Court of Appeals, State of Michigan

ORDER

PEOPLE OF MI V AARON JAMES NOWICKI

Docket No. 369801

LC No. 2021-005473-FH

Michael J. Kelly
Presiding Judge

Sima G. Patel

Daniel S. Korobkin
Judges

The motion for reconsideration is GRANTED, and this Court's opinion issued August 13, 2026 is hereby VACATED. A new opinion is attached to this order.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

September 30, 2026
Date

Chief Clerk

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 30, 2026 1:19 PM
v	No. 369801 Chippewa Circuit Court
AARON JAMES NOWICKI, Defendant-Appellant.	LC No. 2021-005473-FH

ON RECONSIDERATION

Before: M. J. KELLY, P.J., and PATEL and KOROBKIN, JJ.

PER CURIAM.

Defendant, Aaron Nowicki, appeals as of right his conviction following a jury trial of one count of child sexually abusive activity (CSAA), MCL 750.145c(2). For the reasons stated in this opinion, we conditionally reverse his conviction and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

This case arises out of a sting operation conducted by the Genesee Human Oppression Strike Team (GHOST), which was coordinating with local law enforcement in Chippewa County. The GHOST operation used various social media apps and websites to "chat" with people in order to attempt to locate and arrest individuals who were soliciting minors for sexual activity. In this case, using the username "Joy_Boy," law enforcement set up a fictive profile on the social media app "Grindr." The "Joy_Boy" profile was created using a "burner phone" that was not retained in evidence by the police. Grindr's terms of service require that its users be 18 years of age or older,[1] so the officer that created the profile entered a date of birth that would make Joy_Boy 18 years of age. A photograph of a 20-year-old police officer was used for the profile picture. The officer's face was obscured by a "camera flash." In the so-called "about me" section of the Grindr profile,

[1] Grindr does not, however, require users to verify their age.

law enforcement wrote that Joy_Boy was a "discreet newby looking for something different." There was nothing in the profile suggesting that Joy_Boy was actually a 15-year-old boy instead of an 18-year old man.

On August 13, 2021, Nowicki started a message conversation with the police officer posing as Joy_Boy (the decoy):

> *Nowicki*. Heyy
>
> *Nowicki*. What's up today
>
> *Decoy*. Nothing much
>
> *Nowicki*. You looking?
>
> *Decoy*. Yes
>
> *Nowicki*. Nice me too. Into?
>
> *Decoy*. Kinda new so?
>
> *Nowicki*. Nice. I'm a top here. Love pleasing a bottom showing new things

Nowicki then asked whether the decoy "hosted." The decoy responded that he was staying with his cousin. When asked if that meant he did not host, the decoy explained that his cousin was "gone." Nowicki suggested that he could travel to the decoy's location. Rather than respond to that offer, the decoy stated that his cousin was working. Nowicki responded "nice" and shared that he had just finished working. The decoy claimed to have been at Nowicki's workplace earlier, and he added that his cousin was working in the area. Nowicki again asked if the decoy wanted him to "come over." This time, the decoy agreed, noting that his cousin would call before returning.

Thereafter, the decoy raised the issue of age:

> *Decoy*. How old are you. Just don want any problems
>
> *Nowicki*. I'm 30, chill guy here[2]
>
> *Decoy*. Ok, I just don't do thisk often
>
> *Nowicki*. Me neither.

[2] Nowicki admitted that, at the time he sent the message, he was actually 37 years old. He told the jury that he had lied about his age because he would get fewer matches using his real age. He believed that representing to others that he was 30 years old was "appropriate" because he could "pass for a 30 year old" since he dyed his beard.

Nowicki. But I think it would be cool to hang out.

Decoy. Just some fun

Nowicki. Yeah

Nowicki. Ready now?

Decoy. I cant drive. Get my license halloween

Nowicki. I can come to you

Decoy. Long as your ok im a younger than u

Nowicki. Yes I like younger guys

Decoy. Just not real experience. but I no what I like

Decoy. 15

Nowicki. Well I hope to make you happy

Decoy. Jus don't want trouble. But im sure I have lot to learn

Nowicki. No trouble

Nowicki. And having a chill person to show you is good :)

Decoy. If age not an issue im ready to lern

Nowicki. Good

Nowicki then asked questions related to where he could meet the decoy. Rather than answer immediately, the decoy stated that he was "kinda" nervous but was "ok for bottom." Nowicki answered in two separate messages, first saying "[w]e all get jittery sometimes" and then writing "[g]ood." The decoy responded, "I do like a blow too. I can do whatever as long as your clean." Nowicki volunteered that he had recently been tested and was "clean." The decoy then brought up additional sexual acts that they could try. Nowicki agreed with the suggestions. The decoy asked him to promise "no trbl and no pics" before describing more sexual acts. Nowicki stated that he "promised." The decoy then promised Nowicki a "volcano eruption."

Nowicki traveled to the decoy's hotel and knocked at the room where they were supposed to meet. He was immediately arrested by law enforcement agents who had been waiting for him. During a subsequent interview with the police, Nowicki denied seeing the message that said "15," stated that it would have been different if the message was "15 years old," and then stated again that he did not see it. When asked about the decoy's comment regarding not getting his driver's license until Halloween, he pointed out that not everyone gets a license at the same time. Nowicki also told the police that Grindr users had to be 18 and that he had previously blocked users who

disclosed to him that they were underage. Finally, he suggested that he was distracted during the message exchange because he was messaging other Grindr users and was watching YouTube videos.

During a subsequent search of Nowicki's electronic devices and home, law enforcement did not obtain any evidence of child sexually abusive activity or materials. They did, however, locate education and training materials on methods to identify grooming behavior and to protect children from sexual assaults. A certificate located with the materials indicated that Nowicki had completed the training in 2009.

At trial, William Green, an expert in digital forensics who was retained by Nowicki, testified that he had examined the data extracted from Nowicki's cell phone and computer. Green opined that, during the time that Nowicki was messaging the decoy, he was also messaging with other Grindr users. Additionally, Nowicki was using other apps on his phone. Green believed that Nowicki could have been confused by participating in multiple conversations. However, he also testified that all but five of Nowicki's other Grindr messages occurred at different times from his conversation with the decoy. Finally, Green opined that, based upon the timing of the Grindr messages, Nowicki's "Well I hope to make you happy" was made in response to the decoy's message "jus no real experience. but I no what I like." He did not believe it was in response to the "15" message.

Nowicki also testified. He explained that he started using Grindr "around 2011." He was aware that Grindr required users to be 18 years of age or older. He testified that when he had previously encountered users who appeared to be under 18 years of age, he had blocked them and reported them to Grindr. Nowicki stressed that he was not attracted to individuals under the age of 18. He explained that his typical search parameters would show him profiles for users who were between 18 and 30 years of age. Nowicki added that Joy_Boy's age was listed as 18 on his profile, which was a fact that had been confirmed by Green.

When asked about his messages with the decoy, Nowicki testified that he did not just "sit there waiting for a message to come in." Instead, he was looking at other information on his phone, including other Grindr messages and short videos on YouTube. He stated that the fact that the decoy said he was staying with his cousin at a hotel was not a "red flag" because he had had "plenty of meetings where people were staying at a hotel." Similarly, when the decoy stated that he was "younger," Nowicki understood that to mean that he was younger than him. He added that the fact that the decoy mentioned that he was getting his driver's license at Halloween meant "absolutely nothing" because a person can get their license at any age and it was "none of [his] business."[3]

[3] Nowicki admitted that, during his interview with law enforcement, he claimed that he did not see the message regarding Joy_Boy's driver's license.

Nowicki testified that he did not recall seeing the message "15," but he admitted that the message had the "read status" on the app.[4] Nowicki believed it was possible that he had not seen the "15" message because he had a habit of responding to messages by clicking on a notification pop-up on his phone. He thought that, based upon Green's testimony regarding the timing of the messages, he might have been responding to a different message from the decoy when the "15" message was sent. Nowicki added that the "15" message was not sent in response to him asking the decoy about his age and that it had been sent approximately 9 minutes after he had claimed to be 30 years of age. Nowicki maintained that there was "no context" to the "15" message. When asked why he had not inquired about the decoy's age, he stated that, in the 10 years that he had used Grindr, he had not "met anybody who has been under 18 who had that criteria when they list they're 18." He also stated that he took the "normal" steps to determine a Grindr user's age, which was to trust "their profile age." Finally, Nowicki stressed that he told the decoy that he liked younger "guys," not "kids."

As noted above, the jury convicted Nowicki of one count of CSAA. This appeal follows.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Nowicki first argues that there was insufficient evidence to support his conviction of CSAA. We review "de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction." *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). The evidence is reviewed "in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the crime's elements beyond a reasonable doubt." *Id*. "Conflicting evidence and disputed facts are to be resolved by the trier of fact." *Id*. We must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018) (quotation marks and citations omitted). Circumstantial evidence and reasonable inferences from the evidence are sufficient to prove the elements of a crime. *Id*.

B. ANALYSIS

Nowicki was convicted of CSAA. The offense of CSAA is set forth in MCL 750.145c(2). As relevant to Nowicki's conviction,[5] MCL 750.145c(2) provides that a person is guilty of CSAA if he or she:

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[4] On cross examination, Nowicki was asked how he would have interpreted "15" if he had seen it. He claimed that he would have asked a follow-up question, but he would not have interpreted it as an age. However, he admitted that he told the police during his interview that he would have interpreted it as Joy_Boy saying that he was only 15 years old.

[5] MCL 750.145c(2) imposes criminal liability on three distinct groups of people. See *People v Adkins*, 272 Mich App 37, 40; 724 NW2d 710 (2006). Only the third group of persons is implicated in this case, i.e., persons who attempt, prepare or conspire "to arrange for, produce,

> attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

The phrase "child sexually abusive activity" is defined as "a child engaging in a listed sexual act." MCL 750.145c(1)(n). The term "listed sexual act" includes "erotic fondling," which in turn is defined in part as "touching a person's . . . unclothed genitals." MCL 750.145c(1)(g) and (*i*).

The prosecution, therefore, had to first prove that Nowicki arranged to or prepared to meet with the decoy to engage in a listed sexual act. Nowicki does not dispute that he arranged to meet with the decoy so that they could, in part, engage in oral sex, which would include the touching of a person's unclothed genitals. He also testified that he went to the hotel with the intent of engaging in sexual acts with the decoy. Consequently, there is sufficient evidence to support a finding of the first element.

The prosecution next had to prove that Nowicki knew, had reason to know, or should reasonably know that the decoy was a child.[6] Alternatively, the prosecution had to prove that Nowicki failed to take "reasonable precautions" to determine Joy_Boy's age. Nowicki argues that there was insufficient evidence under both alternative methods. We address his arguments in turn.

Nowicki contends that there is insufficient evidence to prove that he knew, had reason to know or should reasonably be expected to know that Joy_Boy was a child. We disagree. Viewed in the light most favorable to the prosecution, the messages between Nowicki and the decoy are circumstantial evidence that Nowicki knew or should reasonably be expected to know that the decoy was a child, i.e. under the age of 18. In the messages, the decoy asked Nowicki his age and, in connection with that question, indicated that he did not want any trouble. The decoy also stated that he did not drive and would not get his license until Halloween. He told Nowicki that he was "younger" and, when Nowicki stated that he liked "younger guys," he did not have real experience. He then stated "15." Although "15" is ambiguous when viewed in isolation, it is reasonable to infer from the context of the conversation that "15" was a reference to Joy_Boy's age. Moreover, Nowicki's expert testified that Grindr users used numerical numbers, without any additional language, to indicate age. Taken as a whole, the jury could reasonably infer that Nowicki either knew or should reasonably have known that he was arranging to engage in sexual acts with a child.

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make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material."

[6] The term child is generally defined as "a person who is less than 18 years of age." MCL 750.145c(1)(c).

To refute that inference, Nowicki directs this Court to evidence and inferences from that evidence that would support a finding that he did not know that he was arranging to engage in sexual acts with a child. He maintains that a person might not have a driver's license for reasons that are unrelated to age. He notes that he stated he liked "younger guys," not boys. He further testified that he understood "younger" to mean younger than him. The jury was not required to credit his stated interpretations of the messages, however. Nor was it required to view each statement in isolation. It is the inferences that may be drawn from the whole conversation, including the "15" message, that would allow a rational jury to find that Nowicki knew, or reasonably should have known, the decoy was a child.

With regard to the "15" message, Nowicki's primary argument is that he did not see the message. Both at trial and on appeal, he supports that claim with his own testimony regarding how messages appeared on his phone, what he was doing when the messages were being received, and to his expert's testimony regarding the timing of the messages. Yet, viewed in the light most favorable to the prosecution, there was also testimony that the "15" message was "read," which allows for an inference that Nowicki did see it. Nowicki also suggests that there is no context for the "15" message, noting that he did not ask the decoy for his age and that the decoy's question about his age had occurred approximately nine minutes earlier. But, as explained above, based upon its placement in the conversation, the "15" message can be reasonably inferred to be an age reference.

In sum, the jury was presented with the totality of the messages that were exchanged between Nowicki and the decoy. It heard Nowicki's explanations for why the information conveyed to him by the decoy did not alert him to the fact that the decoy's persona was a child, including his claims to have not seen the "15" message and that the "15" message was too ambiguous to convey the decoy's purported age. It was for the jury to determine witness credibility and resolve inconsistencies in the evidence. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). And, considering the evidence presented in the light most favorable to the prosecution, there was sufficient evidence to satisfy the knowledge element of CSAA.

There was also sufficient evidence to establish that Nowicki failed to take "reasonable precautions" to determine the age of the decoy. See MCL 750.145c(2). Nowicki correctly notes that there is not an affirmative duty to ask, "How old are you?" But the record reflects that the only step that Nowicki took to verify the decoy's age was to refer to the age stated in the Joy_Boy profile. The jury was free to consider whether that amounted to reasonable precautions in light of the evidence introduced at trial.

In that regard, the record reflects that, notwithstanding that Grindr required its users to be 18 years of age or older, Grindr did not actually verify the age of its users. Nowicki knew that users could lie about their age—indeed, he had done so himself by stating his age as 30 when in fact he was 37. He also knew that users could be under the age of 18 because he had previously encountered such users and blocked them. It is therefore reasonable to infer that Nowicki was aware that the age stated on a profile could be inaccurate. Further, as explained above, the information conveyed to Nowicki during the message exchange with the decoy was sufficient to trigger suspicion that Joy_Boy was actually a 15-year-old, not an 18-year-old. Briefly, the decoy represented that he was inexperienced, could not drive, was getting his license later in the year, was younger than Nowicki, did not want age-related trouble, and—in the context of discussing the

fact that he was younger than Nowicki—stated "15." Considering that Nowicki was aware that the age stated on a profile could be inaccurate, his decision to rely solely upon the stated age instead of making additional inquiries could be found to be unreasonable. That is, viewing this evidence in the light most favorable to the prosecution, the jury could reasonably infer that Nowicki failed to take reasonable precautions to determine the decoy's age.

For the foregoing reasons, we conclude that there was sufficient evidence to support a finding that the essential elements of CSAA were met.

III. CONSTITUTIONALITY OF CSAA STATUTE

A. STANDARD OF REVIEW

In a supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, Nowicki argues that MCL 750.145c(2) is unconstitutional. Challenges to a statute's constitutionality are reviewed de novo. *People v Deroche*, 299 Mich App 301, 305; 829 NW2d 891 (2013). The party challenging the statute bears the burden of proving it is unconstitutional. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). "We presume statutes to be constitutional unless their unconstitutionality is clearly apparent and, if possible, the statute is to be construed as constitutional." *Deroche*, 299 Mich App at 305.

B. ANALYSIS

Nowicki first asserts that the CSAA statute is void for vagueness as applied to him because the phrase "reasonable precautions" is not defined. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *People v Burkman*, 513 Mich 300, 336; 15 NW3d 216 (2024) (quotation marks and citation omitted). "The vagueness doctrine incorporates notions of fair notice or warning and requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Id*. (quotation marks and citation omitted). "Accordingly, a statute may be considered unconstitutionally vague if it fails to provide fair notice of the conduct proscribed or encourages arbitrary and discriminatory enforcement." *Id*. (quotation marks, citation, and alternations omitted). "A statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and such knowledge may be acquired by referring to judicial interpretations, common law, dictionaries, treatises, or the common meaning of words." *Id*. (quotation marks, citation, and alterations omitted).

We conclude that, by using the word "reasonable" to modify "precautions," the Legislature plainly provided that the reasonable person standard should be used when evaluating the precautions taken to ascertain the age of a child. The reasonable person standard provides fair notice of prohibited conduct and prevents abuses in the enforcement of the statute. See *Plymouth v Hancock*, 236 Mich App 197, 201; 600 NW2d 380 (1999). As a result, MCL 750.145c(2), as applied to Nowicki, is not unconstitutionally vague.

Nowicki also asserts that MCL 750.145c(2) is unconstitutional because it is "overbroad." "An overbroad statute is one which is likely to 'chill' constitutionally protected behavior." *People v Hicks*, 149 Mich App 737, 742; 386 NW2d 657 (1986). Nowicki suggests that allowing a

conviction based upon the failure to take "reasonable precautions" to ascertain the age of a child "chills speech between adults who believe each other to be an adult." We disagree. As explained in *People v Roberts*, 292 Mich App 492, 500; 808 NW2d 290 (2011), the CSAA statute "does not hinder any constitutionally protected behavior." Rather, MCL 750.145c(2) "focuses on protecting children from sexual exploitation, assaultive or otherwise." *People v Ward*, 206 Mich App 38, 42; 520 NW2d 363 (1994). Further, there is no First Amendment right to attempt to persuade minors to engage in illegal sex acts. *People v Cervi*, 270 Mich App 603, 622; 717 NW2d 356 (2006). And "speech used to further the sexual exploitation of children does not enjoy constitutional protection." *Id*.

IV. SENTENCE

A. STANDARD OF REVIEW

Nowicki argues that he is entitled to resentencing because the trial court erred by scoring offense variable (OV) 19 at 10 points. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

B. ANALYSIS

OV 19 addresses security threats to penal institutions and interference with the administration of justice or emergency services. MCL 777.49. The court must assess 10 points for OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice, or directly or indirectly violated a personal protection order." MCL 777.49(c). The interference can occur after completion of the charged offense. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). For purposes of OV 19, the phrase "interfere with the administration of justice" means "to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330,

343; 844 NW2d 127 (2013). A defendant does not interfere with the administration of justice by merely denying culpability for the offense. *People v Deweerd*, 511 Mich 979, 980; 990 NW2d 864 (2023). Rather, there must be "something more," such as an active attempt to redirect an investigation, conceal evidence, or prevent a witness from testifying. *Id*.

Here, the trial court scored OV 19 at 10 points based upon Nowicki's evasive and defensive statements to the police denying that he had come to the hotel to have sex with Joy_Boy. Those statements, however, amount to nothing more than a denial of culpability for the offense. Accordingly, the trial court erred by scoring OV 19 at 10 points. Because the correct scoring of OV 19 changes Nowicki's sentencing guidelines range, he is entitled to resentencing. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

V. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

Nowicki next argues that his conviction must be reversed because his lawyer provided him with ineffective assistance by failing to raise entrapment as a defense. "Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "We review for clear error the trial court's factual findings, and we review de novo questions of constitutional law." *People v Yeager*, 511 Mich 478, 487; 999 NW2d 490 (2023) (quotation marks and citation omitted). However, if "no *Ginther*[7] hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).[8]

B. ANALYSIS

[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[8] Generally, a *Ginther* hearing is required if the defendant presents "facts that would require development of a record to determine if defense counsel was ineffective." *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). Nowicki has not presented any facts or issues that would require additional factual development. Moreover, neither he nor the prosecution requested a remand for a *Ginther* hearing.

To prevail upon a claim of ineffective assistance, the defendant must prove (1) that his or her lawyer's "performance fell below an objective standard of reasonableness," and (2) that but for that deficient performance, "there is a reasonable probability that [the] outcome would have been different." *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023) (quotation marks and citation omitted). The burden is on the defendant to establish the factual predicate for an ineffective-assistance claim. *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014).

At the outset, we conclude that Nowicki's lawyer's performance fell below an objective standard of reasonableness when he failed to raise entrapment as a defense. "Michigan applies a two-prong, modified objective test for entrapment under which a defendant is entitled to dismissal of charges if either prong is satisfied." *People v Jade*, ___ Mich ___, ___; ___ NW3d ___ (2026) (Docket No. 167920); slip op at 2. Both the unlawful-inducement prong and the reprehensible-conduct prong of the test are "adjudicated at an evidentiary hearing before the trial court under the procedures established in *People v D'Anglo*, 401 Mich 167, 177-180; 257 NW2d 655 (1977)." *Jade*, ___ Mich at ___; slip op at 4. At the evidentiary hearing, the defendant bears the burden of establishing entrapment by a preponderance of the evidence. *People v Johnson*, 466 Mich 491, 489; 647 NW2d 480 (2002).

In this case, Nowicki's lawyer argued at a jury trial that Nowicki was actually innocent. Defense lawyers are given wide discretion in matters of trial strategy, and, accordingly, there is a "strong presumption of effective assistance of counsel." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). However, as will be discussed more fully below, the facts in this case support a finding of entrapment under both the unlawful-inducement prong and the reprehensible-conduct prong of the modified objective test. And, considering that an entrapment defense is resolved by the trial court, not the jury, and that a successful entrapment defense will result in the dismissal of charges, *Jade*, ___ Mich at ___; slip op at 4, Nowicki's lawyer had no strategic reason to not pursue an entrapment defense.

Having concluded that Nowicki's lawyer's performance was deficient, we must now determine whether, but for that deficient performance, there is a reasonable probability that the outcome would have been different. See *Yeager*, 511 Mich at 488. Specifically, Nowicki must establish that there is a reasonable probability that an entrapment defense would have been successful if raised. See *id*.

In *Jade*, our Supreme Court recently clarified the analysis that must be conducted under each prong of the modified objective test for entrapment. The *Jade* Court explained that "under the 'unlawful inducement' prong, courts examine whether police conduct exceeded the mere offering of an opportunity to commit a crime and instead involved tactics that could have induced or instigated the criminal act by a hypothetical law-abiding person in the defendant's circumstances who was not otherwise ready and willing to commit the charged offense." *Id*. The *Jade* Court noted that the unlawful-inducement prong could be assessed by considering the following nonexhaustive list of factors:

> (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the

commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted. [*Id*. at ___; slip op at 24 (quotation marks and citation omitted).]

The *Jade* Court stressed that the "factors are not mere boxes to be checked." *Id*. Instead, they simply serve as "red flags" for inducement by assisting the trial court in determining "whether the police conduct at issue went beyond merely offering an opportunity to commit the charged offense and whether that police conduct could have induced a hypothetical law-abiding person to commit an offense they were not otherwise ready and willing to commit." *Id*.

Moreover, the *Jade* Court noted that the reviewing court "must consider a defendant's readiness and willingness to commit the charged crime" but only insofar as it serves "as a way to identify whether the cause of the offense came from law enforcement rather than the defendant." *Id*. at ___; slip op at 25. And, because "the unlawful-inducement inquiry is objective, not subjective," the court's consideration of "a particular defendant's circumstances" should be used "only to assist in evaluating whether the police conduct at issue would have led an ordinary, law-abiding person in similar circumstances to commit the charged crime." *Id*. Ultimately, the goal under the unlawful-inducement prong is to focus "on whether government conduct, rather than the defendant's propensity, supplied the causal impetus for the offense." *Id*. at ___; slip op at 26.

In turn, under the reprehensible-conduct prong, "entrapment occurs when "the police engage[] in conduct so reprehensible that it cannot be tolerated." *Id*. "[T]he reprehensible-conduct prong may be met without regard to causation, so long as the conduct in question is egregious enough to be intolerable by a civilized society." *Id*. (quotation marks and citation omitted).

Police escalation is relevant to both prongs of the entrapment test. *Id*. at ___; slip op at 27. That is, "escalation from a less serious offense to a more serious offense may itself establish entrapment." *Id*. at ___; slip op at 28. Entrapment may be found "whenever police conduct transforms a suspect's apparent willingness to commit a less serious offense into exposure for a more serious offense." *Id*. There is not, however, any "escalation constituting entrapment when police simply give a suspect another opportunity to commit the same offense that the suspect previously committed." *Id*.

The *Jade* Court made clear that "[t]he throughline of the entrapment doctrine is that police must detect crime, not manufacture it." *Id*. at ___; slip op at 29. "Police lawfully respond to criminal intent when they react to a suspect's contemplation or initiation of unlawful conduct and simply allow the suspect to follow through on the crime the suspect has already chosen to pursue." *Id*. at ___; slip op at 30. In doing so, "police may answer inquires or arrange meetings so long as officers do not create a new crime or increase the severity of the suspect's contemplated offenses." *Id*. However, the police manufacture crime when they "introduce[] new criminal elements, escalate[] conduct into new crimes, or induce[] conduct that the suspect [has] not shown a willingness to commit." *Id*.

With these clarified legal standards in mind, we turn to Nowicki's argument that his defense lawyer provided ineffective assistance because he did not raise the entrapment defense in a pretrial hearing. The material facts reflect that Nowicki was engaged in a legal activity when he logged into his Grindr app and sent the initial message to the decoy. The decoy's Grindr profile represented that he was 18 years of age and used a photograph of an adult. The photograph was deliberately manipulated to obscure facial features. And the decoy noted that he had to enter a false birthdate because the app was restricted to individuals over the age of 18. Although Nowicki initiated the conversation, there is nothing in his messages suggesting that he was looking to

engage in sexual activity with a person under the age of 18. Instead, his messages were focused on ascertaining what types of sexual activity the decoy was interested in and whether he was available to "host" a meetup. It was the decoy that first introduced the potential for illegal activity. He did so firstly by using language that could be interpreted as reflecting that he was underage.

Specifically, the decoy testified that he deliberately misspelled words so he would appear younger, and he stated that he did not have his license. He later sent the "15" message without providing any additional explanation for what he meant by that message. After insinuating that he was 15 years of age, the decoy extracted promises from Nowicki to engage in explicit sexual activity when they met up. The entirety of the conversation took place on a single day within the span of one hour.

In light of these undisputed facts, we conclude both that Nowicki's lawyer's performance fell below an objective standard of reasonableness when he failed to raise entrapment as a defense in a pretrial motion and that, had he raised it, there is a reasonable probability that the outcome would have been different. The facts implicate entrapment under both the unlawful-inducement prong and the reprehensible-conduct prong.

Several of the factors identified in *Jade* as being "red flags" for unlawful-inducement are present in this case. The operation can best be described as a fishing operation in that the decoy created a fake Grindr profile posing as an 18-year-old man and then waited for any Grindr user to initiate a conversation. It was the decoy who brought up the issue of age and made comments suggesting that he was young, such as the fact that he was not getting his driver's license until Halloween. He also indicated that he lacked experience and then stated in a separate message "15." The decoy thus escalated the discussed encounter from a legal "hookup" between consenting adults to criminal sexual activity involving a 15-year-old child. In doing so, the decoy also promised sexual favors to Nowicki, stating that he would "blow" Nowicki and that "it's a volcano eruption I promise." Thus, the eighth and tenth red-flag factors were implicated. The seventh red-flag factor was also implicated given that there was also some government pressure in that the decoy asked Nowicki to "promise" that there would be no trouble and no photographs taken during the planned sexual encounter. The eleventh red-flag factor is also certainly implicated because the police had complete control over the decoy given that it was a police officer posing as Joy_Boy.

We conclude that another red-flag factor that is present in this case is that the police language escalating the non-criminal activity to serious criminal activity was ambiguous. See *Jade*, ___ Mich at ___; slip op at 6 (noting that the red-flag factors are not meant to be comprehensive). Unlike other cases, such as *Jade*, where the decoy expressly and repeatedly states the purported age as being 15 years old, the decoy in this case only insinuated that he was younger and made an ambiguous statement suggesting that he was 15. The use of ambiguous language to escalate non-criminal activity to criminal activity can induce a hypothetical law-abiding citizen into committing a crime because, depending on how the information is interpreted, the person might not even be aware that they are transitioning from a legal activity to one that is illegal.

In light of the above factors that weigh in favor of a finding that the police activity induced or instigated the criminal activity in this case, we conclude that there is a reasonable probability that an entrapment defense would have been successful had Nowicki's lawyer raised it. See *Yeager*, 511 Mich at 488.

Moreover, there is a reasonable probability that the entrapment defense would have also been successful under the reprehensible police conduct prong of entrapment. Again, there was no criminal activity until the police ambiguously suggested that the decoy was 15 years of age. The police activity in this case consisted of creating a fake profile on Grindr. To create the profile, the officers had to violate Grindr's terms of service. The decoy posed as an 18-year-old, used an enticing photograph of an adult, and deliberately blurred the facial features. The blurring of the facial features decreased the likelihood that other Grindr users would have a visual cue that the person they were messaging was under the age of 18. Once they set their trap, they waited for *anyone* to respond. They had no specific target, nor any specific reason to believe that Grindr users would be likely to solicit a minor for sexual activities. Once Nowicki responded to the deceptive profile, the decoy first ascertained that he was looking for a sexual encounter and then escalated that legal and consensual encounter into one that is decidedly illegal. There is no indication that any procedural safeguards were employed to ensure that the person who responded was ready and willing to engage in sexual activities with a 15-year-old. Instead, the decoy seemingly had discretion to communicate, in whatever manner he saw fit, that he was underage. In this case, that communication was vague and ambiguous.

In sum, this is not the permissible sting operation where "[p]olice lawfully respond to criminal intent when they react to a suspect's contemplation or initiation of unlawful conduct and simply allow the suspect to follow through on the crime the suspect has already chosen to pursue. *Id*. at ___; slip op at 30. Rather, it is the manufacturing of a crime, given that the police introduced all criminal elements and induced—using ambiguous language—conduct that the suspect had not shown a willingness to commit." See *id*.

In sum, Nowicki has established both prongs of his claim of ineffective assistance of counsel. His lawyer's representation amounted to deficient performance when he failed to raise an entrapment defense. And Nowicki was prejudiced by that deficient performance because there is a reasonable probability that the entrapment defense would have been successful and resulted in the dismissal of the charges against him before trial. See *Yeager*, 511 Mich at 488.

Because Nowicki was denied the effective assistance of counsel, we conditionally reverse his conviction and remand for further proceedings. Although we have concluded under the prejudice prong of Nowicki's ineffective-assistance claim that there is a *reasonable probability* that Nowicki's entrapment defense would have been successful, we have not concluded as a matter of law that he was entrapped. That matter has not yet been considered by the trial court, nor has the prosecution been afforded the opportunity to present evidence in opposition to the entrapment defense. On remand, the trial court should apply the clarified entrapment framework to resolve the question of whether Nowicki was entrapped. If the court concludes that he was entrapped, then it should enter an order setting aside his conviction and dismissing the case. If the court concludes that Nowicki was not entrapped, then his conviction for CSAA stands and the trial court should proceed with resentencing.

Conditionally reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Sima G. Patel
/s/ Daniel S. Korobkin