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No. 52285-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL KEEN JR.

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

The Washington State Patrol initiated a sting operation using an on-line advertisement involving an officer posing as a minor. Mr. Keen answered the advertisement and engaged in sexually explicit correspondence with this fictitious minor. Mr. Keen was subsequently arrested and charged with communication with a minor for an immoral purposes after he arrived at a preselected location to allegedly engage in sexual activity. The police also specifically chose the fictitious minor's age to be 13 years of age in order to subject Mr. Keen to a potential conviction for attempted second degree rape of child and the resulting potential harsh sentencing consequences. The police action in arbitrarily seeking this increased potential sentence was outrageous conduct. Mr. Keen asks this Court to reverse the trial court's denial of his many motions to dismiss for outrageous government misconduct.

In addition, despite his indigency and his several prior Washington felony convictions, the trial court imposed the \$100 DNA collection fee. Mr. Keen asks that this fee be stricken under the amendments to the law regarding indigent defendants.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to dismiss the attempted rape of a child conviction for a violation of due process.

2. The trial court erred in entering Conclusion of Law 3, stating:

Law enforcement did not commit entrapment of the defendant as defined in RCW 9A.16.070. Law enforcement did not engage in “sentencing entrapment” by selecting 13 as the age of the fictional child.

3. The trial court erred in entering Conclusion of Law 4, stating in relevant part:

There has been no showing of governmental misconduct that would trigger any remedy to the defendant under Criminal Rule 8.3(b) . . . There is no evidence of any police misconduct. The State has not engaged in any “outrageous conduct” that would result in dismissal under Rule 8.3.

4. The trial court erred in imposing the \$100 DNA collection fee.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Outrageous government misconduct violates a defendant’s right to due process of law and requires dismissal of the charges with prejudice. Where, in setting up a sting operation, the police specifically choose the age of the fictitious victim at 13 in order to increase the

possible sentence, is the remedy of dismissal be applied to deter the State from committing similar egregious misconduct in the future?

2. Amendments to the statutes authorizing imposition of Legal Financial Obligations (LFO) bar imposition of the DNA fee where the defendant is indigent and he has already had DNA taken from a prior felony conviction. These amendments apply to all those whose appeal is pending at the time of the legislation's passage. Is this Court required to strike the \$100 in discretionary LFOs imposed by the trial court where Mr. Keen was indigent and had several Washington prior felony convictions?

D. STATEMENT OF THE CASE

Washington State Patrol (WSP) Sergeant Carlos Rodriguez, along with other members of the WSP, conducted a "Net Nanny" on-line sting in Vancouver by posting a Craigslist advertisement in the "Casual Encounters" section. RP 230-32, 237, 267.

The operation is called Operation Net Nanny. It's an undercover operation where we, through undercover personas, use various different online and social media platforms to chat with individuals who are interested in having sex with kids.

RP 274. The advertisement involved a male looking for another male who was interested in very young men. RP 232-33. The police chose 13

years old as the age of the fictitious young male, acknowledging that the ultimate crime is based upon this age:

Q. You designed this ad, right?

A. I placed the ad.

Q. Well, you created the ad?

A. Yes.

Q. Designed it?

A. Okay.

Q. Okay. And that's to ultimately design a crime you want a response to.

A. Did you say design a crime?

Q. That's what you're doing when you're fishing for people, aren't you?

A. No.

Q. Well, you picked the age, didn't you?

A. Yes.

Q. Okay. The crime is based on the age, isn't it? It is?

A. That is a part of -- that is one of the steps.

RP 235-36 (WSP Sergeant Rodriguez).

Specifically, the police chose the age of 13 because the individual could then be charged with attempted second degree child rape:

Q. Okay. Why did the State Patrol use a thirteen-year old versus a fifteen-year old versus a sixteen-year old? Do you know why?

A. Well, it's because of the attempted rape of a child in the second degree.

Q. So, they were designing the crime that way?

A. Yes.

Q. Okay. Pick the age, design the crime?

A. Yes.

RP 271-72 (WSP Trooper Califano).

Daniel Keen was one of the people who responded to the advertisement. RP 231. WSP Detective Kristl Pohl engaged in email correspondence with Mr. Keen, posing as a 13 year-old male named "Jake." RP 310, 320. The correspondence became more graphically sexual in nature. RP 321-26. The correspondence was continued over the next two days via text messaging conducted by WSP Detective Robert Givens, again continuing the ruse of posing as a 13 year-old male. RP 342-43.

On February 18, 2017, the fictitious 13 year-old male and Mr. Keen agreed to meet to engage in a sexual encounter. RP 387-88. Mr. Keen was initially directed to a 7-Eleven. RP 391-92. Shortly thereafter, Mr. Keen was directed to the house in which the WSP was conducting the sting, where he was arrested. RP 248-49, 268. When he was arrested, Mr. Keen was carrying a bag with condoms, personal lubrication, and other items of a sexual nature. RP 249.

Mr. Keen was charged with a count of attempted second degree rape of a child and a count of communication with a minor for immoral purposes. CP 436. Prior to trial, Mr. Keen moved to dismiss the prosecution for a violation of his due process rights based upon the outrageous conduct of the police in purposely selecting the age of the victim at 13 years. CP 12-72. He renewed the motion prior to trial and again following conviction in a motion for a new trial. CP 228-382, 484-87. The trial court denied each of these motions. CP 214-16, 484-87.

Mr. Keen sought, and the trial court agreed to give, a jury instruction on entrapment. CP 464; RP 430. During their deliberations, the jury sent a question to the court:

IF WE THE JURY AGREE THE DEFINITION OF
ENTRAPMENT IN THIS CASE HAS BEEN MET AS
PRESCRIBED IN PARAGRAPH ONE OF JURY INSTRUCTION
#16, DOES THE DEFENSE OF ENTRAPMENT STAND
IF THE JURY ALSO AGREES ^{THAT} ~~IF~~ LAW ENFORCEMENT DID
NOT VIOLATE THE PARAMETERS OF PARAGRAPH #2?

CP 472.¹ The court had the jury refer to the court's instructions. CP

473. Shortly thereafter, the jury reached its verdict.

Mr. Keen was convicted as charged. CP 474-75. He was sentenced to an indeterminate term of 76.5 months to life on the attempted rape of a child count and 12 months on the communication count. CP 492. Despite Mr. Keen having several Washington prior

¹ The jury instruction on entrapment reads:

Entrapment is a defense to a charge of attempted rape of child in the second degree if the criminal design originated in the mind of law enforcement officials or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit the crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense it will be your duty to return a verdict of not guilty as to the charge.

CP 464.

felony convictions within the past 10 years, the trial court imposed the \$100 DNA collection fee. CP 495.

E. ARGUMENT

1. The police action of selecting the age of the “victim” to increase the sentence amounted to outrageous governmental misconduct.

a. Conduct that violates fundamental fairness violates the defendant’s right to due process.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects against conduct by state actors “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996), quoting *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). The conduct “must be so shocking that it violates fundamental fairness.” *Russell*, 411 U.S. at 432; *Lively*, 130 Wn.2d at 19-20.

Unlike entrapment, where the focal issue is the predisposition of the defendant to commit the offense, outrageous conduct is focused on the State’s behavior. *Lively*, 130 Wn.2d at 19. This form of outrageous conduct is founded on the principle that the conduct of law enforcement officers may be so outrageous that due process principles would bar the State from invoking judicial processes to obtain a conviction. *Russell*,

411 U.S. at 431-32; *Lively*, 130 Wn.2d at 19. Such conduct must be so outrageous that it violates the concept of fundamental fairness inherent in due process and shocks the sense of universal justice mandated by the due process clause. *Dodge City Saloon, Inc. v. Wash. State Liquor Control Bd.*, 168 Wn.App. 388, 402, 288 P.3d 343, *review denied*, 176 Wn.2d 1009 (2012); *State v. Pleasant*, 38 Wn.App. 78, 82, 684 P.2d 761 (1984). Whether the State has engaged in outrageous conduct is a matter of law. *Lively*, 130 Wn.2d at 19.

In determining whether the State's conduct offends due process, courts review the totality of the circumstances. *Lively*, 130 Wn.2d at 19. "Each case must be resolved on its own unique set of facts." *Id.* at 21.

b. The act of selecting the age of the fictitious "victim" in order to increase the sentence amounted to outrageous conduct.

The police were in complete control of the direction this sting took, especially in selecting the age of the fictitious victim, thereby increasing the potential sentence that would be imposed.² This ability to arbitrarily increase the potential sentence is so outrageous that the

² Mr. Keen moved to dismiss for "sentence entrapment" or "sentence manipulation." CP 12-24. "Sentence manipulation" and "sentence entrapment" fall within the rubric of outrageous government conduct. *United States v. Sanchez*, 138 F.3d 1410, 1413-14 (11th Cir. 1998).

attempted rape count should have been dismissed. The trial court erred in failing to grant Mr. Keen's motion to dismiss for outrageous government conduct.

The *Lively* Court suggested several factors which courts should consider when determining whether police conduct offends due process. One factor in determining whether outrageous conduct occurred is whether the government conduct controls the criminal activity or simply allows for the criminal activity to occur.³ *Lively*, 130 Wn.2d at 25. Another related factor regarding outrageous conduct is whether the police motive was to prevent further crime or protect the populace, i.e., whether the government conduct demonstrates a greater interest in creating crimes to prosecute than in protecting the public from further criminal behavior. *Id.* at 26.

The jury's question indicated that the jury agreed that the police engineered this crime and directed it but Mr. Keen had not carried his

³The factors described by the *Lively* Court are: whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation; whether the government controls the criminal activity or simply allows for the criminal activity to occur; whether the police motive was to prevent crime or protect the public; and whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice." *Lively*, 130 Wn.2d at 22.

burden of persuading the jury that he was entrapped. The facts certainly bear this out. Even the mere fact that Mr. Keen communicated in a sexual manner with a minor was sufficient to prove he was arguably guilty of the offense of communicating with a minor for an immoral purpose. But this was not enough for the police. The testimony of the troopers shows they specifically chose the age of the fictitious youth at 13 because they were aware that this fact would increase the potential sentence to an offense with an indeterminate sentence.⁴ Increasing the potential sentence in this arbitrary manner was outrageous conduct.

The fact that Mr. Keen did not prevail in his entrapment defense does not preclude a finding that the police engaged in outrageous conduct:

The two defenses, therefore, are independent. A defendant could be predisposed (and thereby lose his entrapment defense), but could prevail on his outrageous government conduct defense if government misconduct rose to a sufficiently egregious level. A defendant's predisposition would indicate only that the government's conduct in securing his conviction did not contravene Congress's conception of what constitutes a violation of its statutes. Such predisposition would not, however, automatically grant law enforcement officials free reign to secure his conviction through tactics that offend due

⁴ Attempted rape of a child in the second degree is a class A felony with a sentence of a minimum term of the standard range and maximum term of the statutory maximum of life. RCW 9.94A.507(1)(a), (3), RCW 9A.28.020(3)(a), RCW 9A.44.076(2).

process. If a defendant is predisposed to commit a particular crime, the government may employ any tactics that do not violate the defendant's due process rights in order to secure his conviction for that crime.

Stephen A. Miller, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 Nw. U. L. Rev. 305, 337 (1996) (internal footnote omitted).

The fact the jury found Mr. Keen had not carried his burden of proving entrapment in no way precludes a finding that the police acted in an outrageous manner in arbitrarily selecting the age of the fictitious minor, thereby subjecting the defendant to a significantly increased potential sentence. Without a remedy of dismissal, the police will continue to seek higher and higher potential sentences based solely on their arbitrary choice of the fictitious victim's age. *See State v. Solomon*, 3 Wn.App.2d 895, 916, 419 P.3d 436 (2018) ("In ruling to dismiss the charges, the trial court did not adopt a view that no reasonable judge would take. Given the court's finding that law enforcement had initiated and controlled the criminal activity, persistently solicited Solomon to commit the crimes so initiated, and acted in a manner (through the use of language and otherwise) repugnant to the trial judge's view of the community's sense of justice, the trial court's determination was tenable."). Mr. Keen's conviction

for attempted second degree rape of a child in the second degree should be reversed and dismissed.

2. Amendments to the statutes authorizing legal financial obligations requires that the \$100 in legal financial obligations against Mr. Keen be stricken.

In 2018, the law on legal financial obligations changed. Laws of 2018, ch. 269. Now, it is categorically impermissible to impose discretionary costs on indigent defendants. RCW 10.01.160(3). The Washington Supreme Court has determined that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). In other words, that the statute was not in effect at the time of the trial court's decision to impose legal financial obligations does not matter. *Id.* at 747-48. Applying the change in the law, the Supreme Court in *Ramirez* ruled the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.*

Mr. Keen has several Washington State felonies since 1990. Since that time, Washington has required defendants with a felony conviction to provide a DNA sample. Laws of 1989, ch. 350, § 4; RCW 43.43.754. Here in light of Mr. Keen's prior felony convictions, this Court must presume that a DNA sample has been collected from Mr.

Keen prior to the current judgment and sentence. Given this, the trial court erred in imposing the \$100 DNA collection fee and it must be stricken.

F. CONCLUSION

For the reasons stated, Mr. Keen asks this Court to reverse with instructions to dismiss his attempted second degree rape of a child conviction or reverse and remand for resentencing to strike the \$100 DNA collection fee.

DATED this 26th day of June 2019.

Respectfully submitted,

s/Thomas M. Kummerow

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