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of events and conclude that he killed Matsolonia because he hated her enough to have attacked her before. I would reverse the judgment and remand the cause for a new trial.

In closing, a trial court can avoid a retrial by requiring the proponent of extrinsic acts evidence to show that its theory of relevance does not depend on a propensity inference. A trial court should not be hypnotized by the prosecutor's sweeping incantations of identity, intent, modus operandi, motive, and absence of mistake. A trial court should adhere to rules we set out in *Sanchez* and not assume that the evidence is relevant to a catchall list of purposes. When the relevance is not clear, the court should insist that the proponent explain why the evidence will be necessary and set forth its chain of reasoning.

STATE OF NEBRASKA, APPELLEE, V.
DAVID M. KASS, APPELLANT.
799 N.W.2d 680

Filed July 15, 2011. No. S-10-315.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional presents a question of law, which an appellate court resolves without regard to how the issue was decided below.
2. **Jury Instructions.** Whether jury instructions are correct presents a question of law.
3. **Constitutional Law: Criminal Law.** The First Amendment limits a state's ability to prosecute certain criminal offenses.
4. **Constitutional Law: Presumptions.** Except for a few well-recognized categories of unprotected speech, a content-based restriction on speech is presumptively invalid and subject to strict scrutiny.
5. **Constitutional Law: Statutes: Proof.** When a party does not claim that a challenged law has no valid application, a facial challenge must establish that a substantial number of the law's applications are unconstitutional in relation to its legitimate sweep.
6. **Constitutional Law: Statutes.** If a statute is substantially overbroad, it invalidates all enforcement of the law.
7. **Constitutional Law: Statutes: Standing.** A party has standing to challenge a statute as overbroad, even if unaffected by the part that punishes protected speech, when the party claims that the statute will significantly compromise the free speech rights of others not before the court.
8. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct

which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech.

9. ____: ____. A court may invalidate a statute on its face only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies.
10. ____: ____. In considering a facial challenge to a law regulating speech, a court will narrow its application when the language is readily susceptible to such construction.
11. **Statutes: Legislature: Intent.** A statute is susceptible to a narrowing construction when the text or another source of legislative intent identifies a clear line that a court can draw.
12. **Jury Instructions: Appeal and Error.** When a party assigns as error the failure to give an unrequested jury instruction, an appellate court will review only for plain error.
13. **Appeal and Error.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
14. **Jury Instructions.** When instructing the jury, it is proper for the court to describe the offense in the language of the statute.
15. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
16. **Criminal Law: Entrapment: Words and Phrases.** In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense.
17. **Entrapment: Evidence: Proof.** The burden of going forward with evidence of government inducement is on the defendant. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. The court makes this determination as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden.
18. **Entrapment: Evidence.** A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses.
19. **Entrapment: Evidence: Words and Phrases.** Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, promise of reward, or pleas based on need, sympathy, or friendship. Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it.

20. **Entrapment: Words and Phrases.** Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive.
21. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
22. **Judges.** An abuse of discretion occurs when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
23. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
24. ____. In imposing a sentence, the sentencing judge is not limited to any mathematically applied set of factors.
25. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge.

CONNOLLY, J.

A jury found David M. Kass guilty of one count of enticement by an electronic communication device under Neb. Rev. Stat. § 28-833 (Reissue 2008). The district court sentenced Kass to 1 year in prison and ordered him to register as a sex offender. He argues that § 28-833 violates the First Amendment because it is facially overbroad, that the court erred in its jury instructions, and that his sentence is excessive. We affirm.

I. BACKGROUND

On July 13, 2009, Kass, an Omaha police officer, logged onto his "Yahoo!" chat account using his personal computer.

He used the screen name "chs1665." A La Vista police officer also logged onto the chat service that day. This officer, who was conducting an undercover investigation, signed in with a screen name that represented that he was a female. He adopted the screen name "mickigirl14." Because the "romance chat rooms" on the Yahoo! chat services require a person to be at least age 18 to enter, the officer entered a date of birth to indicate that the fictitious female was 19 years old.

The La Vista officer logged onto a chat room designated "Nebraska romance" and waited. He did not initiate contact with any of the other members present in the chat room. Eventually, a participant contacted the officer. The participant was Kass. The two began a conversation that spanned 1½ hours.

In our summary of the conversation that follows, we correct grammar, spelling, or punctuation only when the meaning would otherwise be unclear. We do not add "sic" at any point because it would be necessary far too often and would clutter the opinion.

About 5 minutes into the conversation, Kass asked the officer, or decoy, "asl [age, sex, location]?" To which the decoy responded, "14[, female,] omaha." Kass then said that he was 25, a male, and in Omaha. Kass asked if this was "too old?" The decoy asked, "4 whut?" Kass responded, "anything."

Kass directed the conversation. Shortly after asking the decoy's age, Kass asked the decoy what she was going to do that day. The decoy responded that she would be swimming at a pool at her grandmother's apartment complex. Kass asked whether her bathing suit was "one piece or two piece." When the decoy answered, "two," Kass responded, "nice." Kass also asked her if her suit was small. He asked her what apartment complex she would be swimming at. After the decoy asked why Kass would want to know, Kass backed off that line of questioning.

A short time later, Kass asked what the decoy was wearing. The decoy responded, "just some shorts and a tank, why[?]" Kass then said, "very cute just making convo." He then asked if she was home alone. The decoy responded that her grandmother would still be home for "a little while."

The conversation then turned to more personal matters. Kass asked if the decoy had a boyfriend. She responded, "not anymore." Kass then said, "awesome what all did you do with him?" The decoy responded that she would go to the movies or just hang out with her boyfriend. Kass asked, "did you kiss him?" The decoy responded, "hey now," as if to indicate that such a question was inappropriate. She stated further, "personal qwestion and i dont even no u." Later, after the decoy indicated that she went to a shopping mall often, Kass asked if she shopped at a certain lingerie store and if she had anything from the store. When the decoy indicated that she had underwear and a pajama shirt from the store, Kass asked "what style panties?" After Kass pressed for details on the underwear, the decoy said, "u sure like 2 ask qwestions bout whut i wear," which could again be seen as an indication by the decoy that the line of questioning was inappropriate. Kass responded, "sorry just being dumb lol."

The conversation continued down a sexual path, all seemingly at the direction of Kass and over the, albeit subtle, protestations of the decoy. Kass asked what size bra the decoy wore. The time logs on the chat indicate that the decoy did not respond for 2 minutes, at which time Kass asked, "cat got ur tongue?" The decoy responded, "just not sure if i shuld say." Kass said, "ok dont say if you dont want to." The decoy went on, "its just I dont no u very well . . . and im kinda embarrassed cuz i think im kinda small." Kass then coaxed her into saying that she wore a "32 a," to which Kass responded, "very nice." Kass then said, "i like tiny girls and being properly portioned to ur body is the key."

A short time later, Kass asked, "whats the most you have done with a boy?" The decoy asked if Kass was joking. Kass indicated that he might have been both asking seriously and joking at the same time. The decoy responded that she had not had sex but had done "some stuf." Kass asked if it was "oral fun or just hands?" The decoy then said, "ur not gonna think bad of me if i tell u are u[?]" After Kass said no, the decoy indicated it was oral sex. Kass then pressed for further details, including whether the decoy masturbated. After the decoy said that she had never "finished," Kass asked her,

"you wanna finish?" The decoy also stated that she had "never had one," presumably referring to an orgasm. Kass asked, "want one?" To which the decoy responded, "with u?" Kass answered, "suer . . . or with anyone." Kass pressed the decoy, later asking, "wanna get off?" and encouraged the decoy to try masturbating.

The conversation then turned to graphic detail regarding oral sex. Kass asked if the decoy would like to try it. The decoy then asked Kass if he would be interested in her, considering her age. Kass responded, "kinda." Kass continued to ask numerous detailed questions regarding the decoy's experience with oral sex.

Kass then asked about intercourse. He asked the decoy, "what about sex?" The decoy asked in return, "what bout it." Kass responded, "wanna?" The decoy responded, "alot of girls are doin it but im so scared of gettin pregnent." Kass answered, "condoms . . . lol." The decoy expressed her fear of getting pregnant, stating, "im 2 yung 2 have a baby." A short time later, Kass ended the conversation.

Two days after this conversation, officers served a search warrant on Kass' home. The State later charged Kass with one count of enticement by an electronic communication device in violation of § 28-833.

Before trial, Kass moved to quash or, in the alternative, demur to the information. Kass cited nine bases for his motion, including that the statute violated the First Amendment and was vague and overbroad because of its inclusion of a peace officer as a victim. The court denied this motion.

After the presentation of evidence, the court instructed the jury on two subsections of § 28-833, namely subsections (1)(a) and (c). The court did not instruct the jury on the meaning of "indecent, lewd, lascivious, or obscene." The record, however, does not indicate that Kass ever requested such an instruction. Although Kass had requested an instruction on the defense of entrapment, the court refused to give it. The court found that the record failed to show entrapment and stated that the defense seemed inconsistent with Kass' other defense that he thought the decoy was over the age of 16.

The jury found Kass guilty of enticement. The court then sentenced Kass to 1 year in prison and ordered him to register as a sex offender.

II. ASSIGNMENTS OF ERROR

Kass raises four assignments of error, which we restate as follows:

(1) The court erred in concluding that § 28-833 is not overbroad, in violation of the First Amendment.

(2) The court committed plain error in failing to instruct the jury on the definition of "indecent, lewd, lascivious, or obscene."

(3) The court erred in failing to instruct the jury on an entrapment defense.

(4) The court erred in imposing an excessive sentence.

III. STANDARD OF REVIEW

[1,2] Whether a statute is constitutional presents a question of law, which we resolve without regard to how the issue was decided below.[1] Whether jury instructions are correct also presents a question of law.[2]

IV. ANALYSIS

1. Overbreadth of § 28-833

[3] Kass' first argument is that § 28-833 is overbroad and thus violates the First Amendment. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech"[3] and is made applicable to the states by the Due Process Clause of the 14th Amendment.[4] The First Amendment limits a state's ability to prosecute certain criminal offenses.[5]

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[1] See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

[2] See *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009).

[3] U.S. Const. amend. I.

[4] *Va. Pharmacy Bd. v. Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

[5] *State v. Drahota*, 280 Neb. 627, 788 N.W.2d 796 (2010).

At oral argument, Kass stressed that he was challenging only subsection (1)(a) as being overbroad. Accordingly, we will analyze only that section. Section 28-833(1) provides:

> A person commits the offense of enticement by electronic communication device if he or she is nineteen years of age or over and knowingly and intentionally utilizes an electronic communication device to contact a child under sixteen years of age or a peace officer who is believed by such person to be a child under sixteen years of age and in so doing:
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> (a) Uses or transmits any indecent, lewd, lascivious, or obscene language, writing, or sound;
>
> (b) Transmits or otherwise disseminates any visual depiction of sexually explicit conduct as defined in section 28-1463.02 [defining terms under Child Pornography Prevention Act]; or
>
> (c) Offers or solicits any indecent, lewd, or lascivious act.

We recently considered an equal protection challenge to Neb. Rev. Stat. § 28-320.02 (Reissue 2008), which criminalizes enticement of a child by an electronic communication device to engage in sexual conduct if the sexual conduct would violate specified criminal statutes.[6] We rejected the defendant's argument that the statute was subject to strict scrutiny because it jeopardized the exercise of the fundamental rights to free speech and sexual privacy. We held that the First Amendment does not protect speech used to entice a minor to engage in illegal sexual conduct. We also held that the fundamental right to sexual privacy does not apply to statutes regulating sexual conduct with a minor.[7] Under the same reasoning, we have held that strict scrutiny did not apply to a statute regulating child pornography.[8] Child pornography is not protected speech when adequately defined.[9]

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[6] See *Rung, supra* note 1.

[7] See *id.*

[8] See *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005).

[9] See, *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993).

But § 28-833(1) is not limited to the transmission of child pornography or speech to entice a child to engage in illegal sexual conduct. Subsection (1)(a) prohibits a person over the age of 19 from using an electronic communication device to transmit to a child age 16 or younger any speech that is "indecent, lewd, lascivious, or obscene." Because this prohibition is not tied to promoting illegal activity,[10] we must consider whether it violates the First Amendment's protection of speech.

[4-6] Except for a few well-recognized categories of unprotected speech,[11] a content-based restriction on speech is presumptively invalid and subject to strict scrutiny.[12] The state bears the burden to rebut that presumption.[13] But when a party does not claim that the challenged law has no valid application, a facial challenge must establish that a substantial number of the law's applications are unconstitutional in relation to its legitimate sweep.[14] If shown, this substantial overbreadth invalidates all enforcement of the law.[15] Conversely, the attack fails if the challenger fails to meet this burden.[16]

[7] As noted, the court instructed the jury that it could convict Kass if it found that the State had proved a violation of § 28-833(1)(a) or (c). We do not know under which subsection the jury convicted Kass. Even in that circumstance, however, Kass does not argue that he was engaged in constitutional speech or that subsection (1)(a) is unconstitutional as applied to him. Nonetheless, a party has standing to challenge a statute as overbroad, even if unaffected by the part that punishes protected speech, when the party claims that the statute will significantly compromise the free speech rights of others not

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[10] See *Rung, supra* note 1.

[11] See *Drahota, supra* note 5.

[12] See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L Ed. 2d 865 (2000).

[13] *Playboy Entertainment Group, Inc., supra* note 12.

[14] See, e.g., *U.S. v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

[15] *Virginia v. Hicks*, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

[16] *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

before the court.[17] This exception to traditional standing rules exists out of "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[18]

[8,9] A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech.[19] A court may invalidate a statute on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies.[20] A realistic danger must exist that the statute will significantly compromise recognized First Amendment protections of parties not before the court.[21]

Here, Kass cannot meet that burden. He argues that because the statute does not define "indecent, lewd, lascivious, or obscene," the statute is overbroad in its application. We recognize that the U.S. Supreme Court in *Reno v. American Civil Liberties Union*[22] struck down a similar statute, in part, over its concern that Congress failed to define the terms "'indecent'" and "'patently offensive'" in a manner that ensured they would not be applied to protected speech.[23] But here, the Legislature has used a phrase to define the prohibited conduct that we previously construed in *State v. Kipf*.[24] The Legislature obviously intended to restrict the range of this statute to our earlier construction.

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[17] See, *Hicks, supra* note 15; *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *Hookstra, supra* note 16.

[18] See *Hicks, supra* note 15, 539 U.S. at 119.

[19] *Rung, supra* note 1.

[20] See *id.*

[21] See *id.*

[22] See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

[23] *Id.*, 521 U.S. at 865.

[24] *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

[10,11] In *New York v. Ferber*,[25] the U.S. Supreme Court held that child pornography, though separate from obscenity, is not protected by the First Amendment if the conduct to be prohibited is "adequately defined by the applicable state law, as written or authoritatively construed." The Court has further stated that in considering a facial challenge to a law regulating speech, it will narrow its application when the language is readily susceptible to such construction.[26] We have recognized a similar standard for overbreadth challenges.[27] A statute is susceptible to a narrowing construction when the text or another source of legislative intent identifies a clear line that a court can draw.[28]

Here, the Legislature's use of the phrase "indecent, lewd, lascivious, or obscene," which is the same phrase that we construed in *Kipf*, identifies a clear line that we can apply to narrow the statute's reach. In *Kipf*, we considered a challenge to Neb. Rev. Stat. § 28-1310 (Reissue 1985), which criminalizes intimidation by telephone call if, with intent to terrify, intimidate, threaten, harass, annoy, or offend, a person telephones another and "uses indecent, lewd, lascivious, or obscene language or suggests any indecent, lewd, or lascivious act." We held that the phrase "indecent, lewd, lascivious, or obscene" refers to language that "conjures up repugnant sexual images."[29]

Further, we emphasize that to violate § 28-833, a person must "knowingly and intentionally . . . contact" the minor or decoy. We construe this language to mean that the statute only applies when a person uses the prohibited speech in a private conversation with a minor or a decoy. In other words, the statute only applies when the defendant is speaking exclusively to a minor or decoy. Such a construction eliminates any possibility of chilling constitutionally protected speech among adults, which was a major concern of the Court in *Reno*.

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[25] See *Ferber, supra* note 9, 458 U.S. at 764.

[26] See *Reno, supra* note 22.

[27] See, e.g., *Hookstra, supra* note 16.

[28] See *Reno, supra* note 22.

[29] *Kipf, supra* note 24, 234 Neb. at 235, 450 N.W.2d at 405.

When these limiting constructions are applied to § 28-833, the statute proscribes a person age 19 or older from knowingly and intentionally using an electronic communication device to contact a child under age 16, or peace officer whom the person believes to be a child under age 16, and using language that conjures up repugnant sexual images. This restriction does not include within its ambit the concerns raised in *Reno*.[30] That is, it does not, for example, restrict an adult from having a serious conversation with a child under age 16 about birth control practices, homosexuality, or prison rape.[31] Similarly, the narrowed construction of the statute is sufficient to restrict its application to speech that lacks serious literary, artistic, political, or scientific value.[32] Thus, we conclude that Kass' overbreadth challenge fails.

2. Jury Instructions

Kass also argues that the court erred in failing to instruct the jury in two respects.

(a) Instruction on Meaning of Terms "Indecent, Lewd, Lascivious, or Obscene"

Kass argues that the court erred in not instructing the jury on the meaning of the terms "indecent, lewd, lascivious, or obscene." Kass argues that the court erred in not providing definitions of the terms. The record, however, indicates that Kass never requested such an instruction.

[12,13] Because Kass did not request this instruction, we review the court's failure to give it only for plain error.[33] Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[34]

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[30] *Reno, supra* note 22.

[31] See *id.*

[32] See *Kipf, supra* note 24.

[33] See *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[34] *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[14] The failure to define the terms in the statute does not rise to the level of plain error. The jury instructions described the offense in the language of the statute. And we have previously held that it is proper for the court to describe the offense in the language of the statute.[35] There was no plain error in the court's instruction on the elements of the crime.

(b) Entrapment

Kass argues that the court erred in denying his request for a jury instruction on the defense of entrapment. We find that on the record before us, the evidence does not warrant an entrapment instruction.

[15] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[36]

[16-18] When a defendant raises the defense of entrapment, the trial court must determine, as a matter of law, whether the defendant has presented sufficient evidence to warrant a jury instruction on entrapment.[37] In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense.[38] The burden of going forward with evidence of government inducement is on the defendant. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. The court makes this determination as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial

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[35] See *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

[36] *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009).

[37] *Id.*

[38] *Id.*

burden.[39] A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses.[40]

[19,20] Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, promise of reward, or pleas based on need, sympathy, or friendship. Inducement requires something more than a government agent or informant suggested the crime and provided the occasion for it.[41] Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive.[42] To show inducement, "a defendant must establish that '[it was] the prosecution [that] set the accused in motion . . . .'"[43]

Kass claims two facts show inducement—that given the decoy's profile and Yahoo!'s chat room policies, Kass thought the decoy was over 18, and that the decoy was the first to use the word "sex" or "oral." Neither of these facts suffices to show inducement.

The record shows that Kass was informed of the decoy's supposed age well before he said anything that even approached the speech covered by the statute. When the decoy told Kass her age, Kass asked if he was too old, which indicates that he read and understood the decoy's message. And other statements made by Kass and the decoy lead us to believe that Kass knew he was talking to a minor. At this point, Kass could have left the conversation without violating any law. The decoy did not encourage him to stay. Nor did the decoy urge him to discuss anything sexual. In fact, the chat logs indicate

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[39] See *id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *U.S. v. Brand*, 467 F.3d 179, 190 (2d Cir. 2006), quoting *United States v. Sherman*, 200 F.2d 880 (2d Cir. 1952).

that the decoy protested when Kass' questions and comments turned sexual. Even over these protests, Kass continued to push the conversation toward the topic of sex. The only times the decoy mentioned sex were in response to Kass' questions. The record fails to show that the State induced Kass to act. Accordingly, it was not error for the trial court to refuse the requested instruction.

3. Excessive Sentence

Finally, Kass argues that his sentence is excessive. The court sentenced Kass to 1 year in prison with credit for 2 days served and ordered Kass to register as a sex offender.

Kass was convicted under § 28-833, which is a Class IV felony. Under Neb. Rev. Stat. § 28-105 (Reissue 2008), a person convicted of a Class IV felony can be sentenced to 0 to 5 years in prison, a $10,000 fine, or both. The court sentenced Kass to 1 year in prison, which is well within the statutory limits.

[21-25] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[44] An abuse of discretion occurs when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[45] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[46] In imposing a sentence, the sentencing judge is not limited to any mathematically applied set of factors.[47] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's

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[44] *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009).

[45] See *Rung, supra* note 1.

[46] *Id.*

[47] *Id.*

demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[48]

Given Kass' age, his education, the offense, and the fact that he was a police officer, we conclude that the court did not abuse its discretion in sentencing Kass to 1 year in prison.

V. CONCLUSION

We conclude that none of Kass' assignments of error have merit. We affirm his conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

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[48] *Id.*

IN RE INTEREST OF KATRINA R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KATRINA R., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

799 N.W.2d 673

Filed July 15, 2011. No. S-10-643.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
2. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
3. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
4. ____: ____: ____. Absent any provision affirmatively stating otherwise, it is within the juvenile court's discretion to issue whatever combination of statutorily authorized dispositions as the court deems necessary to protect the juvenile's best interests.
5. **Juvenile Courts: Jurisdiction: Statutes: Child Custody.** It is within the juvenile court's statutory power to issue a dispositional order for juveniles adjudicated under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2008), which includes both legal custody with the Department of Health and Human Services and supervision by a probation officer.

Appeal from the County Court for Lincoln County: KENT D. TURNBULL, Judge. Affirmed.