 Ill. 2d at 381.

Because the entrapment defense contains two elements, common sense and logic dictate that the People may rebut the defense by disproving either element. *See United States v. Mayfield*, 771 F.3d 417, 440 (7th Cir. 2014) (en banc) (reaching this result based on "a fair reading of the two-element structure of the defense"); *United States v. El-Gawli*, 837 F.2d 142, 147 (3d Cir. 1988) (noting "the fundamental truth that entrapment can be disproved in one of two ways, either by proving beyond a reasonable doubt that the defendant was not induced, or by proving beyond a reasonable doubt that he was predisposed to commit the crime"); *United States v. Rodriguez*, 858 F.2d 809, 815 (1st Cir. 1988) ("since entrapment cannot occur unless both elements

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

coincide, the defense fails if the jury is persuaded beyond reasonable doubt that *either* is lacking in a particular case") (emphasis in original).[2]

This Court's decisions addressing claims of self-defense, another multi-element affirmative defense, *see People v. Gray*, 2017 IL 120958, ¶ 50 (identifying six elements of self-defense), reinforce this understanding. As with entrapment, a defendant is entitled to a self-defense instruction if he "establish[es] some evidence of each of the [defense's] elements." *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995). Yet, once the defendant satisfies that burden, the State need only "negate[ ] *any one* of the self-defense elements" to prevail. *Id.* at 128 (emphasis in original).

Seeking a different rule here, defendant contends that the second sentences of the entrapment statute and pattern instruction require the People "to rebut the defense by showing that the defendant was pre-disposed to commit the offense *and* that the government merely afforded him the opportunity to do so," Def. Br. 22 (emphasis in original) — in other words, by proving both predisposition and lack of inducement. But the second sentence of each provision begins with "[h]owever," *see supra* p. 2, framing it as an

---

[2] Although this Court is not bound by federal decisions construing the federal entrapment defense, *see* Def. Br. 23, such decisions may be considered for their persuasive value, *see State ex rel. Leibowitz v. Family Vision Care, LLC*, 2020 IL 124754, ¶ 74. Because the federal entrapment defense contains the same elements as Illinois's entrapment defense, *see Mathews v. United States*, 485 U.S. 58, 63 (1988) ("entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct"), federal decisions explaining the procedural framework of the defense offer helpful guidance.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

exception to the first sentence's definition of entrapment as government inducement of an offense. This two-sentence structure requires the People to prove that the defendant was predisposed to commit the offense and that a public officer merely afforded him an opportunity to do so *only if* the People cannot disprove that the defendant's conduct was induced by a public officer.

Defendant further suggests that, by presenting enough evidence of inducement to warrant an instruction on entrapment, he conclusively established that element of the defense, leaving only the question of predisposition for the jury. *See* Def. Br. 25-26. But this argument mistakes a burden of production for a burden of persuasion. A defendant is entitled to an instruction on an affirmative defense if he "present[s] some evidence" supporting the defense. 720 ILCS 5/3-2(a). That is not a heavy burden, as even "[v]ery slight evidence upon a given theory of a case will justify the giving of an instruction." *People v. Hari*, 218 Ill. 2d 275, 296 (2006). Nor is it a burden of persuasion. Indeed, when determining whether a defendant is entitled to a jury instruction on his theory of the case, a trial court may not weigh the credibility of the evidence supporting the theory. *See People v. McDonald*, 2016 IL 118882, ¶ 25 ("the appropriate standard for determining whether a defendant is entitled to a jury instruction on a lesser-included offense is whether there is *some evidence* in the record that, if believed by the jury, will reduce the crime charged to a lesser offense, not whether there is *some credible* evidence") (emphasis in original).

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

Defendant cites a treatise and several decisions of the appellate court that state that, when an entrapment defense is raised, the defendant bears the burden of proving inducement, while the People bear the burden of proof as to predisposition. Def. Br. 23, 26. But these sources are incorrect. This Court's decisions make clear that a defendant claiming entrapment bears only a burden of production, which requires that he "present 'slight' evidence on each element of the defense." *Wielgos*, 142 Ill. 2d at 136. Once he does so, "the State bears the burden to rebut the entrapment defense beyond a reasonable doubt." *Placek*, 184 Ill. 2d at 381; *see also People v. Tipton*, 78 Ill. 2d 477, 487 (1980) ("Once the entrapment defense is raised, it becomes incumbent upon the State to prove beyond a reasonable doubt that entrapment did not occur.").

Accordingly, the trial court's determination that defendant presented sufficient evidence of inducement to warrant an instruction on entrapment did not prevent the People from defeating the defense by convincing the jury beyond a reasonable doubt that defendant was not induced to commit the offenses. And while the People could also defeat the defense by proving beyond a reasonable doubt that defendant was predisposed to commit the offenses, the People were not required to negate both elements of the defense to prevail.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

2. There is no reasonable probability that the jury would not have found a lack of inducement absent counsel's alleged errors.

Based on the overwhelming evidence that defendant was not induced to commit the offenses, and in light of the nature of counsel's alleged errors, no reasonable probability exists that the jury would not have found a lack of inducement absent those alleged errors. *See* Peo. Br. 35-46.

Defendant contends that it is inappropriate to weigh the competing evidence presented at trial when assessing whether he was prejudiced by counsel's performance. *See* Def. Br. 40-41. But that is precisely the analysis that *Strickland* requires. As that decision instructs, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury," with the recognition that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 695-96; *see also People v. Patterson*, 2014 IL 115102, ¶ 87 (considering "overwhelming evidence" of defendant's guilt when rejecting ineffective assistance claim).

Defendant's further argument that the evidence of inducement was closely balanced, *see* Def. Br. 41-44, relies on a misunderstanding of inducement within the meaning of the entrapment statute. He contends that inducement occurs when a public officer "'originate[s]'" the idea of committing an offense and "'actively encourage[s]'" the defendant to commit it. Def. Br. 49 (quoting *People v. Lozada*, 211 Ill. App. 3d 817, 821 (1st Dist. 1991)). But

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

as numerous federal courts have explained, when interpreting the substantively similar federal entrapment defense, "[e]vidence that the government initiated the contact with the defendant, proposed the crime, or solicited or requested the defendant to engage in criminal conduct, standing alone, is insufficient to constitute inducement." *United States v. Vincent*, 611 F.3d 1246, 1250 (10th Cir. 2010); *see Mayfield*, 771 F.3d at 431-32 (collecting additional cases).

Instead, there must be "government solicitation of the crime *plus* some other government conduct that creates a risk that a person who would not commit the crime if left to his own devices will do so in response to the government's efforts." *Mayfield*, 771 F.3d at 434-35 (emphasis in original). Here, the record contains no evidence that the undercover agents conducting the sting operation engaged in any such conduct. Rather, the transcript of defendant's text message exchange with Special Agent Spencer Taub and the recording of his hotel room conversation with Special Agent Melissa Siffermann show that those agents — who were operating undercover as a mother offering to sell her underage daughters for sex — did no more than "furnish [defendant] an opportunity to commit [the offense] on customary terms." *Id.* at 432.

Defendant asserts that Taub went beyond offering an opportunity to commit the offense when she "continued to actively encourage" him after his initial expression of reluctance, which he asserts violated "the operation's

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

protocol" to cease communications if the person responding to the ad stated he was seeking sex with an adult. Def. Br. 43. But Taub's adherence to operational protocol is not the relevant question. What matters is whether her conduct "creat[ed] a substantial risk that an otherwise law-abiding citizen would commit an offense." *United States v. Poehlman*, 217 F.3d 692, 698 (9th Cir. 2000). It did not. Taub's messages to defendant — "as long as u r gentle and treat my girls good . . . i'm here to protect my grls," and "my girls want 2 do this . . . i won't put them into sum thing they don't wanna do," E10-11 — are not the type of comments that would persuade an otherwise law-abiding person to pay for sex with minors.

As the People's opening brief noted, *see* Peo. Br. 38-39, within just 22 minutes of being offered sex with two underage girls, defendant stated that he wanted "[b]oth" girls, asked where they were located, and said he was "[o]n [his] way." E11-12. He arrived at the hotel about 45 minutes later and — after speaking with Siffermann for less than four and a half minutes — gave her $200 to have sex with her underage daughters. *See* Peo. Exh. 9. Despite this brief timeframe, defendant insists that the agents' conduct here is comparable to the conduct that was found to constitute inducement in *Jacobson v. United States*, 503 U.S. 540 (1992), and *Poehlman*. *See* Def. Br. 42-43. But in *Jacobson*, undercover agents sent the defendant numerous letters from multiple fictious organizations over the course of 26 months, promoting the acceptability of child pornography and the illegitimacy of

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

efforts to ban it. 503 U.S. at 543-47. And in *Poehlman*, the defendant and an undercover agent exchanged "scores of e-mails" over a span of six months that "became increasingly intimate and sexually explicit." 217 F.3d at 700.

Defendant notes that, because he and Taub communicated via text message rather than email or letter, "the total number of communications exchanged between [them] . . . greatly exceeds the number of communications in either *Jacobson* or *Poehlman*." Def. Br. 43. But while defendant and Taub did exchange a total of 67 text messages, almost all of them consisted of just a short sentence or two. *See* E9-12. More importantly, neither the text message exchange, nor defendant's subsequent hotel room conversation with Siffermann, was at all similar in substance to the psychologically manipulative letters and emails in *Jacobson* and *Poehlman*. *See* Peo. Br. 40-42.[3]

It is also necessary to consider the nature of counsel's alleged errors when conducting a *Strickland* prejudice inquiry, since it is important to differentiate between errors that "had a pervasive effect on the inferences to be drawn from the evidence" and those that had only "an isolated, trivial effect." *Strickland*, 466 U.S. at 695-96. As the People's opening brief

[3] Defendant suggests that it is inappropriate to consider decisions analyzing the sufficiency of the evidence when addressing an ineffective assistance claim. Def. Br. 42. But sufficiency cases are helpful in this context because *Strickland* requires courts to consider the strength of the evidence supporting a verdict when assessing whether there is a reasonable probability that the verdict would have been different absent counsel's alleged errors. *Supra* p. 7.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

explained, and defendant does not appear to dispute, only one of counsel's alleged errors — failing to object to the prosecutor's closing argument comment allegedly shifting the burden of proving inducement to defendant — had any potential to influence the jury's consideration of the inducement element. *See* Peo. Br. 44-45. But as the People also explained, any potential prejudice was cured by other closing argument the parties presented, as well as the judge's subsequent instructions, which clearly informed the jury that the People bore the burden of proving that defendant was not entrapped. *See id.* at 45-46.

Defendant notes that, elsewhere during closing argument, the judge admonished defense counsel "not [to] talk about the burdens" and told the jury that "what the lawyers say is not the law." R900-01; *see* Def. Br. 38-39. The judge also reminded the jurors that it would instruct them on the law. R901. Far from compounding any prejudice from the prosecutor's arguably erroneous statement, as defendant contends, *see* Def. Br. 39, these comments ensured that the jury would properly apply the law as reflected in its instructions, eliminating any reasonable probability that counsel's failure to object to the prosecutor's statement affected the jury's assessment of inducement.

In sum, considering both the nature of counsel's alleged errors, and the overwhelming evidence that defendant was not induced within the meaning of the entrapment statute, no reasonable probability exists that the jury

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

would not have rejected defendant's entrapment defense based on a lack of inducement absent counsel's alleged errors.

3. There is no reasonable probability that the jury would not have found predisposition absent counsel's alleged errors.

A similar analysis of the evidence and the nature of counsel's alleged errors reveals no reasonable probability that the jury would not have found that defendant was predisposed to commit the offenses absent the alleged errors. *See* Peo. Br. 46-53.

Contrary to defendant's insistence that "there was little to no evidence to suggest that [he] was predisposed" to pay for sex with minors, Def. Br. 44, the evidence of predisposition was considerable. Admittedly, some factors — such as lack of criminal history and solicitation of the offense by government agents — weigh in defendant's favor, although the latter should be accorded minimal weight because "the fact [that] a government agent proposed an illicit transaction . . . is insufficient to establish entrapment." *United States v. Barger*, 931 F.2d 359, 367 (6th Cir. 1991).

Other factors — such as the nature of the government inducement and defendant's character — either weigh against defendant or are at best mixed. As discussed, *see* Peo. Br. 35-44; *supra* pp. 8-10, there was no evidence that defendant was induced to commit the offenses. But to the extent there may have been minimal inducement, defendant's "ready response to [that]

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

minimal inducement indicates [his] criminal predisposition." *United States v. Myers*, 575 F.3d 801, 805 (8th Cir. 2009).

As for defendant's character, while there was testimony that he had not previously shown an interest in having sex with minors, *see* R730, 736, 742, 746-47, and that a search of his electronic devices after his arrest uncovered no evidence of a sexual interest in minors, *see* R576, 593-95, 615, evidence was also presented that he made several comments during the course of the investigation, such as repeatedly expressing the belief that 14- and 15-year-old girls were "old enough" to have sex, E11, and "ready for that kind of thing," E24, and telling Special Agent Siffermann that he was interested in "porno sex," E25, and wanted to "get shizzed," E22. In context, these were not simply "crude summaries of basic biology," Def. Br. 44, but offered revealing insight into defendant's predisposition.

"[T]he most significant" factor, *Mayfield*, 771 F.3d at 435 (internal quotation marks omitted) — whether defendant exhibited a hesitation to commit the offense that was only overcome by repeated persuasion — also cuts against him. With the exception of his initial reaction upon learning that he was being offered sex with minors — when he stated, "wtf?? Not interested in minors. You crazy?," E10 — defendant showed remarkably little reluctance. While he claims to have "proceeded throughout the text messages to seek sexual conduct with [Taub] rather than the offered minors," Def. Br. 45, he in fact asked Taub only a single time, "What if I just see u.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

Since your above 18." E10. His subsequent messages stating that he would "come only if your there watching," and asking "What about u[,] how muc[h] for u . . . How much for all 3 of u," E11, do not indicate a desire to have sex with Taub instead of the minors.

And in context, even defendant's initial reaction conveyed not a hesitation to pay for sex with minors, but his suspicion that the offer was a set-up. Indeed, shortly after saying he was not interested in minors, defendant told Taub that anyone under 18 was "too risky" and repeatedly asked if she was with law enforcement. E10. Along the same lines, he later told Siffermann that he was "nervous" that he was being "set up or something," E21, and asked her to stay nearby because he feared she would "[l]eave [him] alone with [his] pants down and somebody might come in or something," E23. Thus, rather than expressing genuine reluctance to pay for sex with minors, defendant really only "exhibit[ed] the natural caution and hesitancy that could be expected from one engaged in" such illegal activity. *People v. McSmith*, 23 Ill. 2d 87, 94 (1961).

Turning to counsel's alleged errors, they are not reasonably likely, alone or in combination, to have affected the jury's assessment of defendant's predisposition. First, there was no need for counsel to tender a legal definition of predisposition that focused on defendant's willingness to commit the offenses *before* his initial exposure to the undercover agents — or to object to the prosecutor's discussion of predisposition in closing argument that did

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

not explicitly refer to that temporal focus — because the proper temporal focus is implicit in the common understanding of the term, and because the brevity of defendant's interaction with the government agents makes it unlikely that the jury would have misapplied the concept. *See* Peo. Br. 50-52.

Defendant contends that the jury's request for a legal definition of predisposition reflected its "confusion about how the common definition would apply in the entrapment context." Def. Br. 29-30. But he ignores the dictionary definitions discussed in the People's opening brief, *see* Peo. Br. 50-51, which show no real difference between the legal and common meanings of the term. And like the appellate court, *see* A16, ¶ 38 n.1, defendant does not appear to question the jurors' understanding of the common meaning of predisposition. *See* Peo. Br. 54 n. 18.

Defendant also misunderstands why the brevity of his exposure to the government agents is relevant. It is true that the predisposition element focuses on a defendant's willingness to commit the crime before his exposure to government agents. *See* Def. Br. 32, 45. But defendant offers no reason to think that, with the short amount of time between his initial exposure to the government agents and his subsequent commission of the crimes, the jury would have focused on his state of mind at any point other than before the exposure. *See* Peo. Br. 51-52.

Nor is there a reasonable probability that the verdict was affected by counsel's failure to present evidence that defendant had no prior criminal

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

history. *See* Peo. Br. 52-53. Defendant argues that such evidence would have been "objective proof" that he had not previously paid for sex with minors. Def. Br. 35. But the jury heard other objective evidence of a similar nature, such as that post-arrest searches of defendant's electronic devices uncovered no evidence of inappropriate pictures of minors, internet searches for child pornography, or prior attempts to solicit an adult or minor for sex, R576, 593-95, 615, and that the agents had no prior familiarity with defendant and did not target him in the sting operation, R354-55, 570. In light of the overall strength of the People's case proving that defendant was predisposed to commit the offenses despite that evidence, there is no reasonable probability that the jury would not have found predisposition if counsel had also introduced evidence that defendant had no criminal record.

In sum, considering both the nature of counsel's alleged errors, and the weighty evidence that defendant was predisposed to commit the offenses regardless of any inducement, there is no reasonable probability that the jury would not have found predisposition absent the alleged errors.

B. Counsel's Performance Was Not Deficient.

In addition to his failure to show prejudice, defendant's ineffective assistance claim independently fails because he has not overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

First, defendant has not shown that it was objectively unreasonable for counsel to acquiesce in the trial court's decision not to provide jurors with a legal definition of predisposition that explained the term's temporal focus. *See* Peo. Br. 53-58. Contrary to defendant's assertion, there is no indication that the jury's bare request for the legal definition of predisposition arose from "confusion about how the common definition [of the term] would apply in the entrapment context." Def. Br. 29-30. That distinguishes this case from *People v. Childs*, 159 Ill. 2d 217, 229 (1994), where this Court found error in a trial court's failure to answer a jury note that "posed an explicit question which manifested juror confusion on a substantive legal issue."

And this case is yet another step removed from *Childs*, because the question here is not whether the trial court erred in declining to provide the jury with the legal definition of predisposition, but whether defense counsel was objectively unreasonable for not asking the court to do so. Defendant argues that counsel's decision cannot be deemed "a matter of trial strategy" because he believes it was not "well thought-out" or backed by "independent research" but was instead motivated by a desire "to avoid being held ineffective." Def. Br. 33. This line of argument is inconsistent with the rule that "[j]udicial scrutiny of counsel's performance must be highly deferential," and that a court must "strongly presume[ ]" that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90. It also overlooks that "[t]he relevant question is not

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

At the time counsel acted here, the First District had rejected a claim that a defense attorney was ineffective for agreeing not to provide a definition of predisposition in response to a jury's request for clarification of the term. *See People v. Sanchez*, 388 Ill. App. 3d 467, 477-78 (1st Dist. 2009). There, the court explained that "[w]hen words in a jury instruction have a commonly understood meaning, the court need not define them with additional instructions," "especially . . . where the pattern jury instructions do not provide that an additional definition is necessary." *Id.* While the court ultimately found that the defendant was not prejudiced by counsel's omission, its reasoning equally supports the view that counsel's performance was not deficient.[4] Given that reasoning, counsel's decision not to propose further instruction on the definition of predisposition here cannot be deemed to have been objectively unreasonable.

Nor was it objectively unreasonable for counsel not to object to various comments by the prosecutor in closing argument. Counsel could have reasonably decided not to object when the prosecutor discussed predisposition without expressly mentioning the element's temporal focus for the same

[4] This portion of *Sanchez* did not, as defendant contends, rest on a finding that the evidence of predisposition was not close. *See* Def. Br. 31. Rather, the court relied on that finding when rejecting a separate claim of prejudice arising from a discovery violation. *See Sanchez*, 388 Ill. App. 3d at 472-76.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

reason that counsel reasonably acquiesced in the trial court's decision not to deliver the legal definition of predisposition in response to the jury's request, namely, that the brevity of the agents' interactions with defendant made it unnecessary to highlight that aspect of the definition. *Cf. United States v. Brown*, 43 F.3d 618, 628 n.8 (11th Cir. 1995) (explaining that "extra clarity [may] be required to keep the temporal frame in focus" "where a long and complex government campaign made the defendant's independent state-of-mind difficult to determine").

It was also reasonable for counsel to refrain from objecting when the prosecutor told the jury that "if you find that the police did incite or induce [defendant], then you can look at [whether defendant] was predisposed." R917. Although this comment could be interpreted as incorrectly implying that defendant had to prove that he was induced,[5] it would have been evident to counsel that the court would later instruct the jury (as it did) that the People bore the burden of proof on all elements of the case, including that defendant was not entrapped. *See* Peo. Br. 58-59; R929-33. In fact, earlier in the closing arguments, the court reminded the jury that "what the lawyers say is not the law" and that the court would instruct the jury on the law.

[5] Defendant contends that the comment also misstated the law by telling the jury it need not consider whether defendant was predisposed if it found he was not induced. Def. Br. 37. As discussed, *see supra* pp. 1-6, this argument rests on a misunderstanding of how the entrapment defense operates.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

R901. With that knowledge, counsel could have reasonably determined that it was unnecessary to object to the prosecutor's comment.

Finally, defendant has not shown that counsel's failure to introduce evidence that he had no prior criminal history, standing alone, is an "error[ ] so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *see* Peo. Br. 59-60. While counsel did not present evidence of defendant's lack of criminal history, counsel elicited other objective evidence of a similar nature, *see supra* p. 16, and called several character witnesses on defendant's behalf. Even if another lawyer might have also presented evidence that defendant had no criminal history, "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney." *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (internal quotation marks omitted).

In sum, because "counsel's overall performance indicates active and capable advocacy," defendant has not shown that he received constitutionally deficient representation. *Id.* at 111. For this reason — and because defendant has not shown prejudice from counsel's alleged errors in any event — this Court should reverse the appellate court's judgment granting relief on his ineffective assistance claim and affirm his convictions.

II. The Evidence Was Sufficient to Rebut Defendant's Entrapment Defense.

In his first request for cross-relief, defendant asks this Court to vacate his convictions outright on the ground that the evidence was insufficient to

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

prove beyond a reasonable doubt that he was not entrapped. But this argument rests on the same misunderstanding of the entrapment defense and misperception of the evidence that infect defendant's *Strickland* prejudice analysis.

"When reviewing the sufficiency of the evidence, the relevant question is whether, after viewing all the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *People v. Brand*, 2021 IL 125945, ¶ 58, including whether the evidence rebutted an affirmative defense, *see Gray*, 2017 IL 120958, ¶ 51 ("The standard of review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that the defendant did not act in self-defense."); *Placek*, 184 Ill. 2d at 383 (rejecting sufficiency challenge after "find[ing] that, upon reviewing all of the evidence in the light most favorable to the prosecution, the evidence sufficiently support[ed] the jury's rejection of defendant's entrapment defense").

As discussed throughout the People's opening brief and above, there was overwhelming evidence demonstrating both that defendant was not induced to commit the offenses and that he was predisposed to do so in any event. And even if this Court were to conclude, contrary to the People's argument, that the evidence was close enough to support a finding that defendant was prejudiced by counsel's alleged errors in presenting the

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

entrapment defense, there is little question that, when viewed in the light most favorable to the People, the evidence was at least sufficient to allow a rational trier of fact to reject the defense, as even the appellate court acknowledged. *See* A22-23, ¶ 60.

III. Defendant's Conduct Satisfies the Elements of Involuntary Sexual Servitude of a Minor.

In his next request for cross-relief, defendant asks the Court to vacate his conviction for involuntary sexual servitude of a minor. The jury found defendant guilty of this offense for "knowingly attempt[ing] to obtain by any means another person under 17 years of age, knowing that the minor would engage in commercial sexual activity." C142; *see* C36, 191. Defendant argues that the evidence was insufficient to support this charge because, in his view, the offense of involuntary sexual servitude of a minor applies only to those who participate in the sex trafficking of minors for profit and not to those who pay to have sex with the trafficked minors.

Because this issue presents a question of statutory construction, this Court's review is de novo. *People v. Wise*, 2021 IL 125392, ¶ 23. The Court's "primary objective when analyzing a statute is to ascertain and give effect to the legislature's intent." *Id.* "The most reliable indicator of legislative intent is the statutory language, given its plain and ordinary meaning." *Id.* (internal quotation marks omitted). Thus, "[w]hen the language of a statute is clear and unambiguous, [this Court] must apply it as written, without resort to aids of statutory construction" and without "reading in exceptions,

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

limitations, or conditions not expressed by the legislature." *Id.* (internal quotation marks omitted).

"A person commits involuntary sexual servitude of a minor when he or she knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity[.]" 720 ILCS 5/10-9(c).[6] The plain meaning of "obtain," as used in this context, is to "get, acquire, or secure (something)," *New Oxford American Dictionary* 1176 (2d ed. 2005), or "to gain or attain possession or disposal of[,] usu[ally] by some planned action or method," *Webster's Third New International Dictionary* 1559 (2002); *see People v. Perry*, 224 Ill. 2d 312, 330 (2007) ("In determining the plain meaning of a statutory term, it is entirely appropriate to look to the dictionary for a definition."). Thus, under the statute's plain language, defendant attempted to obtain — as in, "get, acquire, or secure," or "gain or attain possession . . . of" — a person under 18 years of age, knowing that the minor would engage in commercial sexual activity, when he gave Special Agent Siffermann $200 to have sex with her underage daughters.

Defendant's contrary interpretation relies on an unduly narrow and inapplicable definition of "obtain" that he draws from unrelated portions of

---

[6] "Commercial sexual activity" is defined as "any sex act on account of which anything of value is given, promised to, or received by any person." 720 ILCS 5/10-9(a)(2).

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

the statute. Section 10-9 defines three offenses: involuntary servitude, 720 ILCS 5/10-9(b); involuntary sexual servitude of a minor, 720 ILCS 5/10-9(c); and trafficking in persons, 720 ILCS 5/10-9(d). Involuntary servitude is defined as "knowingly subject[ing], attempt[ing] to subject, or engag[ing] in a conspiracy to subject another person to labor or services obtained or maintained through any of [several enumerated] means," including "caus[ing] or threaten[ing] to cause physical harm to any person," "physically restrain[ing] or threaten[ing] to physically restrain another person," and "us[ing] intimidation . . . over any person[.]" 720 ILCS 5/10-9(b). The statute provides that "'[o]btain' means, *in relation to labor or services*, to secure performance thereof." 720 ILCS 5/10-9(a)(7) (emphasis added). The statute further defines "[l]abor" as "work of economic or financial value," 720 ILCS 5/10-9(a)(5), and "[s]ervices" as "activities resulting from a relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor," 720 ILCS 5/10-9(a)(8).

Citing these definitions, defendant argues that "obtain" only "applies to a relationship between the defendant and the victim in which the defendant receives economic benefit from the victim's services and can only be accomplished by physical force, harm, restraint, intimidation, or threat[.]" Def. Br. 64. In defendant's view, therefore, a person obtains a minor within the meaning of the involuntary sexual servitude of a minor provision only if the person is acting as a "pimp," who has "an ongoing relationship [with] the

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

victim" and benefits from or supervises activities the victim performs. *Id.* at 60-61.

This argument has two fatal flaws. First, it depends on a statutory definition of "obtain" that is expressly limited to the context of labor or services — and on the separate statutory definitions of "labor" and "services" — even though the words "labor" and "services" are nowhere to be found in the section of the statute defining the offense of involuntary sexual servitude of a minor. Unlike the offense of involuntary servitude, which applies when a person subjects (or attempts to subject) "another person to labor or services obtained or maintained through any of [several enumerated] means," 720 ILCS 5/10-9(b), involuntary sexual servitude of minor occurs when a person "obtains [or attempts to obtain] by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity," 720 ILCS 5/10-9(c). In other words, involuntary servitude involves the obtaining of another person's *labor or services*, whereas involuntary sexual servitude of a minor involves the obtaining of *another person*, knowing that the person will engage in commercial sexual activity.[7]

[7] Although "[c]ommercial sexual activity" is a "form[ ] of activit[y] that [is a] 'service[ ]' under" the statute, 720 ILCS 5/10-9(a)(8), a person need not obtain (or attempt to obtain) commercial sexual activity to commit involuntary sexual servitude of a minor, but instead must obtain (or attempt to obtain) a minor, "knowing that the minor will engage in commercial sexual activity," 720 ILCS 5/10-9(c). Nothing in this language requires that the commercial sexual activity be performed under the defendant's supervision or for the defendant's economic benefit.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

Thus, the statutory definition of "'[o]btain[,]' . . . in relation to labor or services," 720 ILCS 5/10-9(a)(7), and the definitions of "labor" and "services," have no bearing on how to interpret "obtain" as used in the provision defining the offense of involuntary sexual servitude of a minor. *See Wise*, 2021 IL 125392, ¶ 36 (when construing statutory language, the "focus is and must remain on the language of the provision under which defendant was convicted" and not "provisions [that] establish separate and distinct offenses") (internal quotation marks omitted). And because nothing in the plain meaning of the word "obtain," nor elsewhere in the relevant language of section 10-9(c), requires a person charged with involuntary sexual servitude of a minor to have "a principal-agent relationship" with the trafficked minor or to have acted for "economic benefit," Def. Br. 60, it would be improper to read those conditions into the statutory text. *Wise*, 2021 IL 125392, ¶ 23.

Second, defendant errs in attempting to graft the particular means of obtaining labor or services required to commit involuntary servitude, *see* 720 ILCS 5/10-9(b), such as force, threats, restraint, and intimidation, onto the meaning of "obtain" as used in the section defining involuntary sexual servitude of a minor. Unlike the former, the latter offense broadly prohibits a person from obtaining (or attempting to obtain) a minor "by any means." 720 ILCS 5/10-9(c). "It is well settled that when the legislature uses certain language in one instance of a statute and different language in another part, we assume different meanings were intended." *People v. Goossens*, 2015 IL

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

118347, ¶ 12. And it is also settled that courts may not depart from the plain meaning of statutory language "by reading in exceptions, limitations, or conditions not expressed by the legislature." *Wise*, 2021 IL 125392, ¶ 23. Defendant's interpretation of section 10-9(c) violates both of these axioms of statutory construction.

Defendant also notes that, in an unpublished and subsequently reversed decision, a federal trial court relied on the canon of construction known as *noscitur a sociis* to hold that the federal sex trafficking statute did not apply to those who purchase sex with trafficked minors. Def. Br. 62-63 (citing *United States v. Bonestroo*, No. CR 11-40016-01-KES, 2012 U.S. Dist. LEXIS 981 (D.S.D. Jan. 4, 2012), *rev'd sub nom. United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013)); *see Dynak v. Bd. of Educ. of Wood Dale Sch. Dist. 7*, 2020 IL 125062, ¶ 22 (describing the canon as "a general rule that words grouped in a list should be given related meaning"). At the time, the statute provided that "[w]hoever knowingly . . . recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person . . . knowing . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act," was guilty of the offense. 18 U.S.C. § 1591(a) (2010); *see also id.* § 1594(a) (providing that an attempt to violate § 1591 "shall be punishable in the same manner as a completed violation of that section"). The court reasoned that each of the operative verbs in the statute "represents a potential step in the process of engaging in a child sex

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

trafficking business," but concluded that "[t]he trafficking process described in this list stops short of the john," or the person who ultimately "attempt[s] to purchase sex with these children." *Bonestroo*, 2012 U.S. Dist. LEXIS 981, at *12-13.

As defendant acknowledges, the United States Court of Appeals for the Eighth Circuit reversed the trial court's judgment in *Jungers*, a consolidated appeal involving Bonestroo and another defendant. The Eighth Circuit concluded that "[t]he plain and unambiguous provisions of [the statute] apply to both suppliers and consumers of commercial sex acts." *Jungers*, 702 F.3d at 1069 (internal citations omitted). To start, the court explained that "[n]othing in the text of [the statute] expressly limits its provisions to suppliers or suggests Congress intended categorically to exclude purchasers or consumers . . . of commercial sex acts whose conduct otherwise violates [the statute]." *Id.* at 1070. To the contrary, the court noted, the statute uses "expansive" terms, like "whoever" and "any," neither of which "implicitly limits the application of [the statute] to suppliers nor exempts purchasers from prosecution." *Id.* at 1070-71 (internal quotation marks omitted).

Likewise, citing dictionary definitions of "obtain" consistent with those discussed above, *see supra* p. 23, the court concluded that the plain meaning of that term is "broad enough to encompass the actions of both suppliers and purchasers of commercial sex acts." *Id.* at 1071. And, in particular, the court explained that the *noscitur a sociis* canon did not support giving the word an

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

interpretation narrower than its plain meaning, rejecting the premise that "the other operative verbs in [the statute] apply only to steps in the process of trafficking." *Id.* at 1073 n.4. To the contrary, the court explained, "a purchaser may entice, harbor, transport, obtain, and maintain the minor child, as well as a supplier may." *Id.*; *see id.* at 1072-73 (discussing example of a purchaser who arranges with a pimp to pick up a minor and fly her to a hotel out of state for several days, where he then provides the minor with food, clothing, and drugs, and offers her money to perform additional sex acts, supporting a finding that the purchaser "enticed, harbored, transported, obtained, and maintained" the minor).

Because Illinois's involuntary sexual servitude of a minor offense was modeled after the federal child sex trafficking offense considered in *Jungers*, this Court should follow *Jungers*' persuasive reasoning when construing the state offense. *See In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 35 ("Because the federal and state statutes incorporate substantially similar language, we may look to federal cases interpreting the federal statute in construing the similarly worded Illinois statute.").

When first enacted in 2005, *see* Ill. Legis. Public Act 94-9, § 5 (eff. Jan. 1, 2006), the Illinois statute creating the offense (then called "involuntary servitude of a minor") was a near carbon copy of its federal counterpart.[8]

[8] *Compare* 720 ILCS 5/10A-10(b) (2006) ("Whoever knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

Indeed, as the bill's sponsor explained, the state statute was designed to "match[ ] existing Federal Law" and followed a "model law" provided by the federal government. 94th Ill. Gen. Assem., House Proceedings, Apr. 8, 2005, at 12, 17 (statements of Rep. Chavez).

In 2009, the General Assembly repealed the original statute and reenacted it with slightly different wording, but without altering the language relevant here. *See* Ill. Legis. Public Act 96-710, §§ 25, 30 (eff. Jan. 1, 2010). Now codified at 720 ILCS 5/10-9, the renamed offense of involuntary sexual servitude of a minor provided, as it does today, that a person commits the offense "when he or she knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity[.]" 720 ILCS 5/10-9(c) (2010).

Defendant seeks to avoid the outcome in *Jungers* by arguing that the state statue, unlike the federal one, contains a definition of "obtain" that is narrower than its ordinary meaning. Def. Br. 63-64. But, as explained, *see supra* pp. 24-26, the provision defendant cites defines the term "in relation to

---

under 18 years of age, knowing that the minor will engage in commercial sexual activity . . . shall be punished as follows . . . "), *with* 18 U.S.C. § 1591(a) (2005) ("Whoever knowingly . . . recruits, entices, harbors, transports, provides, or obtains by any means a person . . . knowing that . . . the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as [follows]").

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

labor or services." 720 ILCS 5/10-9(a)(7). The section of the statute defining involuntary sexual servitude of a minor prohibits a person from obtaining (or attempting to obtain) not labor or services, but "another person." 720 ILCS 5/10-9(c). Thus, like the court in *Jungers*, this Court should interpret "obtain," as used in section 10-9(c), in accord with its plain and ordinary meaning. And as in *Jungers*, this Court should also conclude that the plain meaning is "broad enough to encompass the actions of both suppliers and purchasers of commercial sex acts." *Jungers*, 702 F.3d at 1071.

Defendant further argues that legislative history "evinces an intent to use [section 10-9] to prosecute traffickers, not patrons." Def. Br. 64. Once again, defendant's arguments are unavailing. To start, a resort to legislative history is appropriate "[o]nly if the statutory language is ambiguous." *Land v. Bd. of Educ. of the City of Chi.*, 202 Ill. 2d 414, 426 (2002). Where a statute's language is unambiguous, as it is here, courts "must rely on the plain and ordinary meaning of the words chosen by the legislature." *Id.*

In any event, the legislative history defendant cites does not support his position. He notes Representative Cassidy's comments — while debating an amendment to the statute that did not alter the relevant language of section 10-9(c), *see* 97th Ill. Gen. Assem., House Bill 5278, § 15 — that focused on "traffickers [who] enrich themselves." 97th Ill. Gen. Assem., House Proceedings, Mar. 27, 2012, at 15. But even if the legislature "had [such traffickers] in mind" when it enacted the statute, the statutory

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

language it used "is not so limited." *Jungers*, 702 F.3d at 1074 (internal quotation marks omitted). And defendant offers no reason to think that, in addressing the evils of child sex trafficking, the General Assembly would not have targeted both the supply and demand sides of the problem. *See* U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, *Prevention: Fighting Sex Trafficking by Curbing Demand for Prostitution* (June 2011), https://2009-2017.state.gov/documents/organization/167329.pdf ("[I]f there were no demand for commercial sex, trafficking in persons for commercial sexual exploitation would not exist in the form it does today.").

Defendant also cites a bill recently introduced in the General Assembly that would have added the phrase "purchases the sexual services of a minor, whether from the trafficker or minor," to the list of prohibited conduct in section 10-9(c). 101st Ill. Gen. Assem., Senate Bill 1693, § 20; *see* Def. Br. 65. After a first reading, the bill was referred to committee, but no further action was taken before the legislative session expired.[9] As defendant notes, "an amendment to a statute creates a presumption that the amendment was intended to change the law." *Ready v. United/Goedecke Services*, 232 Ill. 2d 369, 380 (2008). But it does not follow that an unenacted proposal to include language in a statute prohibiting certain conduct "implies that the current text of the statute does not include [such conduct]." Def. Br. 65; *cf. People v.*

[9] *See* Bill Status of SB1693, 101st Ill. Gen. Assem., available at https://www.ilga.gov/legislation/BillStatus_pf.asp?DocNum=1693&DocTypeID=SB&LegID=118901&GAID=15&SessionID=108&GA=101.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

Jackson, 2011 IL 110615, ¶ 18 (presumption that amendment was intended to change existing law "is not controlling and may be overcome by other considerations"). Instead, it is just as likely that the General Assembly believed that no amendment was necessary because the statute already reaches such conduct. Indeed, when Congress added similar language to the federal child sex trafficking statute, it stressed that it was doing so only to codify the result of *Jungers*. *See* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227, §§ 108(c), 109(4) (explaining that amendment's purpose was "to clarify the range of conduct punished as sex trafficking" and "mak[e] absolutely clear . . . that criminals who purchase sexual acts from human trafficking victims may be . . . convicted as sex trafficking offenders").

Finally, defendant argues that it "is unnecessary and unreasonable" to give the word "obtain" its plain and ordinary meaning when construing the offense of involuntary sexual servitude of a minor because the offense of patronizing a minor engaged in prostitution, 720 ILCS 5/11-18.1, already prohibits "paying money to have sex with a minor." Def. Br. 65. According to defendant, interpreting involuntary sexual servitude of a minor to reach his conduct would render the patronizing a minor engaged in prostitution statute "superfluous." Def. Br. 66. However, as discussed below, *see infra* pp. 37-38, defendant misconstrues the elements of these offenses.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

In sum, under the plain meaning of section 10-9(c), a person who pays to have sex with a trafficked minor may be convicted of involuntary sexual servitude of a minor for "knowingly . . . attempt[ing] to . . . obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity." 720 ILCS 5/10-9(c).[10]

And the evidence here, viewed in the light most favorable to the prosecution, was sufficient to prove that defendant committed this offense. The evidence showed that defendant gave Special Agent Siffermann $200 to have sex in a hotel room with two girls whom he believed were Siffermann's underage daughters. Before doing so, he stressed that he was "not gonna give any money to [the girls], only to [Siffermann]." E25. And while defendant expressed reluctance to be alone with the girls, he ultimately gave Siffermann the money even after she explained that she would be in the bathroom while the sex act took place. *See* E23-25. Viewed in the light most favorable to the People, this evidence was sufficient to establish that defendant attempted to get or secure, or gain or attain possession of, the underage girls, knowing they would engage in commercial sexual activity. *See Jungers*, 702 F.3d at 1076 (finding evidence sufficient to prove that the

[10] The statute defines a "[t]rafficking victim" as "a person subjected to the practices set forth in [the statute]." 720 ILCS 5/10-9(a)(10). Defendant does not dispute that the fictional underage girls in the sting operation, if real, would have qualified as trafficking victims. *See* Def. Br. 60-61 (arguing that the undercover agents who portrayed the girls' mother "would have been guilty of involuntary sexual servitude of a minor" because they "fulfilled the role of the pimp who was in possession of the victims").

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

defendant attempted to obtain underage girls when he "agreed to pay $200 to get the girls alone with him in a room so he could do anything he wanted to them short of visible physical abuse"); *State v. Rufus*, 2015 ND 212, ¶ 20 (rejecting sufficiency challenge under similar statute where the defendant "sought to purchase from [an undercover agent] an hour alone in a separate room with a fourteen-year-old girl in order to engage in sexual acts with her," even though agent "informed [defendant] he would be in another room nearby for the girl's safety").

IV. Defendant's Conviction for Involuntary Sexual Servitude of a Minor Does Not Violate the Proportionate Penalties Clause.

Defendant's final contention is that, if the involuntary sexual servitude of a minor statute applies to his conduct of paying to have sex with trafficked minors (as it does), then the statute violates the Illinois Constitution's proportionate penalties clause because, according to defendant, it contains the same elements as the less serious offense of attempting to patronize a minor engaged in prostitution. As explained below, this argument rests on a misunderstanding of the elements of both offenses.

"A proportionality challenge derives from article I, section 11, of the Illinois Constitution of 1970[,] . . . which is commonly referred to as the proportionate penalties clause, [and] provides that '[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.'" *People v. Williams*, 2015 IL 117470, ¶ 9 (quoting Ill. Const. 1970, art. I, § 11). As relevant here,

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

an offense will be found to violate the proportionate penalties clause if it carries a penalty that "is harsher than the penalty for a different offense that contains identical elements." *Id.* A proportionate penalties challenge under the identical elements test presents a question of law that this Court reviews de novo. *Id.*, ¶ 8.

As discussed above, defendant was convicted of involuntary sexual servitude of a minor for "knowingly . . . attempt[ing] to . . . obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity[.]" 720 ILCS 5/10-9(c). Because "there [was] no overt force or threat and the minor [was] under the age of 17 years," the offense was a Class X felony. 720 ILCS 5/10-9(c)(2).

A person commits the offense of patronizing a minor engaged in prostitution if he or she "engages in an act of sexual penetration . . . with a person engaged in prostitution who is under 18 years of age," 720 ILCS 5/11-18.1(a), or "engages in any touching or fondling, with a person engaged in prostitution who . . . is under 18 years of age[,] . . . of the sex organs of one person by the other person, with the intent to achieve sexual arousal or gratification," 720 ILCS 5/11-18.1(a-5). A person is engaged in prostitution if he or she "knowingly performs, offers or agrees to perform any act of sexual penetration . . . for anything of value, or any touching or fondling of the sex organs of one person by another person, for anything of value, for the purpose of sexual arousal or gratification[.]" 720 ILCS 5/11-14(a). Patronizing a

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

minor engaged in prostitution is generally a Class 3 felony, *see* 720 ILCS 5/11-18.1(c), and an attempt to commit the offense is generally punished as a Class A misdemeanor, *see* 720 ILCS 5/8-4(c)(5).

Contrary to defendant's contention, *see* Def. Br. 69-70, the offenses of involuntary sexual servitude of a minor and attempting to patronize a minor engaged in prostitution do not contain identical elements. Again, as charged here, the involuntary sexual servitude of a minor statute required the People to prove that defendant "knowingly . . . attempt[ed] to . . . obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity." 720 ILCS 5/10-9(c). "Obtain," in this context, means to get or secure, or to gain or attain possession of — in short, to gain control over. *See supra* p. 23. The offense of attempting to patronize a minor engaged in prostitution, on the other hand, does not require that a defendant attempt to gain control over a minor. Instead, it requires only that the defendant attempt to engage in a sex act with a minor engaged in prostitution, *see* 720 ILCS 5/11-18.1(a), (a-5), meaning a minor who "knowingly performs, offers or agrees to perform" a sex act "for anything of value," 720 ILCS 5/11-14(a).[11]

[11] Although "a person under the age of 18" is "immune from prosecution for a prostitution offense," 720 ILCS 5/11-14(d), the trial court was wrong to infer that this immunity provision eliminated the offense of patronizing a minor engaged in prostitution. *See* R160, 190-93.

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

Moreover, because involuntary sexual servitude of a minor (as charged here) requires that a defendant attempt to obtain a minor, it necessarily implies that he do so through a third-party who is exercising control over the minor, or at least that he know or believe that the minor is being controlled by a third-party. In contrast, the elements of attempting to patronize a minor engaged in prostitution are satisfied even if a defendant attempts to purchase sex with a minor directly, without attempting to obtain the minor from a third-party trafficker.

In sum, the offense of involuntary sexual servitude of a minor includes an element — that the defendant attempt to obtain a minor, knowing the minor will engage in commercial sexual activity — that is not included in the offense of attempting to patronize a minor engaged in prostitution.

Defendant deems it "problematic" that involuntary sexual servitude of a minor is punished more severely than attempting to patronize a minor engaged in prostitution. Def. Br. 70-71. But "it is the legislature's role to declare and define conduct constituting a crime and to determine the nature and extent of the punishment for it." *People v. Johnson*, 2019 IL 123318, ¶ 34. That responsibility is delegated to the legislature because it is "institutionally . . . more aware than the courts of the evils confronting our society and, therefore, is more capable of gauging the seriousness of various offenses." *People v. Steppan*, 105 Ill. 2d 310, 319 (1985). Here, the General Assembly could rationally conclude that attempting to obtain and have sex

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

with a trafficked minor causes more harm, and is thus deserving of greater punishment, than merely attempting to pay for sex with a minor engaged in prostitution. In the end, because the two offenses do not have identical elements, defendant's proportionate penalties clause challenge must fail. *See Williams*, 2015 IL 117470, ¶ 14 ("Having determined that the [two offenses] are not identical, there can be no proportionate penalty violation.").

CONCLUSION

This Court should reverse the appellate court's judgment and reject defendant's requests for cross-relief.

December 28, 2021

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIC M. LEVIN
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5029
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

RULE 341(c) CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 39 pages.

/s/ Eric M. Levin
ERIC M. LEVIN
Assistant Attorney General

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 28, 2021, the **Plaintiff-Appellant's Reply Brief and Response to Request for Cross-Relief** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided service of such filing to the email addresses of the persons named below:

Thomas A. Lilien
Yasemin Eken
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, Illinois 60120
2nddistrict.eserve@osad.state.il.us

Counsel for Defendant-Appellee

Bryan G. Lesser
Gordon Rees Scully Mansukhani LLP
One North Franklin, Suite 800
Chicago, Illinois 60606
Blesser@grsm.com

Counsel for Defendant-Appellee

Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of **Plaintiff-Appellant's Reply Brief and Response to Request for Cross-Relief** to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Eric M. Levin
ERIC M. LEVIN
Assistant Attorney General

SUBMITTED - 16089004 - Criminal Appeals, OAG - 12/28/2021 10:18 AM