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Court of Appeals
Division II
State of Washington
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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 WRIGHT,

Appellant.

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

REPLY BRIEF

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A. ARGUMENT

1. The trial court's failure to instruct the jury on entrapment deprived Ezra of his right to present a defense, requiring reversal of the conviction.

Without the jury appropriately instructed on entrapment, Ezra was unable to argue his theory of defense to the jury; thus, the court's error deprived him of the right to present a defense under the Sixth and Fourteenth Amendments and Article I, sections 21 and 22.

The State argues the court did not err when it denied the entrapment instruction because the record reflects that Ezra "controlled the criminal activity." Brief of Respondent (BOR at 15). The State is incorrect.

The evidence proved that the "criminal design originated in the minds" of the task force. RCW 9A.16.070. The Craigslist ad was placed by the task force, the wording carefully scrutinized to be completely ambiguous. CP 4; RP 440-41. Sergeant Carlos Rodriguez testified his task force is an interagency "proactive" operation, requiring between 50 to 60 officers for a single arrest. RP 376, 378. The testimony of Detectives Rodriguez and Kleinfelder ("mom") were

more than adequate to satisfy the threshold of the first prong of the affirmative defense. RCW 9A.16.070(1)(a).¹

As to the second prong, the evidence that Ezra was lured, and would otherwise have never participated in such conduct, was stark. RCW 9A.16.070(1)(b). Detective Kleinfelder was the first and only person to refer to sex at all for approximately five hours. Ex. 16 at 12 (line 184). The reference to sex was fleeting, and the conversation did not return to the topic for another five hours. Ex. 16 at 7-12.

Each time Ezra attempted to steer the conversation to a topic that felt more safe and comfortable to him, the detective returned to talking about having sex with her fictional “children.” When Ezra requested a picture of the “mother,” the Detective re-routed his request into pictures of the children. Ex. 16 at 11 (lines 172-73). Moreover, Ezra attempted to discontinue the sexual tone or divert the Detective a

¹ (1) In any prosecution for a crime, it is a defense that:

(a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and

(b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070.

number of times, asking the Detective to meet on a different day, or in a neutral location. Ex. 16 at 3 (lines 30-31), at 8. At the same time, Ezra continued texting with other women he has met on Craigslist, to arrange liaisons. Ex. 16 at 1, 2, 4, 10, 11.

Law enforcement officers agreed that no evidence – other than this one interaction arranged by the officers themselves – showed Ezra had a pre-existing interest in sexual contact with children. Ezra had no child pornography, sex toys, or anything inappropriate on his cell phone, computer, or in his JBLM barracks. RP 415, 425. There was simply a lack of evidence that Ezra had any intention of committing this crime before law enforcement induced him to.

The State misrepresents the record when it suggests that Ezra participated in the manipulation during the chat with Detective Kleinfelder. BOR at 3 (“Wright stated, ‘My gut tells me you aren’t for real in this,’ and stated, I’m real. I’m military.”). In fact, the State combines both participants’ texts, leading to a misleading result. Ezra, a JBLM soldier, was the pawn of Detective Kleinfelder, who at no time was “for real.”

The cases the State relies upon for its entrapment argument are cited pursuant to GR 14.1, and as such are not controlling authority.

See, e.g., State v. Carson, 5 Wn. App.2d 1032 (2018); State v. Racus, 7 Wn. App.2d 287, 433 P.3d 830 (2019) (unpublished portion). Even so, if this Court chooses to follow Racus and Carson, it should find this case distinguishable on its facts.

In both Racus and Carson, the defendants responded to ads and entered communications with a detective posing as a mother of young children; however, this is where Ezra's situation is different. Both Mr. Racus and Mr. Carson engaged in highly lewd and sexualized messaging with the "mother" about their intentions with the child(ren).² This negates the (b) prong of the affirmative defense. RCW 9A.16.070 ("had not otherwise intended to commit"). Thus, in these two cases, the denial of the entrapment instruction makes sense and is appropriate. Racus, 7 Wn. App.2d 287, *51; Carson, 5 Wn. App.2d 1032, *4 (2018).

On the other hand, Ezra's communications are distinguishable from those in Racus and Carson. Ezra is naïve and reluctant to discuss the children at all, preferring to exchange pictures of himself with a friend's dog, as in a pen-pal relationship. Ex. 16 at 7. He makes no

² Carson: "I'm kind of hoping that I f*** her." 5 Wn. App.2d 1032, *1. Racus: 7 Wn. App.2d at 294-96 (discussions of oral sex and child having braces).

lewd comments or suggestive remarks; nor does he speak to the “children,” or ask to.

At one point, the “mother” makes a risqué remark, asking Ezra about his girth, at the point she is requesting that he brings condoms. Ezra misses this context completely, responding that he is 5’5” tall. RP 456; Ex. 16. Ezra’s inexperience and naïveté is painfully clear.

This Court should find Ezra’s case is similar to State v. Chapman, where this Court reversed for failure to give an entrapment instruction. 7 Wn, App.2d 1026, 2017 WL 7362790, *5 (2019).³ With similar facts to this case, the State presented insufficient evidence that Chapman had a predisposition to commit the offense.

There was simply no evidence presented that Ezra was predisposed to commit this offense; conversely, the evidence plainly showed the crime was methodically planned and induced by detectives in the task force. Because both prongs were satisfied under RCW 9A.16.070, the court erred when it failed to instruct the jury on entrapment.

The evidence presented was sufficient for the instruction to be given to the jury; the court erred because the jury was not given the

³ Unpublished opinions have no precedential authority and are cited to provide guidance to the Court. GR 14.1.

proper tools to guide its deliberations. State v. Fernandez-Medina, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000); U.S. Const. amends. VI, XIV; Const. art. I, § 21, 22.

This Court should reverse.

2. The police conduct violated due process, because it shocks our universal sense of fairness.

Outrageous police conduct that shocks our universal sense of fairness violates due process and bars the government from invoking judicial process to obtain a conviction. State v. Solomon, 3 Wn. App.2d 895, 909-10, 419 P.3d 436 (2018); Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). This issue implicates due process and may be raised for the first time on appeal. Id.; U.S. Const. amends. VI, XIV.

The factors used to determine whether police conduct violates fundamental fairness are discussed in the Opening Brief; it is clear that several of the factors are met in this case. Opening Brief at 21-26. The State does not seem to spend time contesting the factors argued in the briefing, relying instead on asserting truisms, for example: “Wright controlled the criminal activity and the MECTF merely provided an ad for which [sic] the criminal activity could occur.” BOR at 15-16.

The State does not explain how Ezra allegedly “controlled” the activity; nor does the briefing explain how, with the facts of this particular case, that would even be possible in a sting operation when one has been “stung.” Detective Kleinfelder was clearly running the show with Ezra, telling him where/when/how to take each step, from sending pictures to the appearance on the doorstep of the “trap house.” Ex. 16. To baldly assert that “Wright controlled the criminal activity” is unfair at best, and a misstatement of the record at worst.

This Court should find this net nanny sting operation constituted outrageous and fundamentally unfair government misconduct in violation of Ezra’s constitutional right to due process, similar to that found in Solomon. 3 Wn. App.2d at 909-10.

In Lively, the Court held the government controlled the criminal activity because police conduct was “so closely related” to the defendant’s actions. 130 Wn.2d at 25-26. The same is true here. In fact, even more than in Lively, where the police used an informant, the criminal activity here was entirely conducted by police officers. See Lively, 130 Wn.2d at 33-34; Solomon, 3 Wn. App.2d at 914.

The government's conduct in this net nanny sting was so outrageous that it violates the common sense notion of fundamental fairness. Because the government's conduct offends due process, this Court should reverse Ezra's conviction.

B. CONCLUSION

For these reasons, as well as those in the Opening Brief, this Court should reverse, due to the court's refusal to instruct the jury on entrapment, which deprived Ezra of his right to present a defense. In addition, the law enforcement conduct in this case shocks the conscience and requires reversal, due to its lack of fundamental fairness.

Respectfully submitted this 29th day of January, 2020.

s/ Jan Trasen

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