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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

TAMMY MICHELLE RUSH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00759-7

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly prohibited Keith Rush from testifying about his cooperation agreement with Oregon police officials because said testimony would not have been relevant to establish the defense of entrapment by estoppel for his wife Tammy Rush.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Tammy Michelle Rush¹ was charged by amended information with two counts of Possession of a Controlled Substance with Intent to Deliver – Methamphetamine, with count one occurring on January 30, 2015 and count two occurring on March 30, 2016, one count of Possession of a Controlled Substance – Cocaine occurring on January 30, 2015, and one count of Bail Jumping on a Class B or C Felony for missing a required court appearance on September 1, 2016. CP 60-61. Each Possession with Intent to Deliver count included a school bus route stop enhancement and was based on evidence found following vehicle stops of Tammy, and subsequent searches of those vehicles and the Rushes' residence. CP 60-61.

The case proceeded to a jury trial before the Honorable Robert Lewis on January 9, 2017 and concluded on January 12, 2017 with the

¹ Because Tammy Rush's husband, Keith Rush, is mentioned frequently in this brief I intend to refer to each by their first name to avoid confusion. No disrespect is intended.

jury's verdict convicting Tammy as charged and answering yes on the special verdict forms for the school bus route stop enhancements. RP 72-471; CP 212-17.² The trial court sentenced Tammy to a standard range sentence of 50 months plus an additional 24 months for the school bus route stop enhancements³ for a total of 74 months to be served in confinement. CP 274-284. Tammy filed a timely notice of appeal. CP 288.

B. STATEMENT OF FACTS

Tammy and Keith Rush lived in a residence at 2105 East 26th Street in Vancouver, Washington. RP 100, 126-27, 144, 189. The residence included a detached garage wherein Tammy sometimes stayed. RP 133, 144, 191, 201. On January 30, 2015, Washington police officials, as part of an execution of a search warrant, stopped the Rushes who were departing their home in a BMW SUV that Tammy was driving. RP 100, 126-27. Upon being stopped, the officers retrieved a set of barrel keys from Tammy's person. RP 109-110, 130, 142. The keys provided access to locked storage cabinets in the Rushes' garage. RP 129-131, 142-44. The police unlocked one of the cabinets using the barrel keys and found cocaine, a working digital scale, and packaging material, to include empty plastic bags. RP 103-112, 129-135, 142-44, 294. The police also found

² Tammy does not challenge her convictions for counts 2 or 4 or the school bus route stop enhancements.

³ The enhancements ran consecutive to the base sentence but concurrent to each other. CP 277.

995.9 grams of methamphetamine, i.e., just under a kilogram or 2.2 pounds, hidden in the rafters of the garage in an ice cream box along with additional packing material. RP 128-29, 294-95.

The Rushes were not booked into jail following the execution of the search warrant and discovery of the drug evidence. RP 220, 513-14, 521-22. Instead, Washington police officials decided to release the couple because they had learned from an Oregon police official, prior to the execution of the warrant, that if the Rushes were arrested and booked into jail that an ongoing Oregon investigation could be disrupted. RP 513-15, 522-25.

On March 30, 2016, Washington police officials again stopped Tammy as she was driving, this time by herself,⁴ in a black SUV. RP 190-91, 230-31. Pursuant to Tammy's consent, the police searched Tammy's backpack, which was within the SUV, and found four individual bags of methamphetamine⁵ and cash money. RP 195-96, 232-35, 323-328. Following the stop, the police executed another search warrant at her residence and the same detached garage that was the subject of the January 2015 search. RP 146, 153, 167-69. During the search the police found

⁴ Keith was in prison. RP 203, 344, 380.

⁵ The total weight of the methamphetamine was not established, but a forensic scientist testified that the bag with the "visually largest amount" contained 221.65 grams of methamphetamine, that two other bags appeared to contain a similar amount, and that the fourth bag contained significantly less methamphetamine than the others. RP 324-25.

\$13,000 in cash hidden in a paper towel dispenser, a large money counter, a pound-size digital scale, and numerous documents and mail, which helped establish Tammy's residency and control over the premises. RP 146-49, 154-164, 171-75, 179-183, 200-01.

Finally, Tammy made multiple admissions to the investigating detective following the traffic stop, to include that (1) she had approximately a pound of methamphetamine in her backpack that was located in *her* SUV; (2) she received approximately a kilogram (2.2 pounds) of methamphetamine from her suppliers every other day and that she pays \$9,000 for each kilogram; (3) she had a scale and packaging for the methamphetamine at her house; (4) a number of people owed her debts for the methamphetamine she had given to them; (5) over half of the cash money found at the house was the result of drug proceeds; and (6) she had about four or five customers to whom she dealt methamphetamine and was making about \$6,000 a week of profit from dealing to them. RP 191-204.

Keith's Cooperation Agreement

Before January 30, 2015, the date of the first crimes in Washington for which Tammy was charged, Keith had been charged with multiple serious drugs crimes in Oregon. CP 132-39. After Keith had been charged,

he entered into a cooperation agreement with Oregon police officials. CP 132-39. Throughout, and prior to Tammy's trial she sought to introduce evidence of Keith's cooperation agreement with Oregon police officials in which he agreed to assist in gathering evidence against other Oregon drug dealers and testify against them in return for the ability to plead to a reduced crime and to receive a more favorable sentencing recommendation. RP 8-10, 221-26, 337-351, 541-43; CP 132-39. She essentially argued that Keith's agreement to cooperate with Oregon police officials immunized her from prosecution for the drug dealing activity for which she was charged. She made this argument despite providing offers of proof—in the form of testimony from herself and Keith—to the court that on January 30, 2015 she was not told, and had no knowledge, of Keith's cooperation agreement. RP 337-351, 541-43. Ultimately, the trial court prohibited Tammy from introducing said evidence because it could not establish the proffered defense of entrapment by estoppel and was otherwise irrelevant. RP 357-362.

ARGUMENT

I. The trial court properly prohibited Keith Rush from testifying about his cooperation agreement with Oregon police officials because said testimony would not have been relevant to establish the defense of entrapment by estoppel for his wife Tammy Rush.

The defense of entrapment by estoppel is an affirmative defense that may be raised in only certain, relatively narrow, circumstances. *State v. Krzeszowski*, 106 Wn.App. 638, 646, 24 P.3d 48 (2001); *State v. Sweeney*, 125 Wn.App. 77, 83, 104 P.3d 46 (2005); *U.S. v. Votrobek*, 847 F.3d 1335, 1344 (11th Cir. 2017). The circumstances under which the defense may be raised are when a government official or agent expressly and “actively mislead[s] the defendant” that certain “proscribed activity was in fact legal” and thereby induces the defendant to engage in that proscribed activity. *Krzeszowski*, 106 Wn.App. at 646 (citation and internal quotation omitted); *Sweeney*, 125 Wn.App. at 83; *U.S. v. Mergen*, 764 F.3d 199, 205 (2nd Cir. 2014) (noting that the defense “requires that the government, by its own actions, induce[] [the defendant] to do [criminal] acts and le[a]d him to rely reasonably on his belief that his actions would be lawful by reason of the government’s *seeming* authorization”) (alterations and emphasis in original) (citation and internal quotation omitted). Thus, where “the government agent has not expressly represented the activity as legal, the defense does not apply.” *Krzeszowski*,

106 Wn.App. at 646 (citation omitted); *Votrobek*, 847 F.3d at 1344 (holding that the defense “requires a showing that a government official affirmatively communicated to the defendant the official’s approval *of the conduct at issue*”) (emphasis added).

While the focus on whether the defense can be raised is “on the conduct of the government not the intent of the” defendant, the defendant’s reliance on the government’s express and active misrepresentation must still be reasonable. *U.S. v. Spires*, 79 F.3d 464, 466 (5th Cir. 1996); *Krzeszowski*, 106 Wn.App. at 646 (citation omitted); *State v. Leavitt*, 107 Wn.App. 361, 372, 27 P.3d 622 (2001) (citation omitted). Additionally, the defense is not available where the government that expressly and actively misleads and “the government that prosecutes are not the same.” *U.S. v. Bruscantini*, 761 F.2d 640, 642 (11th Cir. 1985); *U.S. v. Caron*, 64 F.3d 713, 715-17 (1st Cir. 1995); *U.S. v. Etheridge*, 932 F.2d 318, 320 (4th Cir. 1991); *U.S. v. Brebner*, 951 F.2d 1017, 1026-27 (9th Cir. 1991); *Votrobek*, 847 F.3d at 1345. In other words, a defendant cannot reasonably rely on the legal representations made by a state government official who lacks the authority to bind a different state to his or her representation. *Bruscantini*, 761 F.2d at 642; *Brebner*, 951 F.2d at 1026-27. Finally, “[g]reat caution should be exercised when it comes to the application of [this] defense” as “the defendant’s conduct must remain

within the general scope of the solicitation or assurance of authorization and the defense will not support a claim of an open-ended license to commit crimes in the expectation of receiving subsequent authorization.” *Mergen*, 764 at 205 (citations and internal quotations omitted).

Here, the trial court properly excluded Keith’s testimony regarding his cooperation agreement with Oregon law enforcement officials because said agreement was not relevant to a defense of entrapment by estoppel.⁶ RP 60-63, 357-362, 561. His testimony on this topic was not relevant, i.e., would not help to establish the defense for Tammy, because (1) no governmental official expressly misrepresented *to* Tammy that *any* of her drug dealing activity was legal; (2) no governmental official expressly misrepresented *to* Tammy that her drug dealing activity or possession of drugs on January 30, 2015 was legal; and (3) no governmental official expressly misrepresented *to* Tammy that her drug dealing activity or possession of drugs in Washington was legal. Because no governmental official expressly misrepresented anything to Tammy regarding her drug dealing activity she could not have been induced by the government to

⁶ Thus, the standard of review is abuse of discretion based on the exclusion of the testimony or evidence rather than a de novo review based on a defendant’s constitutional right to present a defense. *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). It is well-settled that a defendant does not have a right to present irrelevant or otherwise inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010).

engage in the illegal drug dealing activity for which she was convicted nor could she have reasonably relied on any misrepresentation.

In fact, the multiple offers of proof made—by defense counsel, Tammy, and Keith—and the written cooperation agreement between Keith and Oregon police officials established that on January 30, 2015, Tammy was completely unaware of Keith’s cooperation agreement,⁷ that Keith’s written cooperation agreement did not mention Tammy, and that Keith’s written cooperation agreement did not authorize him or anyone else to commit crimes in Washington. RP 56, 59, 338-39, 342-43, 345-48, 350, 541-43; CP 132-139.⁸ When combined with the testimony of Washington police officials that on January 30, 2015 they were not parties to the Oregon agreement, were not privy to the details of that agreement, did not make any agreements with Keith or Tammy on that day, and were not

⁷ In fact, despite evidence to the contrary, Keith claimed that Tammy had no knowledge of the drugs that were present in their garage on January 30, 2015. RP 337-351. When offered the opportunity to testify at trial to his wife’s lack of knowledge, Keith invoked his Fifth Amendment right to not—further—incriminate himself. RP 376-78.

⁸ Section 2.I of the agreement states: “[t]he Multnomah County District Attorney agrees that the defendant will not be charged or prosecuted for any activities performed under the supervision and at the specific direction of participant law enforcement officers. The defendant understands and acknowledges, however, the defendant’s involvement in any criminal conduct, including but not limited to . . . the unlawful manufacture, distribution, possession or use of controlled substances, without the knowledge and specific authorization of participant law enforcement officers, shall constitute a breach of this agreement.”

Section 2.L of the agreement states: “[t]he defendant understands and acknowledges that this agreement constitutes the exclusive agreement between the parties, that there are no other promises, representations, or agreements between the parties, expressed or implied, other than those contained in this agreement.”

directed by Oregon officials to take specific acts,⁹ there was no relevant basis by which to admit Keith's testimony regarding his cooperation agreement and no basis by which Tammy could raise the defense of entrapment by estoppel. RP 494-96, 506-08, 513-515, 520-531.

Furthermore, to the extent that any governmental official expressly misrepresented the law, it would have been Oregon police officials misrepresenting the law to Keith. As established above, such a misrepresentation would not be sufficient—even if the misrepresentation was made directly to Tammy—for raising the defense of entrapment by estoppel since the defense is not available where the government that expressly and actively misleads and “the government that prosecutes are not the same.” *Bruscantini*, 761 at 642; *Caron*, 64 F.3d at 715-17; *Brebner*, 951 F.2d at 1026-27. Tammy, however, now contends that Washington police officials ratified the purported representations of the Oregon police officials by not arresting her on January 30, 2015 and thereby authorized her drug activity on that date. Brief of Appellant at 8-9. This argument is without merit. First, as noted above, the offers of proof provided at trial do not establish the necessary premise of that argument—that Oregon police officials expressly authorized the drug dealing activity

⁹ An Oregon police officer did contact Det. Chris Luque after discovering that Keith and Tammy had been stopped and informed him that it would be detrimental to an investigation if the couple were arrested, but understood if they had to be. RP 524.

in question. Second, the decision to not arrest does not equate to a police official expressly and “actively mislead[ing]” Tammy that certain “proscribed activity was in fact legal.” *Krzeszowski*, 106 Wn.App. at 646. Third, because the unlawful drug dealing activity had already taken place before Tammy had any contact with Washington police officials, nothing that the Washington police officials did after that fact, whether they “ratified” the Oregon agreement or not, could logically be characterized as inducing Tammy to engage in the unlawful drug dealing activity as would be required for her to raise the defense. Thus, Tammy’s argument fails and the trial court correctly ruled that Keith’s testimony regarding his cooperation agreement was irrelevant.

Even if, however, the trial court erred when it restricted the scope of Keith’s allowable testimony¹⁰ any error was harmless under any harmlessness test. Here, the evidence against Tammy for the crimes committed on January 30, 2015 was overwhelming and included her personal possession of the barrel keys that unlocked the cabinet within her garage that contained the cocaine, a scale, and packaging material,

¹⁰ Had Keith testified consistent with his offer of proof at trial then the State would have been able to impeach him with his statements to the police on January 30, 2015. Amongst those statements that would have undermined Tammy’s purported defense, Keith told the police that he was angry with Tammy because he had told her to stop dealing so much recently but that she had refused and was continually selling large quantities of methamphetamine. CP 1-3. He also told the police that Tammy placed the methamphetamine in the garage on the day in question. CP 1-3.

methamphetamine within her garage, and her later, numerous and detailed admissions upon being contacted and arrested on March 30, 2016.

CONCLUSION

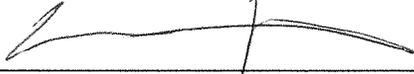
For the reasons argued above, this Court should affirm the trial court's ruling excluding evidence of Keith's cooperation agreement and affirm Tammy's convictions.

DATED this 5th day of Jan, 2018.

Respectfully submitted:

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