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Court of Appeals  
Division III  
State of Washington  
3/4/2020 11:09 AM

NO. 36250-7-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS ARBOGAST,

Appellant.

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FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Cameron Mitchell, Judge

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APPELLANT'S REPLY BRIEF

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A. STATEMENT OF FACTS IN REPLY

1. ON THE STATE'S MOTION THE TRIAL COURT PROHIBITED THE DEFENSE FROM ARGUING OR PRESENTING A DEFENSE OF ENTRAPMENT.

The State dares to argue "entrapment was not the defense," citing to defense counsel's opening statement, the defendant's testimony, and closing argument. Resp. Br. at 16.

Of course, in response to the State's motion in limine, the trial court precluded the defense from presenting evidence of entrapment without first presenting it to the court outside the jury's hearing. App. Br. at 28-30; RP 56-78, 97-108, 1333-34. Ultimately the court ruled the defense could not present any evidence or have an instruction on entrapment. RP 1343-50. Therefore counsel could not argue that theory.

Clearly defense counsel intended to present this defense. He proposed instructions, and took exception to the court's failure to give them. CP 143-44; RP 1486. See *State v. Frost*, 160 Wn.2d 765, 161 P.3d 361 (2007).<sup>1</sup>

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<sup>1</sup> In *Frost*, the trial court ruled the defense could not argue both the State's failure to prove accomplice liability and duress. Defense counsel objected to the ruling, but complied with  
(continued...)

2. THE DEFENDANT ACKNOWLEDGED HE INTENDED TO "BE WITH" THE CHILDREN, NOT TO "HAVE SEX" WITH THE CHILDREN.

The State repeatedly claims:

The defendant admitted to Det. John Davis of the Kennewick Police Department that he went to "Brandi's" apartment to be "with" the children, **meaning to have sex with them.** RP at 1446.

Resp. Br. at 10, 21. The State has created this "meaning," just as the police created this "crime."

Mr. Arbogast stated he did not intend to have sex with any children. RP 1392.

Det. Davis did not ask Mr. Arbogast whether he intended to have sexual intercourse with the children. Det. Davis testified:

Q. And did you ask him anything about the children?

A. Just that if his intent, before he arrived, was to be with the children. And he said yes.

RP 1446. Mr. Arbogast never said he went to the apartment to have sex with the children. Det. Davis never testified that Mr. Arbogast said such a thing. In fact, he corrected defense counsel's words on cross-examination:

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<sup>1</sup>(...continued)  
it, arguing only duress. The Supreme Court held it was Constitutional error to preclude both arguments. *Id.* at 770.

Q. (MR. PECHTEL continuing) And you questioned him. And you say that you had him admit that he went there to have sex with the children; is that correct?

A. **To be with the children.**

RP 1451 (emphasis added). Mr. Arbogast made no such admission in his lengthy earlier interview with other detectives. App. Br. at 22-24; Exs. 21-23.

B. ARGUMENT IN REPLY

1. ARGUING LACK OF INTENT DID NOT PRECLUDE THE DEFENSE OF ENTRAPMENT.

The State claims in order to present the defense of entrapment, Mr. Arbogast had to admit all the elements of the charged crime. Because he denied he intended to have sexual intercourse with the "children," the State argues he could not present entrapment. Resp. Br. at 16-18.

The State is incorrect.

In *State v. Frost, supra*, the Supreme Court clarified a trial court's mistaken interpretation of its decision in *State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994).

The trial court in *Frost* prohibited defense counsel from arguing both duress and that the State failed to prove accomplice liability. "We hold that the trial court ... unduly limited the scope

of Frost's counsel's closing argument" by restricting counsel to a single defense. *Id.* at 771. The Supreme Court rejected the proposition the State argues here.

To require [a concession of criminal liability to assert an affirmative defense] would arguably run afoul of the due process requirement that the State prove each element of a charged offense beyond a reasonable doubt. ... Likewise it would infringe upon a criminal defendant's Sixth Amendment right to have counsel make argument to the jury, at least where duress is only one of the viable defense theories.

*Frost*, at 776 (citations omitted).

Addressing entrapment, the Court explained affirmative defenses

do not require admission of "the crime itself or all the elements of a crime before being entitled to an entrapment instruction." ... [E]ven if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment.

*Frost*, 160 Wn.2d at 776 & n.4, citing and quoting with approval: *State v. Galisia*, 63 Wn. App. 833, 836-37, 822 P.2d 303, review denied, 119 Wn.2d 1003 (1992); *State v. Matson*, 22 Wn. App. 114, 587 P.2d 540 (1978); *State v. Draper*, 10 Wn. App. 802, 521

P.2d 53 (1974); *Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988).

Here Mr. Arbogast denied he actually intended to have sexual intercourse with any children. Nonetheless, he admitted he made the communications the State presented. Those communications were the result of entrapment.

As in *Frost*, here the trial court erred by refusing instructions, evidence, and argument on the proposed affirmative defense - entrapment.

2. THE STATE DOES NOT ADDRESS THE DEFINITION OF PREDISPOSITION.

The State argues the defendant did not establish his lack of predisposition to have sex with children. Resp. Br. at 20-21. Yet it ignores the concept of "predisposition" -- that it must exist before the police begin luring. App. Br. at 39-42. The State offers no authority to the contrary.

The State cites only evidence obtained after Mr. Arbogast responded to the fake ad, and after "Brandi" initiated all communications regarding the children. Thus this evidence cannot be used to establish a predisposition.

Furthermore, the court prohibited the defense from presenting evidence that he lacked any predisposition. App. Br. at 29-30.

3. THE STATE'S ATTEMPT TO DISTINGUISH APPELLANT'S AUTHORITY RELIES ON ITS INCORRECT STATUTORY INTERPRETATION.

The State claims this case is distinct from *United States v. Gamache*, 156 F.3d 1, 9 (1st Cir. 1998), and *United States v. Poehlman*, 217 F.3d 692, 697 (9th Cir. 2000), because it argues federal law permits an entrapment defense even when a defendant does not admit all elements of the charged crime. Resp. Br. at 22. But, as shown above, Washington law also permits an entrapment defense without admitting all elements of the charged crime.

The State relies on *People v. Grizzle*, 140 P.3d 224 (Colo. App. 2006),<sup>2</sup> as distinct from the federal law of entrapment. The Colorado statute on entrapment, however, is also very different from the Washington statute. Compare: C.R.S. § 188-1-709 (2005), quoted in *Grizzle* at 225; with RCW 9A.16.070, quoted in App. Br. at 34.

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<sup>2</sup> Furthermore, *Grizzle* involved a sting where the officer pretended to be the 13-year-old girl, not as here an adult woman who was luring someone looking for an adult woman.

Similarly, the Colorado courts have rejected the rule of *Mathews v. United States, supra*.<sup>3</sup> In contrast, the Washington Supreme Court accepted and approved of *Mathews*,

holding that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment."

*Frost, supra*, 160 Wn.2d at 776 n.4.

4. *TRUJILLO CANNOT WITHSTAND ANALYSIS AFTER FROST.*

The State does not distinguish between the burden of production and the burden of persuasion. Resp. Br. at 18-19. It claims appellant cites no authority that *State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994), review denied, 126 Wn.2d 1008 (1995), is erroneous. But see App. Br. at 52-54 and authorities there cited.

*Trujillo* relied on *Riker* to reject *State v. Galisia, supra*, and to reach the erroneous conclusion it did. But in *Frost*, the Supreme Court again approved *Galisia*, and clarified: "Nothing in the *Riker* opinion was directed toward answering the question presented in the case at bar." 160 Wn.2d

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<sup>3</sup> *Grizzle*, 140 P.3d at 226-27.

at 775. Nor did *Riker* address the burden of production of evidence to obtain an instruction on an affirmative defense.

5. DISMISSAL FOR OUTRAGEOUS GOVERNMENT CONDUCT IS APPROPRIATE.

The State quotes *State v. Markwart*, 182 Wn. App. 335, 350, 329 P.3d 108 (2014), that "the banner of outrageous misconduct is often raised but seldom saluted." Resp. Br. at 12-13. The *Markwart* court set out the factors to consider dismissal from *State v. Lively*, 130 Wn.2d 1, 22, 921 P.2d 1035 (1996):

[(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 ... 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."

*Markwart*, 182 Wn. App. at 351. The State does not address these factors.

*Markwart* presented very different facts. There the defendant openly announced he was providing medical marijuana as the provider for

more than one person. The prosecutor met with him and expressed his position that he was not complying with state law. He then sent an informant to him to obtain medical marijuana and gather the evidence that the State had warned did not comply. "Law enforcement did not induce Tyler Markwart to engage in any conduct he was not already willing to perform." *Markwart*, 182 Wn. App. at 351.

Unlike *Markwart*, there is no question the police conduct here instigated a crime, rather than infiltrating ongoing criminal activity. Mr. Arbogast expressed his reluctance to engage with children, repeatedly bringing the communication back to trying to meet "Brandi." The police persisted, sent a flirty picture of Brandi, and several times suggested she could engage with him, but conditioned it on engaging with "her children." Mr. Arbogast eventually said what she wanted to hear. As a result, she agreed to meet him immediately. The government controlled all the activity here, directing Mr. Arbogast to change from email to text, setting conditions for meeting, and requiring him to come to the place it

specified. The government was the first to suggest and use the words suggesting criminal activity. See App. Br. at 37-38.

While the police no doubt intended with their sting to prevent crime and in some very broad sense protect the community, within the confines of this one interaction with Mr. Arbogast, their methods fell far from the mark. Creating this crime, using an adult woman as a lure to persuade someone lawfully seeking an adult woman to verbally agree to engage in sexual contact with children, is indeed "repugnant to a sense of justice."<sup>4</sup>

The State cites three cases it claims used the same investigation methods. But police used a different lie in those cases, and no one ever raised the issue of government misconduct or entrapment. Unlike here, in *State v. Townsend*, 147

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<sup>4</sup> The time lapse in the course of communications demonstrates the effect of technology, not of police persistence. In *Gamache*, the police published their ad in a physical magazine in 1995. Mr. Gamache and 96 others responded via the United States mail service. 156 F.3d at 3. The government similarly used the mail service in *Jacobson v. United States*, 503 U.S. 540, 553-54, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). Although emails were used in 1995 in *Poehlman*, the police had to lure Mr. Poehlman to travel from Florida to California - not merely 10 minutes away within the Tri-Cities. 217 F.3d at 697.

Wn.2d 666, 679, 57 P.3d 255 (2002), and *State v. Patel*, 170 Wn.2d 476, 242 P.3d 856 (2010), the police posed as the child, communicating directly with the defendant, not as an adult woman who might attract an innocent person lawfully looking to meet an adult woman.<sup>5</sup> In *State v. Wilson*, 158 Wn. App. 305, 308, 242 P.3d 19 (2010), the defendant immediately and repeatedly expressed his interest in the advertised "mother/daughter duo" with the 13-year-old. There was no appeal to the mother only, as here.

Also unlike here, the defendant in *Townsend* was already trying to arrange liaisons with young girls on his computer before the police targeted him.

6. THIS COURT SHOULD ALSO ADDRESS THE ISSUES RAISED IN APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS.

The State does not respond to the issues in the Statement of Additional Grounds. Appellant urges this Court to review them carefully.

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<sup>5</sup> See also: *Gamache and Poehlman, supra* (adult "woman" conditioned meeting on verbally agreeing to sexually mentor children); App. Br. at 37-39.

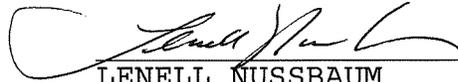
C. CONCLUSION

For the reasons stated above, in the Appellant's Amended Brief and in the Statement of Additional Grounds, this Court should reverse these convictions and dismiss the charges.

In the alternative, it should reverse the convictions and remand for a new trial.

DATED this 3d day of March, 2020.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 36250-7-III
	)	
Vs.	)	DECLARATION OF SERVICE
	)	ON APPELLANT
DOUGLAS ARBOGAST,	)	
	)	
Appellant.	)	
_____	)	

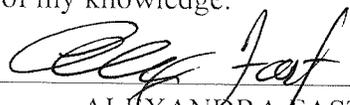
ALEXANDRA FAST declares:

On March 4, 2020, I caused a copy of the Appellant's Reply Brief in this case to be served on the appellant by depositing it in the United States Postal Service, postage prepaid, addressed as follows:

Mr. Douglas Arbogast  
408905  
P.O. Box 769  
Connell, WA 99326

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

3.4.2020 - SEATTLE, WA  
Date and Place

  
\_\_\_\_\_  
ALEXANDRA FAST

**LAW OFFICE OF LENELL NUSSBAUM PLLC**

**March 04, 2020 - 11:09 AM**

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