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

STATE OF WASHINGTON, Respondent

v.

DANIEL KEEN JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00390-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The police did not engage in outrageous governmental misconduct when it selected the age of the “victim” as 13 as part of its operation designed to locate and prosecute individuals desiring to engage in unlawful sexual conduct with minors.**
- II. **The State concedes that the \$100 DNA collection fee imposed by the trial court must be stricken upon remand.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Daniel Keen Jr. was charged by amended information with Attempted Rape of a Child in the Second Degree and Communication with a Minor for Immoral Purposes for his actions on, about, or between February 15, 2017 and February 19, 2017. CP 436-37. Prior to trial, Keen sought dismissal of the charges alleging, amongst other things, outrageous governmental misconduct under the banner of “sentencing entrapment” or “sentence manipulation” when the police posed as a 13-year-old boy as part of a sting operation.¹ CP 12-24, 228-236, 383; RP 7-10. The trial court, the Honorable Gregory Gonzales, denied Keen’s motion to dismiss. CP 213-16; RP 27-29.

¹ Keen renewed this motion to dismiss at the close of the State’s case. RP 415-16. The trial court denied this motion. CP 486-47; RP 418-19.

The case proceeded to a jury trial, which commenced on June 11, 2018 and concluded the next day, June 12, 2018. RP 227-465. The jury returned its verdicts on June 13, 2018 finding Keen guilty as charged. CP 474-75; RP 473-77. The trial court sentenced Keen to a standard range, minimum term of 76.5 months with an indeterminate maximum term pursuant to RCW 9.94A.507. CP 488-492; RP 489-490. Keen filed a timely notice of appeal. CP 515.

B. STATEMENT OF FACTS

In February of 2018, the Washington State Patrol (“WSP”) conducted a “Net Nanny” online sting operation in Vancouver by posting a Craigslist advertisement in the “Casual Encounters” section. RP 230-32, 237, 267, 274. The advertisement stated “I’m young and want some fun – Twink-M4M” and “If you like young boys then HMU.” RP 232. The trooper that created the ad explained that “Twink” refers to a younger male that looks like a boy. RP 232, 235-36. He also explained that in “M4M” the “M” stands for male and that the acronym refers to the gender of the person posting the ad and the gender of the person that the poster is looking for; so in this case that the poster was a male looking for another male. RP 232-33. “HMU” in the ad means “hit me up,” which, in turn, means “contact me.” RP 233-34. The advertisement also requested a picture. RP 234. The purpose of posting the advertisement and of the

language used was to have contact with “individuals who are interested in having sex with kids.” RP 274, 334.

If anyone responded to the ad, the troopers of the WSP were going to assume the fictitious identity of a thirteen-year old boy named “Jake.” RP 319-322. Keen responded to the ad via email on February 15, 2017 and correspondence ensued. CP 25-26²; RP 310-11, 317-18, 322. Keen’s initial email stated “Daddy has a morning eight-inch woody boy” and included three pictures, two of which were of a penis. CP 26; RP 321-22, 329-330. “Jake” responded “Damn yes, you do hot. How old are you?”. CP 26; RP 322. Keen wrote back the following:

Going to run this by asking that question like everybody does does it really matter if your not fucking the HR number your fucking a dick in a man or being fucked by one but if you must know I am 5’10 160 48 I have more experience in rimming sucking fucking and massaging then you have your entire life. I’ll treat your body like an island and I’m the treasure hunter.

CP 26; RP 322-23.

The trooper posing as Jake responded in another email stating “I didn’t really understand that but whatevs I’m 13 I’ve played a little with my cuz but want to try everything.” CP 26; RP 323. Keen’s next response included an acknowledgment of “Jake’s” age:

² Keen attached the probable cause statement, which contains the electronic correspondence between Keen and “Jake,” to his pre-trial motion to dismiss.

Did you say your only 13 I just sent my pictures to a 13 year old boy. Do you know that you can get everybody in trouble that talks to you on this website? Anyone who talks to you, let alone makes contact with you can end up in jail for a very long time. Do you not know this, are you real, are you police bait trap. . . . Or are you just a horny young teenage boy

CP 27; RP 323-24. After a couple more short responses by each party, the trooper posing as “Jake” sent an email stating “I’m not the cops sorry to freak you out bye” as a means of “cutting communication with him if he was not interested in speaking to someone my age.”³ CP 27; RP 324.

Keen, however, continued to communicate with “Jake” and the conversation was moved to text message where another trooper assumed the identity of “Jake.” CP 27; RP 325-27, 341-43.

Keen texted with “Jake” over the next three days. CP 27-32; RP 345, 407. Keen sent additional pictures of his penis. CP 27-29; RP 345-46, 351-52. Keen enquired as to where “Jake” lived. RP 347. Keen made many explicit sexual comments and described sex acts that he would like to perform on “Jake.” CP 29-32; RP 355-59, 384-85. And Keen acknowledged that “Jake” was 13 on multiple occasions, and if he forgot “Jake” repeatedly reminded him. CP 28, 31; RP 349, 351, 354, 386, 391. Finally, Keen proposed meeting “Jake” by “stop[ping] over before I go to work or pick[ing] you up after or something.” RP 388-89.

³ This second quotation is the trooper’s testimony not a statement made by “Jake” in an email.

That same day, February 18, 2017, a meeting was setup wherein Keen would go to a 7-Eleven and then be directed to the house in which WSP was conducting the sting operation. RP 390-93. Keen showed up at the sting house, knocked on the door, walked in, and was arrested. RP 244-45, 248-49, 268, 393. When Keen was arrested he was carrying a Slurpee for “Jake” and a bag containing condoms, lubricants, sex toys, and masturbation devices. RP 249, 291-93, 302.

ARGUMENT

I. The police did not engage in outrageous governmental misconduct when it selected the age of the “victim” as 13 as part of its operation designed to locate and prosecute individuals desiring to engage in unlawful sexual conduct with minors.

Police action in investigating crime can be “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *State v. Solomon*, 3 Wn.App.2d 895, 902, 419 P.3d 436 (2018) (quoting *State v. Lively*, 103 Wn.2d 1, 19, 921 P.2d 1035 (1996)). This outrageous conduct “must be so shocking that it violates fundamental fairness.” *Id.* (quoting *Lively*, 103 Wn.2d at 19-20). Dismissal is not proper just because the police “act[] deceptively” or even if the police engage in flagrant “deceitful conduct” or a “violation of criminal laws;” rather dismissal “based on outrageous conduct is

reserved for only the most egregious circumstances.” *Id.* at 902 (citations omitted). Thus, it comes as no surprise that the “defense of government misconduct is nearly impossible to establish.” *State v. Markwart*, 182 Wn.App. 335, 348, 329 P.3d 108 (2014). Accordingly, Washington courts have declined to dismiss convictions for outrageous governmental misconduct where the police or its agents have engaged in illegal activities, to include engaging in acts of prostitution, where the police purchased “lewd table dances with public funds to gain evidence of violation of liquor rules,” and where the police established an elaborate operation for the purchase and sale of stolen goods. *Id.* at 350-51 (citing cases).

When considering a claim of outrageous governmental misconduct trial courts are to “evaluate the conduct based on the totality of the circumstances” considering each case’s “own unique set of facts” and “bearing in mind proper law enforcement objectives—the prevention of crime and the apprehension of violators. . . .” *Id.* at 903 (citations omitted) (internal quotations omitted). More specifically, courts must consider the five *Lively* factors:

[(1)] whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; [(2)] whether the defendant’s reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation; [(3)] whether the

government controls the criminal activity or simply allows for the criminal activity to occur; [(4)] whether the police motive was to prevent crime or protect the public; and [(5)] whether the government conduct itself amounted to criminal activity or conduct repugnant to a sense of justice.

103 Wn.2d at 22 (internal citations omitted). Appellate courts review a trial court's denial of a motion to dismiss on the "basis of outrageous governmental misconduct under an abuse of discretion standard."

Solomon, 3 Wn.App.2d at 910 (internal quotation omitted).

In the trial court, Keen complained about the fact that the police chose the age of the "victim" as 13, which he referred to as "sentencing entrapment" or "sentencing manipulation" and acknowledged that proof of such generally allows only for the possibility of "a downward departure" at sentencing. CP 12-24; RP 7-10. On appeal, Keen argues that "sentence entrapment" falls under the banner of "outrageous government misconduct" such that the remedy for proof of sentencing entrapment is dismissal. Br. of App. at 9-10 n. 2 (citing *U.S. v. Sanchez*, 138 F.3d 1410, 1413-14 (11th Cir. 1998)). But even *Sanchez*, the case cited by Keen, recognized that "[n]o court of appeals has overturned a conviction . . . on the basis of a sentencing manipulation claim" and that the other circuit courts of appeal that recognize the claim—not all do—only consider whether this kind of "manipulative government conduct warrant[s] a downward departure in sentencing." 138 F.3d at 1413-14; *see U.S. v.*

Guest, 564 F.3d 777, 781 (6th Cir. 2009) (affirming that the Sixth Circuit does not recognize “sentencing entrapment” or “sentence manipulation” where the FBI created two fictitious children rather than one as part of a sting operation); *U.S. v. Garcia*, 411 F.3d 1173, 1180 (10th Cir. 2005) (recognizing that sentencing manipulation, even if considered outrageous governmental misconduct, may entitle one to a downward departure at sentencing); *U.S. v. Stauffer*, 38 F.3d 1103, 1106-08 (9th Cir. 1994) (same).

Solomon is instructive. 3 Wn.App.2d 895. There, an “officer assumed the guise of a fictional 14-year-old girl and sent Solomon nearly 100 messages laden with graphic, sexualized language and innuendo and persistently solicited him to engage in a sexual encounter with the fictional minor, notwithstanding that he had rejected her solicitations seven times over the course of four days.” 3 Wn.App.2d at 897-98. Solomon held that “the detective’s use of graphic and highly sexualized language amounted to a manipulation of Solomon” and, as a result, the trial court did not abuse its discretion when it dismissed the prosecution. *Id.* at 915-16.

Here, however titled, the WSP did not engage in outrageous governmental misconduct. The WSP’s actions in assuming the identity of the fictional 13-year-old “Jake” stand in stark contrast to police in *Solomon*. The WSP did not use graphic and highly sexualized language—

Keen did, the WSP did not persist in soliciting⁴ a meeting—Keen did, and there was never an attempt by Keen to discontinue communications with or reject “Jake,” on the contrary when “Jake” gave Keen a chance to discontinue the communication by saying “sorry to freak you out bye” Keen continued to message “Jake.” Keen’s only reluctance in communicating with “Jake” was his concern that it was a “police bait trap.” RP 324.

Applying the *Lively* factors leads to the same conclusion. The WSP’s ad infiltrated ongoing criminal activity and did not instigate it. Keen instigated the criminal activity by responding to the ad and requesting sexual contact with a child. The WSP did not need to overcome Keen’s reluctance to commit a crime by “pleas of sympathy, promises of excessive profits, or persistent solicitation” since Keen did not exhibit any real reluctance in meeting with “Jake” for the purpose of having sex. The WSP did not engage in any criminal activity during the sting operation. The WSP did not control the criminal activity; instead it allowed for it to occur. Keen initiated the sexual discussions, which amounted to a crime, controlled the extent of the crime, and arranged for the crime to take place. Finally, the motive of the WSP was to prevent crime and protect the public by intercepting adults that have a sexual interest in children. RP 398-400;

⁴ The WSP, of course, acceded to a meeting following Keen’s proposal.

See State v. Jacobson, 3 Wn.App.2d 1058, 2018 WL 2215888, 8-9 (2018) (declining to find governmental misconduct during a Craigslist sting operation wherein the police posed as a mother of an 11-year-old girl)⁵; *see also State v. Forler*, 9 Wn.App.2d 1020, 2019 WL 2423345, 7-9 (2019) (declining to find governmental misconduct during a Craigslist sting operation wherein the police posed as a mother of two children, ages seven and eleven).⁶

Furthermore, the act of selecting the age of the fictitious victim as 13, i.e., an age younger than necessary to be able to establish *some* crime, is far from outrageous governmental misconduct. That the sentencing consequences for the defendant are steeper does not change the calculus. On the contrary, the decision to choose as young an age as possible is wise. As Detective Robert Givens explained “[w]e’re looking for adults that have a sexual interest in children” and “we want those [(sexual predators)] who are targeting the more vulnerable, and the younger are logically the more vulnerable.” RP 398-400. Keen knew that “Jake” was thirteen and he chose to use his own transportation to travel to meet Jake with condoms, lubricants, and sex toys for what he thought

⁵ This Court’s opinion in *Jacobson* is unpublished. Pursuant to GR 14.1 the opinion “may be accorded such persuasive value as the court deems appropriate.”

⁶ The court’s opinion in *Forler* is unpublished. Pursuant to GR 14.1 the opinion “may be accorded such persuasive value as the court deems appropriate.”

would be sex with a child. Accordingly, the trial court did not abuse its discretion when it denied Keen's motion to dismiss.

II. The State concedes that the \$100 DNA collection fee imposed by the trial court must be stricken upon remand.

The \$100 DNA collection fee cannot be imposed on an indigent defendant upon a felony conviction when the defendant's criminal history included a prior felony for which RCW 43.43.751(1)(a) required the collection of a DNA sample from the defendant. RCW 43.43.751(2); *State v. Anderson*, 9 Wn.App.2d 430, 460-61, 447 P.3d 176 (2019); *State v. Maling*, 6 Wn.App.2d 838, 844-45, 431 P.3d 499 (2018). Here, the trial court found Keen indigent and Keen's criminal history includes multiple felonies that required the collection of a DNA sample from him. CP 491, 502-03. Accordingly, this Court should remand to the trial court with instructions to strike the \$100 DNA collection fee.

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CONCLUSION

For the reasons argued above, Keen's convictions should be affirmed and his case should be remanded to the trial court to strike the \$100 DNA collection fee.

DATED this 29th day of October, 2019.

Respectfully submitted:

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