

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 10-731

JOHN TIPTON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 2, 2011

APPEAL FROM THE CLEBURNE
COUNTY CIRCUIT COURT
[NO. CR-2008-116]

HONORABLE JOHN DAN KEMP,
JUDGE

AFFIRMED

ROBIN F. WYNNE, Judge

Appellant John Tipton appeals following his conviction for internet stalking of a child, a Class B felony. Specifically, Tipton contends that his conviction was not supported by sufficient evidence. We affirm.

On the night of June 5, 2008, and into the early morning hours of June 6, 2008, Tipton engaged in an internet chat conversation with Detective Kim Bettis, a thirty-eight-year-old Cleburne County detective posing as a teenaged female in order to catch internet stalkers. Detective Bettis's decoy profile was that of an almost-fourteen-year-old girl named "Kimmie" living in the Heber Springs area with her single mother, who worked nights at a local club. Kimmie's profile picture was a small photograph of Detective Bettis's face wearing sunglasses and covering her mouth with her hand. On the night of June 5, Kimmie logged into a Yahoo chat room designed for adults living in Arkansas who were looking for romance.

At approximately 11:46 p.m., Kimmie received an instant message from “J T,” a twenty-eight-year-old man later identified as Tipton. Tipton asked Kimmie to identify her age, sex, and location, to which Kimmie replied that she was thirteen, almost fourteen, in Heber Springs. Tipton responded with, “oh, young!!!!!!!!!!!!!!” Tipton then requested that Kimmie show him more pictures of herself. Kimmie sent two photographs: one of a young girl wearing sunglasses sitting on a rock next to a lake and one of a young girl wearing a two-piece bathing suit kneeling on a couch, with her face turned away from the camera. Neither of these photographs was of Detective Bettis.

Throughout the chat conversation, Tipton commented several times that Kimmie might be older than fourteen; however, he continued to ask questions and make comments that indicated he believed he was talking to a teenager. Specifically, Tipton asked Kimmie why she was online at such a young age, why she was home schooled, and what her mom would think about her chatting with a twenty-eight-year-old man so late at night. He also commented that Kimmie was “a little young,” that he could understand why her mother would not allow Kimmie to have a web cam since she was a fourteen-year old who looked twenty-one, and that he was a little embarrassed to be flirting with a teenaged girl. At one point, Tipton asked Kimmie how old she wished she was, to which she replied twenty-one, and he asked her to say that she was twenty-one instead of fourteen. Kimmie replied with “k,” meaning “okay” or “whatever.”

In addition to discussing Kimmie’s parents and home schooling, the conversation took a sexual tone in several places. For example, when Kimmie stated that she spent time in the

chat room because she was curious, Tipton commented, “you act innocent but i doubt you are.” When Kimmie asked what was on his mind that night, Tipton replied, “not the right things.” At one point, Tipton sent a picture of himself with his wife. Kimmie commented that he was “hot” and so was his wife, and Tipton asked, “u swing like taht [sic]?” At one point, Kimmie left the computer for a few minutes to use the restroom, and when she returned, Tipton asked her if she was into “golden showers.”

About thirty-five minutes into the chat conversation, Kimmie and Tipton arranged to meet the following day at the dam site in Heber Springs. Tipton expressed nervousness about meeting her but offered to drive to Heber Springs to pick her up. Kimmie asked if it mattered that she was a virgin, and Tipton replied, “I guess not.” She stated that she wasn’t “easy,” that she had been waiting. Tipton asked if she had been waiting for a twenty-eight-year old. Kimmie also asked if Tipton would bring protection, and Tipton said, “sure.”

The following day, Tipton and Kimmie exchanged text messages while Tipton was on his way to the arranged meeting place. Again, Tipton indicated that he was nervous about meeting Kimmie. When Tipton arrived at the dam site, he was immediately apprehended and taken into custody. Law enforcement officers searched his vehicle and discovered three condoms, which Tipton later admitted to bringing because of the possibility of having sex with Kimmie. Tipton was formally charged with internet stalking of a child on June 16, 2008.

At the bench trial held on June 26, 2009, Tipton claimed emphatically that he never believed Kimmie to be underage. He explained that he believed Kimmie was an adult who was pretending to be a teenager and that he knew this because her pictures did not look like

pictures of a teenager. When questioned about his many references during the chat conversation to Kimmie being a teenager, Tipton claimed he was being sarcastic or just playing along. Tipton did admit, however, that he drove to Heber Springs for the possibility of having sex with Kimmie.

At the close of all evidence, Tipton's attorney moved for dismissal. The circuit court denied the motion and found Tipton guilty of internet stalking of a child. In making its ruling, the court specifically found that Tipton's assertions—specifically that he did not believe Kimmie was under the age of fifteen—were not credible. Tipton was sentenced to forty-two months' imprisonment with an additional thirty-six months suspended and was ordered to pay a \$2,500 fine and other costs. He was also ordered to register as a sex offender. Tipton filed a timely notice of appeal.

For his appeal, Tipton challenges the sufficiency of the evidence presented by the State. When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in the light most favorable to appellee and affirm if substantial evidence supports the guilty verdict. *Turner v. State*, 2010 Ark. App. 214, at 3. Substantial evidence is evidence—either direct or circumstantial—that will, with reasonable certainty, compel a conclusion one way or another without resorting to speculation or conjecture. *Id.* It is within the province of the fact-finder to determine the weight of the evidence and the credibility of the witnesses. *Id.* Likewise, a fact-finder is free to draw upon its common knowledge and experience to infer

a defendant's intent or state of mind. *Gikonyo v. State*, 102 Ark. App. 223, 229, 283 S.W.3d 631, 635 (2008).

A person commits the offense of internet stalking of a child if the person, being at least twenty-one years of age, knowingly uses a computer online service, internet service, or local internet bulletin-board service to seduce, solicit, lure, or entice an individual that the person believes to be fifteen years of age or younger, in an effort to arrange a meeting with the individual for the purpose of engaging in sexual intercourse, sexually explicit conduct, or deviate sexual activity. Ark. Code Ann. § 5-27-306(a)(2) (Supp. 2009). In this case, Tipton admits that he was over the age of twenty-one when he knowingly used a computer to chat with Kimmie. However, he disputes the other elements of the crime.

Most of Tipton's arguments center on his subjective disbelief that Kimmie was under the age of fifteen. Although Tipton claims repeatedly that much of what he said during the chat conversation was meant to be sarcastic, whether to believe Tipton's self-serving testimony was strictly a matter of credibility for the fact-finder. Here, the fact-finder specifically found such statements to not be credible. Therefore, we must instead look to the remaining evidence that supports the guilty verdict and determine whether it is substantial. We hold that it is.

Kimmie informed Tipton of her age at the very beginning of the chat session. At no time did she ever say that she was any age other than thirteen-going-on-fourteen. Although Tipton wanted her to say she was twenty-one instead, Kimmie merely said "okay" in

response to his coaxing. Throughout the rest of the conversation, Tipton continually referred to Kimmie's young age and his trepidation about meeting such a young girl. Although it is impossible to ascertain exactly what Tipton's beliefs were about Kimmie's age, this evidence supports an inference that Tipton believed Kimmie was under the age of fifteen.

Tipton also argues that, because Kimmie's profile picture was actually a photograph of thirty-eight-year-old Detective Bettis, he could not have reasonably believed that Kimmie was under the age of fifteen. The profile picture is contained in the addendum, along with the other two photographs Kimmie sent to Tipton. Estimating the age of a person based on a photograph alone is fairly difficult, especially considering that it is small and somewhat blurry, and in that photograph, the most prominent features—the eyes and mouth—are covered. Even enlarged, the picture shows no telltale signs of the woman's actual age. However, the weight to be given to the photograph is a question for the fact-finder. Considering this, along with the tenor of the conversation between Tipton and Kimmie, the photographs themselves do not support Tipton's argument that he could not have believed Kimmie was under age fifteen.

Tipton argues in his brief that there was no proof that he went to meet Kimmie for the purpose of sex. This argument is unconvincing because Tipton admitted during his testimony that he brought condoms to Heber Springs due to the possibility of having sex with Kimmie that day. Although Tipton's brief states that "there was no way to know" how long the condoms had been in Tipton's car, Tipton freely admitted on the stand that he brought

the condoms with him that day because he thought he might need them for sex. According to Tipton's testimony, he believed he was flirting and planning to meet with an adult for the purpose of cheating on his wife. Therefore, his attempt to now claim that sex was not on his agenda falls flat.

The remaining disputed element is that Tipton seduced, solicited, lured, or enticed Kimmie to meet with him. Although Tipton states in the beginning of his brief that this, too, was unsupported by substantial evidence, he makes no effort to develop any arguments supporting this contention. A mere conclusory statement in a point for appeal, without supporting arguments or citation to authority, constitutes a waiver of the question, and the issue will not be addressed on appeal. *Estacuy v. State*, 94 Ark. App. 183, 188, 228 S.W.3d 567, 571 (2006).

The facts presented here leave some questions as to whether the statutory requirements were clearly met. However, we do not concern ourselves with this because it was not fully developed on appeal. The record contains substantial evidence supporting the verdict, so that one could conclude with reasonable certainty that Tipton believed Kimmie was under the age of fifteen and that he arranged to meet with her for the purpose of engaging in sexual activity. For these reasons, we affirm.

Affirmed.

HART and BROWN, JJ., agree.