NOT FOR PUBLICATION

In the United States Court of Appeals
For the Eleventh Circuit

No. 26-10313
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OBDY JESSAEL MENCIA GUERRERO,
a.k.a. Obdy J. Mencias,
a.k.a. Obdy Mencia Guerrero,
a.k.a. Obdy Jehzael,
a.k.a. Obdy Guerrero,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:24-cr-00101-JA-PRL-1

Before GRANT, LAGOA, and KIDD, Circuit Judges.

PER CURIAM:

Obdy Jessael Mencia Guerrero appeals his conviction for attempting to entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). He argues that the district court erred when it refused to instruct the jury on entrapment because the undercover officer's statements in their text and phone conversations amounted to more than a scintilla of evidence of government inducement.

After careful review of the record, we conclude that Guerrero did not produce sufficient evidence of government inducement to warrant an entrapment instruction and affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In July 2024, Deputy Regan Thoresen of the Marion County Sheriff's Office served as an undercover decoy in an operation targeting adults who use online platforms to solicit minors. She created a profile on Badoo, an adult-only dating application, under the name "Avery," and she used photographs of herself at age 13. Because Badoo prohibits minors, the profile listed Avery as over 18. As Avery, Deputy Thoresen would "swipe right" on other users' profiles, wait for them to message her, move the conversation to text messaging, and disclose that Avery was 14. If the user raised sexual activity, she would then arrange a meeting.

On July 14, 2024, Avery matched with Guerrero on Badoo, and Guerrero messaged her first, asking for her phone number. By text, Guerrero told Avery he was 37; she then said she was 14 and asked whether that was okay with him, and he answered, "Yes." He then asked her out, and when she asked what he wanted to do,

he said, "You can come to my house tonight, and tomorrow we can go eat." Avery asked what he wanted to do at his house, and he said they could "get to know each other and see what we do," and added that "we can do everything you like."

Guerrero then called Avery and suggested they drink beer and watch television. Avery asked, "Okay, is that all?" and said the plan "sounds kind of boring." Guerrero suggested going to eat the next day and, after Avery remained noncommittal, told her it was "okay" if she did not want to come over that night.

When texting resumed, Avery told Guerrero she would have to "sneak out," and she asked where she would sleep and what he wanted to do since she would be at his house until the next day. Guerrero answered, "Of course, if you want we can do it." When Avery asked, "Do what?," he wrote, "Look, I want to know you and I'm going to respect you. I would like to have a girl as pretty as you." Avery asked whether they were "just going to drink beer and watch TV the whole night." Guerrero answered, "Yeah," and added that it was too late to buy beer; they instead agreed to meet the next afternoon. Avery did not send her address the next day.

Eleven days later, Guerrero texted Avery "Y," and she did not respond. Two days after that, on July 27, he wrote again, saying he would like to meet her "[t]onight if you can," and asked whether she would come stay with him at his house. Avery asked what they would do. Guerrero suggested they could talk, and Avery replied that she did not want to go all the way to Daytona

"just to talk" because that was "lame." Guerrero responded, "We can have a good time, and we can have sex." Avery replied, "Okay that would be fine," and asked when. Guerrero then asked, "Would you like to have sex with me?" Avery said, "Sure, if you want to," and Guerrero followed up with, "Yes." When Avery asked whether he was still okay with her being 14 and not "super experienced," he answered, "It's okay."

Guerrero then requested assurance that Avery would not get him into trouble, and he asked whether she had ever had sex with someone older; she answered, "Once." They agreed that he would pick her up at a gas station near her house, and on a second call, Guerrero told Avery, "I am scared because you're 14, you know?" When Avery later texted that she was "not trying to get pregnant," he responded, "Don't worry" and "We'll do it with protection." Guerrero then drove to the gas station, where the deputies arrested him.

A grand jury indicted Guerrero for attempted enticement of a minor (Count One) and illegal reentry (Count Two). The district court severed the counts, and Guerrero proceeded to trial on Count One. At the charge conference, he requested the pattern entrapment instruction, and both parties agreed that *United States v. Mayweather*, 991 F.3d 1163 (11th Cir. 2021), supplied the governing standard. Defense counsel argued that Avery's repeated questions about what they would do, and her statements that Guerrero's suggestions were boring, signaled that he needed to "escalate." The government responded that Avery never raised sex and

that Guerrero alone introduced it after a two-week lapse in which Avery did not contact him.

The district court declined to give the instruction. It explained that the government had merely created an opportunity rather than designed a crime, that Avery did not "initiate anything" but instead "puts him off," and that her statement that watching television would be boring was "not the government manufacturing a crime." The jury found Guerrero guilty. Guerrero later pleaded guilty to Count Two, and the district court sentenced him to concurrent terms of 121 and 24 months' imprisonment. Guerrero timely appealed.[1]

II. STANDARD OF REVIEW

We review *de novo* whether a defendant produced sufficient evidence to warrant an entrapment instruction. *See United States v. Dixon*, 901 F.3d 1322, 1346–47 (11th Cir. 2018); *Mayweather*, 991 F.3d at 1174 n.13.[2] A district court's refusal to give a requested instruction is reversible error only if the instruction "(1) is correct, (2) is not substantially covered by other instructions which were delivered, and (3) deals with some point so 'vital' that the failure to give the requested instruction seriously impaired the defendant's ability

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[1] Guerrero does not challenge his conviction or sentence on Count Two.

[2] Guerrero contends that we review for abuse of discretion. While some of our earlier decisions purported to review this question for abuse of discretion, *see, e.g., United States v. Chirinos*, 112 F.3d 1089, 1101 (11th Cir. 1997), we have since clarified that the correct standard is *de novo*. *See Dixon*, 901 F.3d at 1346–47; *Mayweather*, 991 F.3d at 1174 n.13.

to defend." *Mayweather*, 991 F.3d at 1175 (citation omitted). A defendant is entitled to instructions on a theory of defense only where there is "any foundation in the evidence" for it, *United States v. Ryan*, 289 F.3d 1339, 1344 (11th Cir. 2002) (quotation omitted), so the dispute here turns on whether Guerrero laid such a foundation.

III. ANALYSIS

A. *Entrapment and the Defendant's Burden of Production*

The entrapment defense rests on a distinction between the government's detection of crime and its creation of crime. "Artifice and stratagem may be employed to catch those engaged in criminal enterprises," *Sorrells v. United States*, 287 U.S. 435, 441 (1932), but "Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Jacobson v. United States*, 503 U.S. 540, 548 (1992) (citation omitted). The line falls "between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman v. United States*, 356 U.S. 369, 372 (1958).

Entrapment 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." *Mathews v. United States*, 485 U.S. 58, 63 (1988). The defendant bears the initial burden of producing sufficient evidence of government inducement, and in deciding whether he has met it, "we look only at whether there was sufficient evidence produced to raise the issue of government inducement," accepting the testimony most favorable to the

defendant. *Mayweather*, 991 F.3d at 1176. The defendant "must merely come forward with some evidence, more than a scintilla, that government agents induced him to commit the offense." *Id.* at 1176–77 (quotation marks omitted). If the defendant does, the government must prove predisposition to the jury beyond a reasonable doubt. *See id.* at 1176.

The burden on the defendant is light, but it requires more than evidence that the government presented the opportunity, however "attractive" that opportunity may be. *United States v. Sistrunk*, 622 F.3d 1328, 1334 (11th Cir. 2010). Accordingly, "evidence of the government's mere suggestion of a crime or initiation of contact is not enough." *United States v. Brown*, 43 F.3d 618, 623 (11th Cir. 1995). Inducement "requires an element of persuasion or mild coercion," which may be shown by evidence that the defendant "had not favorably received the government plan, and the government had to 'push it' on him, or that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate." *Mayweather*, 991 F.3d at 1177 (quoting *Sistrunk*, 622 F.3d at 1333). In short, inducement is "an opportunity *plus* some added government behavior that aims to pressure, manipulate, or coerce the defendant into criminal activity." *Id.*

The focus is the government's conduct. Evidence that the defendant eagerly agreed to the crime or declined an opportunity to back out goes to predisposition rather than inducement. *See id.* at 1180 n.20. However, whether the government had to overcome

a defendant's hesitation does remain a part of the inducement inquiry because the record must contain some evidence of government pressure or manipulation. *See id.* at 1177–78.

B. Guerrero Did Not Produce Sufficient Evidence of Inducement

Reviewing the record *de novo*, we agree with the district court. The content of the messages and calls was undisputed and admitted without objection, so the only question is whether that evidence, read in Guerrero's favor, shows inducement. It does not.

The July 14 conversation. Guerrero contends that Avery "urge[d]" him "to engage in a sexually explicit conversation" by repeatedly asking what they would do and by calling his suggestions boring. Avery's questions did come early and often, and Guerrero's suggestive statements followed her description of his suggested plans as "boring." A question that asks a defendant to state his own intentions, however, does not pressure him to form them. Avery never proposed sex or any particular activity; she asked what Guerrero wanted, and he answered. Moreover, when she asked directly whether they would just drink beer and watch television all night, he said yes.

The government also did not push a plan on a reluctant defendant. *See Mayweather*, 991 F.3d at 1177. Guerrero initiated the contact and invited Avery to his house shortly after learning she was 14. There was no hesitation for the government to overcome, and Avery did not press the invitation; she instead put it off, and when the next day came, she did not respond.

The contrast with *Mayweather* is instructive. There, the informant met one defendant's hesitation with repeated calls, promises to pay his traffic fines and other debts, and assurances that the crime would be quick and safe, which was pressure aimed at securing the defendant's participation in a crime the informant had proposed. *See* 991 F.3d at 1177–78. Here, Avery proposed no crime, made no promises, and never initiated contact.

The July 27 conversation. Guerrero renewed the conversation on his own after Avery had ignored his earlier message, and he asked her to stay at his house that night. When she said that coming to Daytona "just to talk" was "lame," he responded that "we can have sex." Avery's statement declined one activity; it did not propose another. Guerrero was the first to mention sex. Avery merely acquiesced, and when Guerrero then asked whether she wanted to have sex with him, her answer—"Sure, if you want to"—placed the decision back on him. Acquiescence to a defendant's proposal is not pressure to make the proposal.

Guerrero also points to Avery's later assurances that she would not tell anyone, that her mother did not pay attention to what she did, and that she was not trying to get pregnant. Taken as true, most of these statements simply answered Guerrero's own questions. Avery did raise the subject of pregnancy on her own, but she did so only after Guerrero had proposed sex, confirmed he wanted it, and arranged to pick her up. A question about the details of a plan the defendant has already made does not induce the de-

fendant to make it. Avery's statements may have made the opportunity easier to take, but an easy or attractive opportunity is not inducement. *See Sistrunk*, 622 F.3d at 1334.

To the extent Guerrero relies on the deception inherent in Avery's persona, that deception is the "artifice and stratagem" the law permits; it supplies the opportunity and not the "plus." *See Sorrells*, 287 U.S. at 441; *Mayweather*, 991 F.3d at 1177. Guerrero thus stands where the two *Mayweather* defendants who were not entitled to the instruction stood, as there was no evidence of pressure or manipulation and "simply no 'plus'" beyond the opportunity to commit the crime. 991 F.3d at 1179–80.

The portrayal of Avery. Guerrero next argues that the government portrayed Avery as a "sexually precocious" teenager interested only in sex who had "enjoyed" sex with an older man. The record does not support that characterization, even if read in his favor. Avery never mentioned sex before Guerrero did, and she told him she was "kind of new to this" and "not super experienced." Her answer that she had been with someone older "[o]nce" came only in response to Guerrero's question after he had already proposed sex. Nothing in that one-word answer supports the inference that she enjoyed the experience, and in any event, the statement made *after* Guerrero proposed sex could not have pressured him into proposing it.

The out-of-circuit decisions Guerrero cites do not suggest otherwise. The Eighth Circuit has listed a minor's sexually precocious portrayal as one relevant factor, *see United States v. Zupnik*,

989 F.3d 649, 655 (8th Cir. 2021), but it has held it insufficient where the defendant initiated the contact, initiated most of the sexual discussions, and proposed the encounter, *see United States v. Young*, 613 F.3d 735, 747 (8th Cir. 2010). Further, in *United States v. Pérez-Rodríguez*, 13 F.4th 1, 20 (1st Cir. 2021), the agent made adult sexual activity contingent on the defendant's participation in sexual activity with a minor and repeatedly suggested the encounter would benefit the child. Avery said nothing about harm or benefit, and Guerrero's own words noting that he was "scared because [Avery was] 14" show that he understood what he proposed.

Guerrero's remaining arguments. Guerrero contends that the government asks us to weigh the evidence and draw inferences against him. We have not done so. We have instead accepted every statement as Guerrero presents it and drawn every reasonable inference in his favor. Ultimately, the evidence—taken on his own terms—shows an opportunity and nothing more. Guerrero also argues that the district court conflated inducement with predisposition. Although the district court remarked that the operation sought people "predisposed" to the offense and that Guerrero did not appear to have been "hunting" for minors, its ruling rested on the absence of inducement. The district court explained that Avery "doesn't initiate anything" and her statements were "not the government manufacturing a crime." In any event, our review is *de novo*, and we independently conclude that Guerrero's evidence of inducement was insufficient.

Because Guerrero did not produce more than a scintilla of evidence of government inducement, we conclude that the requested instruction lacked an evidentiary foundation, and we need not reach the remaining requirements for reversible error. *See Mayweather*, 991 F.3d at 1175. We thus conclude that the district court did not err in declining to instruct the jury on entrapment.

IV. CONCLUSION

For the reasons stated, we affirm Guerrero's conviction.

AFFIRMED.