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Court of Appeals
Division II
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No. 53260-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

EZRA D. WRIGHT,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 16-1-01590-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a defendant is entitled to a jury instruction on entrapment when they respond to an ad for "family playtime," engage in a text message conversation to arrange sex with an 11-year-old-girl, and ignore repeated opportunities provided by law enforcement to cease communications.

2. Whether law enforcement engages in outrageous conduct that undermines fundamental fairness by merely infiltrating the world of internet crimes against children by posting an ad on Craigslist, which a defendant responds to, arranges sex with a minor and travels to a pre-arranged location prepared to engage in that activity despite being given several opportunities to back out.

B. STATEMENT OF THE CASE.

The Washington State Patrol Missing and Exploited Children's Task Force (MECTF) conducts undercover operations where detectives post ads online to look for individuals who are looking to have sex with children. RP 362-363, 376. In September of 2016, the MECTF conducted such an operation in Thurston County. RP 376. For that operation, detectives from the MECTF created personas "based on actual cases where people were

providing their children for sex." RP 377. Detective Sgt. Carlos Rodriguez indicated the

> Internet Crimes Against Children Task Force program helps state and local law enforcement agencies develop an effective response to technology facilitating child sexual exploitation and Internet Crimes Against Children. This support encompasses forensic and investigative components, training and technical assistance, victim services, prevention and community education.

RP 428-429.

For the Thurston County operation, the MECTF posted an add on Craigslist in the "casual encounters" section. RP 430. The add was titled, "Family playtime!?! -W4M," and the ad stated, "Mommy/Daughter, daddy/daughter, daddy/son, mommy/son. You get the drift. If you know what I'm talking about, hit me up, we'll chat more about what I have to offer you." RP 441, Ex 5. The appellant, Ezra Wright, responded to the ad. RP 442.

Detective Krista Kleinfelder wrote to Wright, "I'm not into role-playing only someone serious. I'm a single mother of three young kids, 13, 11, and 6, looking for someone to teach my kids," and provided a phone number and a code word for Wright to continue chatting with her. RP 444, Ex 5. She followed that with "This is taboo and not for everyone." RP 444, Ex 5.

Wright initiated a text message conversation using the code word that Kleinfelder provided, indicating that he was "open to whatever." RP 452, Ex 1. Kleinfelder asked him if he had experience with younger kids and when Wright asked, what do you want me to do with them, responded, "I like to watch someone have sex with them." RP 452, Ex 1. Rather than backing out of the conversation, Wright then asked to see pictures and continued texting with Kleinfelder's fictious persona, "Hannah." RP 452, Ex 1.

At one point during the messaging, Wright stated, "My gut tells me you aren't for real in this," and stated, I'm real. I'm military." RP 454, Ex 1. Kleinfelder responded indicating that she did not feel that he was being honest or direct and indicating that she was trying to filter out flakes. RP 454, Ex 1. Again, rather than discontinuing messages, Wright responded, stating, "This is illegal in a lot of ways. You can - - we can meet if that makes you feel better." RP 454-455, Ex 1.

Kleinfelder responded, "Me and my family live a discreet life filled with taboo. I don't think it's wrong, but others do, so I have to be careful," to which Wright responded, "I just don't want to get in trouble with the law. Do you want to meet tonight?" RP 455, Ex 1. Kleinfelder replied, "I understand. Then this not for you. For what?"

RP 455, Ex 1. Despite having been given a chance to discontinue the chats, Wright continued texting with Kleinfelder and when she asked, "tell me specifically what you want with me kids," Wright replied, "I'll have sex with the girls but not the male. Does that sound good to you?" RP 455, Ex 1.

When Kleinfelder stated, "How big are you? The six year old is kind of small. I would also require condoms," Wright responded, I'm 5'5". I have condoms," and asked for a picture of "just the girls." RP 456, Ex 1. Wright asked, "Do they both consent to this? The're not going to tell anyone else." RP 456-457, Ex 1. After Kleinfelder responded, "They know we don't talk about playtime. We have our little secrets. They are both very excited," Wright responded, "when are you available? And where are you from?" RP 457, Ex 1.

Wright continued texting, stating, "I'm available tonight if you are," to which Kleinfelder responded, "Do you have condoms?" RP 457, Ex 1. Wright and Kleinfelder continued chatting and Wright indicated that he was interested in "just the 11-year-old for now." RP 457, Ex 1. Wright indicating he was "from JBLM" and asked if Kleinfelder could meet in Puyallup. When Kleinfelder stated, "No. I have a place here, and it will be comfortable and relaxing for you," Wright responded, "Okay. I hope you're not a cop." RP 457, Ex 1.

After Kleinfelder responded, "I hope you are not a cop coming from JBLM," Wright wrote, "Nope. This has to be as discreet as possible." RP 457, Ex 1. Wright asked if the daughters could come outside and asked for pictures of the area surrounding the apartment, to which Kleinfelder responded, "It's okay if you don't want to come here. You can walk away. I'd understand." RP 458-459, Ex 1. Wright asking if they could meet somewhere neutral first and Kleinfelder responded, "I get it. Maybe this isn't for you. I'm not taking my 11-year-old and six-year-old out in the middle of the night. Either at my place or this isn't for you." RP 459, Ex 1.

Wright then asked about meeting during the next day, to which Kleinfelder responded, "Sorry, I'm done with these games." RP 459, Ex 1. Again, rather than discontinuing the conversation, Wright responded, this time stating, "All right, I'll be there. But if your place looks sketchy, I'm out." RP 459, Ex 1. Wright followed directions to a 7-Eleven in Tumwater and was eventually given the address of the apartment that the MECTF was using for its operation. RP 459-460, Ex 1.

When he arrived, Wright called to ask her to open the door because he was on the side walk. RP 462. Kleinfelder opened the

door and waved to him, at which time he asked to push the door open so he could see inside because he was concerned that there would be police offices inside. RP 462. Wright entered the apartment and said that "he was concerned that it was like a *To Catch a Predator* situation." RP 463. Wright was ultimately arrested by the MECTF operation in the apartment. RP 490. During a search incident to arrest, Wright had "a set of car keys, a cell phone and then a single Durex condom." RP 490. When law enforcement searched Wright's vehicle, they located a box of condoms. RP 499.

Wright was charged with attempted rape of a child in the first degree. CP 2. Following the State's case in chief, Wright offered Exhibit 16, which was a report containing the messages from Exhibit 1, along with other messages recovered from Wright's phone. RP 519, 524, 548. The defense offered no witnesses. RP 548-549. Wright's attorney proposed a jury instruction on entrapment, based on WPIC 18.05. CP 90. The trial court considered arguments from counsel regarding the instruction. RP 560-571. The trial court ruled

> With regard to the defense proposed entrapment instruction, the court is not including that instruction in its final set of instructions. The court believes that

> there is inadequate evidence in the record to support that instruction. The evidence here is quite limited. I do not believe that the lapse of time alone is enough, and the text messages, which I think are really the basis of any entrapment defense, clarify exactly what the detective was proposing, rather than luring or inducing, which is required. Therefore, the court is not including that instruction.

RP 572-573.

The jury convicted Wright as charged. CP 159. The minimum sentence was a downward exceptional sentence of 50 months, with a maximum sentence of life pursuant to RCW 9.94A.512. CP 240-253. This appeal follows.

C. ARGUMENT.

1. The trial court did not err when it denied Wright's request for a jury instruction on entrapment because the evidence demonstrated that Wright was not led to commit a crime that he was not predisposed to commit.

An instruction can be given to the jury if evidence exists to support the theory upon which the instruction is based. State v. Trujillo, 75 Wn. App. 913, 917, 833 P.2d 329 (1994); State v. Davis, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992). In order to be entitled to an entrapment instruction, "a defendant must present evidence which would be sufficient to permit a reasonable juror to conclude

that the defendant has established the defense by a preponderance of the evidence." Trujillo, 75 Wn. App. 917.

"The defense of entrapment is not established by a showing that law enforcement officials merely afforded the actor an opportunity to commit a crime." RCW 9A.16.070(2). A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. In re Detention of Pouncey, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). To prove the affirmative defense of entrapment, a defendant must show that he committed a crime, that the State or a State actor lured or induced him to commit the crime, and that the defendant lacked the disposition to commit the crime. State v. Lively, 130 Wn.2d 1, 9, 921 P.2d 1035 (1996); RCW 9A.16.070.

Several Washington State cases have considered the entrapment defense in the context of MECTF operations. In State v. Racus, 7 Wn. App.2d 287, 433 P.3d 830, 2019 Wash.App. LEXIS 176 (2019),[1] this Court found that the defendant failed to

[1] The discussion of entrapment occurs in the unpublished portion of the opinion and is offered only for whatever persuasive value that this Court deems appropriate pursuant to GR 14.1.

show by a preponderance of the evidence that he was entitled to an instruction on entrapment because, though he had initially "said that he did not want to do anything illegal, he reengaged in communications," therefore, the "WSP simply afforded [him] the opportunity to commit the crime." Id. at 27.

In State v. Carson, 2018 Wash.App. LEXIS 2269,[2] Division III of this Court found that the defendant failed to present sufficient evidence for an entrapment instruction despite the fact that Carson had expressed some interest in having sex with the fictitious mother. Id. at 2-3, 10. This Court did find error in the denial of an entrapment instruction in State v. Chapman, 2019 Wash.App. LEXIS 214.[3] In that case, the defendant "presented evidence that he was induced to drive to Kitsap County," because the fictitious mother "promise[d] to have sex with him" in addition to having sex with the minor child. Id. at 8, 14-15.

In this case, it is clear that the MECTF merely afforded Wright the opportunity to commit a crime. He responded to the ad, he continued speaking with the fictitious mother after it was made

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[2] Unpublished decision, offered for whatever persuasive value this Court deems appropriate pursuant to GR 14.1.

[3] Unpublished decision offered for whatever persuasive value this Court deems appropriate pursuant to GR 14.1.

clear that it was not role play and involved sex only with minor children, and he was given several opportunities to back out of the conversations prior to arriving at the agreed upon location. RP 444, 454, 458-459, Ex 1.

Unlike Chapman, Wright never expressed a desire to have sex with the fictitious mother and the undercover officer never indicated that the mother was willing to have sex with him if he came to have sex with the minor child. Ex 1. The trial court correctly found that Wright did not produce sufficient evidence to support the entrapment instruction. RP 572-573.

2. The MECTF merely infiltrated the world of online sexual abuse of children and their conduct was neither improper or outrageous.

"Outrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be 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). For police conduct to violate due process, "the conduct must be so shocking that it violates fundamental fairness." Id. Examples of outrageous conduct include "those cases where the government conduct is so integrally involved in the offense that the government agents direct

the crime from the beginning to end, or where the crime is fabricated by the police to obtain a defendant's conviction, rather than to protect the public from criminal behavior." Id. at 21.

"Public policy allows for some deceitful conduct and a violation of criminal laws by the police in order to detect and eliminate criminal activity." Id. at 20. "Dismissal based on outrageous conduct is reserved for only the most egregious circumstances." Id. In reviewing a claim of outrageous government conduct, the court evaluates the totality of the circumstances. Id. at 21. Factors that a court must consider when determining whether police conduct offends due process 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.

Id. at 22.

In Lively, a police informant met the defendant at an AA (alcoholics anonymous) meeting shortly after she had attempted suicide, the informant moved in with her, proposed marriage to her

and encouraged her to become involved in police sponsored drug activity. Id. at 25. The Lively Court further noted that the trial court had specifically found that the defendant was attending the meetings where she met the informant "in an effort to eliminate her drug problem," and the trial court specifically found, "without apparent predisposition, the Defendant was induced by the informant, [ ], to commit the crime of delivery." Id. at 25.

While the informant in Lively clearly crossed a line, the law allows for law enforcement to engaged in at least some deceitful practices. State v. Jessup, 31 Wn. App. 304, 312-314, 641 P.2d 1185 (1982) (police agents engaged in acts of prostitution and attempted to recruit new prostitutes); State v. Pleasant, 38 Wn. App. 78, 82-83, 684 P.2d 761 (1984) (police created a phony job recruiting center and solicited the purchase of marijuana from a potential job applicant).

In the context of internet crimes against children, it is well known that law enforcement may conduct somewhat deceitful operations to find those who wish to prey upon children. Several published and unpublished cases in Washington State have discussed such operations. In State v. Harris, 2019

Wash.App.LEXIS 36,[4] this Court found that there was no substantive due process violation where a detective posted an ad on the Craigslist Casual Encounters page that the defendant responded to. Id. at 18. This Court specifically noted that the detective did "not target Harris or instigate a crime," rather the Detective posted an advertisement and Harris "instigated criminal activity by responding to the ad and attempting sexual contact with a child." Id.

In State v. Jacobson, 2018 Wash.App.LEXIS 1161,[5] this Court considered an ad posted by law enforcement on Craigslist, similar to that posted in this case, that Jacobson responded to. Id. at 20. This Court analyzed the factors from Lively and found no outrageous conduct, stating

> Although law enforcement initially posted the Craigslist ad, law enforcement's ad merely infiltrated ongoing criminal activity and did not instigate it. Instead, Jacobson instigated criminal activity by responding to the ad requesting sexual contact with a child. In addition, law enforcement did not engage in criminal conduct during the undercover operation. Rather, law enforcement acted deceptively—posing as a mother who sought compensation for Jacobson's sexual contact with her 11 year old daughter.

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[4] Unpublished decision, offered for whatever persuasive authority this Court deems appropriate per GR 14.1.

[5] Unpublished opinion offered for whatever persuasive value the Court deems appropriate pursuant to GR14.1

> Moreover, law enforcement did not control the criminal activity and instead allowed criminal activity to occur.

Id. at 22.

In State v. Solomon, 3 Wn. App.2d 895, 908, 419 P.3d 436 (2018), Division I of this Court utilized an abuse of discretion standard of review to consider whether the trial court had abused its discretion by dismissing a case based on the doctrine of outrageous government conduct. The Court reviewed the trial court's findings and found that the ruling was not based on untenable grounds. Id. at 916. In that case, a detective pretended to be a 15 year old girl but the advertisement simply said, "a young female looking for sex with either a man or woman." Id. at 898-899. The detective exchanged messages with the defendant for 45 minutes before disclosing that she was "15". Id. at 899. The defendant rejected the detective's advances "7 times" and the trial court found that his reluctance was overcome by the detective's "persistent solicitation." Id. at 913-914.

In its unpublished decision of State v. Forler, 2019 Wash.App.LEXIS 1467,[6] Division I distinguished the facts of

[6] Unpublished opinion offered for whatever persuasive value the Court deems appropriate pursuant to GR 14.1.

Solomon. In contrasting the facts of Solomon from those in Forler, Division I stated

> Forler continued to instigate the conversations, even after offered the chance to cease communications. Even though Detective Rodriguez attempted to discontinue conversation by saying "it's best we don't go further then. Good luck," Forler responded and continued conversations. At no point did Forler express disinterest in "Shannon's" offer.

Forler, at 22. Forler involved a Craigslist ad titled "New to area. Young fun family. No RP. W4M" indicating "I have a very close young family that is very giving. Incest experience is a plus," and "2 dau 11/7 that are home schooled." Id. at 2.

This case is very similar to Forler, Jacobson, and Harris. The MECTF merely infiltrated the world of online sexual abuse of children. Wright instigated the criminal activity by responding to the ad and continuing to discuss sex with a child via text messages with Detective Kleinfelder. He continued to instigate the conversations, even after repeatedly being offered the chance to cease communications. RP 444, 454, 458-459, Ex 1. Additionally, law enforcement did not engage in criminal conduct, rather law enforcement acted deceptively posing as a mother who was offering her children for sex. Wright responded. Wright controlled the criminal activity and the MECTF merely provided an ad for

which the criminal activity could occur. Wright was looking for sex and did not shy away from having sex with an 11 year old girl. Ex 1, Ex 16. He chose to take a substantial step toward committing that act.

Wright includes a citation to a KOMO news report regarding a Kitsap County operation. The report is not relevant to this case, as it involved a different operation of the MECTF. Moreover. Wright's reference to the article is misleading, stating "In this case and in related cases, the conduct targeted individuals with no known criminal history and no known predisposition." Brief of Appellant at 25. The argument comes from a hearsay statement in the article, purportedly from the Kitsap County Prosecuting Attorney's Office indicating that the suspects in the Kitsap county operation had no criminal history. In reality, the facts of this case demonstrate that the MECTF did not specifically target anyone. Rather, the MECTF placed an ad in a venue where it had reason to believe people were seeking sex with children. The only way anybody became a target of investigation was by responding to that ad and attempting to arrange sex with children. Wright made himself a target of the investigation by actively pursuing sex with an 11-year-old girl.

The conduct of the MECTF properly sought to investigate internet crimes against children. The conduct of law enforcement was not outrageous and did not violate substantive due process. All Wright needed to do in order to not be arrested was cease communications at any one of the opportunities that were provided to him. He did not do so. He controlled the criminal activity by arranging to have sex with a minor and arriving at the pre-arranged location prepared to do so. Moreover, the record in this case reveals that Wright knew that his conduct was illegal, yet he continued the conduct. RP 454-455. 457, 463. Law enforcement merely infiltrated the world of online sexual abuse of minors that Wright voluntarily placed himself into. Wright does not meet any of the factors listed in Lively, nor can he show that the MECTF engaged in conduct so shocking that it violates fundamental fairness. His claim of outrageous government conduct must fail.

D. CONCLUSION.

The trial court correctly concluded that there was insufficient evidence at trial to support an entrapment jury instruction. Wright fails to demonstrate any of the Lively factors in this case. The evidence presented at trial showed that Wright controlled the criminal activity and did not take advantage of several opportunities

that were given to him to cease his communications. The State respectfully requests that this Court affirm Wright's conviction and sentence.

Respectfully submitted this 30th day of December, 2019.

Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

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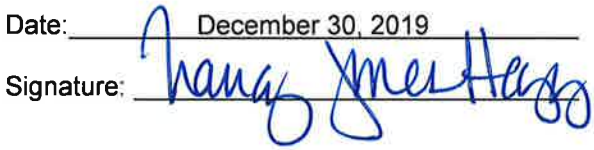
Signature: 

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