71155-5

71155-5

NO. 71155-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RYAN FIROVED,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An application to intercept and record communications under the Washington Privacy Act must show that law enforcement gave serious consideration to other normal investigative techniques and explain why those methods were inadequate. In this investigation of conspiracy to commit rape of a child in the first degree, the application established that the defendant was comfortable talking to the cooperating witness and ostensible conspirator about his plans and was unlikely to speak with any other person about it, that it was impracticable to arrange to have an officer present during the conversations, that the actual content, context, tone and inflection of the defendant's speech were necessary to show his intent and to refute the likely defense of entrapment or that the conversations were mere fantasy or jest, and that there was no other feasible way to investigate the defendant's claim to have committed another child rape without jeopardizing the conspiracy investigation. Are the facts set forth in the information at least "minimally adequate" to support the order authorizing interception?

2. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts

of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court while the appeal was pending and are consistent with the trial court's oral ruling. Has the trial court properly entered written findings in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Ryan Firoved was charged by amended information with attempted rape of a child in the first degree. CP 1-11, 72-73. Firoved moved to suppress the evidence of recorded telephone conversations with the intended victim's mother on grounds that the application for an order authorizing interception of the calls failed to comply with the requirements of the Washington Privacy Act, chapter 9.73 RCW. CP 39-71. Following a lengthy evidentiary hearing, the trial court denied the motion. 1RP[1] 82-128; 2RP 8-65. The jury found Firoved guilty as charged, and the court imposed a sentence of 120 months to life. CP 74, 92-103.

[1] The verbatim report of proceedings consists of six separately-paginated volumes. The State refers to the materials as follows: 1RP – 9/11 & 9/26/2013; 2RP – 9/30 & 10/2/2013; 3RP – 10/3/2013; 4RP – 10/7/2013; 5RP – 10/8/2013; 6RP – 10/9 & 11/1/2013.

2. SUBSTANTIVE FACTS

Kristin Piper and Ryan Firoved had an on-again, off-again sexual relationship spanning several years. 3RP 40, 43, 47-49, 52, 53, 54, 58; 5RP 103-04. Piper was in love with Firoved, but the feeling was not mutual. 3RP 60; 5RP 105. Firoved was married, had a child, and had other girlfriends. 5RP 105. Piper had a daughter when she met Firoved and married another man during one of the gaps in her relationship with him. 3RP 38, 53. When she and her husband began having problems in early 2012, she rekindled the relationship with Firoved. 3RP 54. Piper's daughter was nine years old at the time. 3RP 38.

In March or April of 2012, Firoved, who had a previous conviction for rape of a child in the third degree, told Piper that he liked "things that are taboo." 1RP 26; 3RP 66. He claimed that he had had sex with the 12-year-old sister of a friend in Oregon. 3RP 67. He also told her that he liked women to wax their pubic area so he could fantasize that they were 12-year-old girls. 3RP 70. Firoved claimed that he had attempted to have sex with his 6-year-old sister when he was 12 years old, and that he had a sexual relationship with his step-sister throughout high school. 2RP 72. He claimed that he masturbated while watching his

8-year-old daughter masturbate, and that "when she turns 10 I can have sex with her because I want to show her it's love or how it is instead of having a high schooler get his rocks off on her. To show her that I care." 3RP 73. Piper refused to believe these things and continued her relationship with Firoved. 3RP 68-69, 73-74.

Within a month or two of Firoved's disclosures to Piper about his sexual contact with minors, he asked Piper "when I was going to give him my daughter" and told her that he thought about her 9-year-old's "tight little pussy." 3RP 75-76. He wanted to have both his daughter and Piper's daughter watch them have sex "and then they could join in and he could show them how to do everything." 3RP 76. Piper refused, but still wanted to continue her relationship with Firoved. 3RP 69, 76. About this time, however, Firoved started pushing Piper away, deleted her from his Facebook account, falsely claimed to be in Wenatchee, and stopped responding to her increasingly desperate calls and texts. 3RP 76, 78, 87, 113-20. When Firoved contacted Piper on June 10, he claimed to have had oral sex with his minor niece while he was in Wenatchee. 3RP 79-81, 85-89. Piper was upset, but later apologized to Firoved for her reaction and begged for their relationship to return to "normal." 3RP 96-101.

Firoved continued to bring up the idea of sexual contact with Piper's daughter. 3RP 102. When Piper finally decided that he was serious about it, she went to the police. 3RP 104. Piper spoke with Kirkland Police Detective O'Neill on June 25, 2012. CP 120; 1RP 24; 3RP 64. She provided a written statement and showed O'Neill some of the text messages from Firoved. CP 120; 1RP 25. O'Neill discovered Firoved's prior rape of a child conviction, and learned from a colleague in the Internet Crimes Against Children Task Force that Firoved had responded to a Craigslist ad by a detective posing as a father seeking to arrange sex with his fictitious 13-year-old daughter. 1RP 119. With Piper's cooperation and consent, Detective O'Neill sought and obtained a court order to intercept and record telephone calls between Piper and Firoved. 1RP 83-86; CP 50-67, 69-71, 120-21.

Between the time of Piper's first meeting with police and when she returned to make a recorded call to Firoved, she and Firoved continued to exchange text messages about Piper's daughter. 3RP 124. Piper stated that she did not like Firoved's interest in molesting her daughter. 3RP 126-27. Initially responding, "I don't know what you're talking about," Firoved eventually explained, "I'm looking at it this way. If you want to be

with me you will submit and I am in charge what says goes [sic]." 3RP 127. He reiterated, "I'm serious. Anything I say goes." 3RP 127.

Piper made the first recorded call at the police station with Detective O'Neill on July 3, 2012. 1RP 89-90; 2RP 132; 3RP 104; CP 71. During that call, Piper and Firoved discussed meeting at a hotel for Firoved to have oral sex with Piper's daughter. Ex. 22, 23.[2] They discussed how Piper should explain being at a hotel to her daughter, how the two would get the girl comfortable with sexual contact, whether and how Piper would participate, and Firoved's intended sexual acts with Piper's daughter. Ex. 23 at 4-5, 15, 17-19, 21. Firoved was concerned that the police might be listening in and resisted stating exactly what he planned to do, preferring to "play it by ear." Ex. 23 at 4, 10-11. But Firoved confirmed that "I will be there Thursday" and that he was 100 percent sure that he would perform oral sex on the girl if Piper was there to be his "partner in crime." Ex. 23 at 27-28. During the call, Firoved sent Piper a text message stating, "So turned on." 3RP 132.

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[2] Exhibit 22 is the audio of all recorded telephone calls. Exhibit 23 is the transcript of the first call, admitted for illustrative purposes only. CP 118. Exhibit 24 is the transcript of the second call, also admitted for illustrative purposes. CP 118.

After this first recorded conversation, Piper and Firoved exchanged more text messages. 3RP 132. Piper suggested that they should "hold off until you know exactly what you want to do with her. I don't want to do the play-by-ear thing." 3RP 133. Firoved responded, "I still think it should be on." 3RP 134. The two agreed to talk about it later. 3RP 135.

Using her own phone, Piper recorded a second call with Firoved later that day. 3RP 136; CP 121; Ex. 22; Ex. 25. Firoved was more explicit about his plans in this conversation. Ex 25 at 2, 6. When Piper asked if he still wanted to meet her daughter at the hotel, Firoved responded, "Yeah, yes, yes, yes, yes." Ex. 25 at 3. He confirmed, "I want to have oral sex with [the child]." Ex. 25 at 5. He thought that Piper should be there "the first time[.]" Ex. 25 at 7. He did not think that he should bring the girl a teddy bear because that "would be creepy." Ex. 25 at 9. The two agreed to meet at a hotel on Thursday. Ex. 25 at 8. Firoved was arrested when he arrived at the hotel. 3RP 14-21; 4RP 26-28.

At trial, Firoved testified that he and Piper shared their sexual fantasies and that he told her untrue stories of his sexual contact with minors because it was a turn-on for both of them. 5RP 107-10. He claimed that Piper was the first to bring up the

idea of molesting her daughter. 5RP 113-15. He claimed they had never spoken of it before she sent the July 26 text message stating that she did not like him wanting to molest her daughter and that it was "most definitely not going to happen." 5RP 113-15. According to Firoved, Piper then disclosed that it was something she was interested in, and he continued to discuss it with her because they both enjoyed the fantasy. 5RP 115. Firoved testified that he only told Piper that he wanted sexual contact with her daughter because he thought it was what she wanted to hear. 5RP 123. He claimed that he did not think he would ever meet the daughter and that he only went to the hotel to tell Piper that nothing would ever happen between him and her daughter and to break up with her in person. 5RP 126-27.

C. ARGUMENT

1. DETECTIVE O'NEILL'S APPLICATION ADEQUATELY ESTABLISHED THE NECESSITY OF RECORDING FIROVED'S COMMUNICATIONS IN COMPLIANCE WITH THE PRIVACY ACT.

Firoved contends that the police violated the Washington Privacy Act by obtaining authorization to intercept phone calls without showing that normal investigative procedures had failed or

were unlikely to succeed. Because the application establishes that police seriously considered alternatives and reasonably believed the alternatives were impracticable or unlikely to succeed, Firoved's argument is without merit.

Washington's Privacy Act generally prohibits the state or any person to record a private conversation without first obtaining the consent of all persons engaged in the conversation. RCW 9.73.030(1). Conversations recorded in violation of the Privacy Act are not admissible as evidence in a criminal trial. RCW 9.73.050. An exception to the "two-party consent" rule allows law enforcement officers to record private conversations with the consent of one party to the conversation and judicial authorization. RCW 9.73.090(2). An application for judicial authorization to record communications must include, among other things, a "particular statement of facts" which at least minimally shows that "other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." RCW 9.73.130(3)(f).

This is not a showing of absolute necessity. State v. Constance, 154 Wn. App. 861, 880, 226 P.3d 231 (2010). Police

are not required to exhaust all possible investigatory techniques in order to satisfy the requirements of RCW 9.73.130(3)(f). State v. Johnson, 125 Wn. App. 443, 455-56, 105 P.3d 85, 91 (2005) (citing State v. Cisneros, 63 Wn. App. 724, 729, 821 P.2d 1262 (1992)). Rather, the critical inquiry is whether the application minimally "shows that police gave 'serious consideration to other methods' and explains why those methods are inadequate." Constance, 154 Wn. App. at 881 (quoting State v. Manning, 81 Wn. App. 714, 720, 915 P.2d 1162 (1996)).

Requirements such as knowledge or intent, or other difficulties of proof inherent in the crime alleged, are appropriately considered by the issuing judge, and adequately establish the minimal showing required. Constance, 154 Wn. App. at 883 (investigating solicitation to commit murder, which requires proof of intent); State v. Lopez, 70 Wn. App. 259, 267, 856 P.2d 390, 395 (1993) (conspiracy to possess illegal drugs with intent to deliver); State v. Knight, 54 Wn. App. 143, 151, 772 P.2d 1042 (1989) (crime required proof of defendant's knowledge that property was stolen). An order authorizing recording is also appropriately issued where "the investigation has turned up circumstantial evidence that points to the defendant but is insufficient to convict and a recording

is needed to avoid a 'one-on-one swearing contest' between defendant and undercover agent." State v. Babcock, 168 Wn. App. 598, 610, 279 P.3d 890 (2012) (citing Knight, 54 Wn. App. at 150; State v. Platz, 33 Wn. App. 345, 350, 655 P.2d 710 (1982)).

In deciding whether to authorize the interception and recording of communications, the issuing judge "'has considerable discretion to determine whether the statutory safeguards have been satisfied.'" Constance, 154 Wn. App. at 880 (quoting Johnson, 125 Wn. App. at 455). Appellate review of an intercept order is therefore highly deferential. Cisneros, 63 Wn. App. at 729. The reviewing court does not review the application de novo, but "determine[s] whether the facts set forth in the application 'are minimally adequate' to support the court order." Constance, 154 Wn. App. at 880 (quoting Johnson, 125 Wn. App. at 455). The fact that both the issuing judge and a trial judge have considered the supporting information sufficient is "significant" in the determination that the statutory requirements were satisfied. Platz, 33 Wn. App. at 351.

Firoved argues that Detective O'Neill's intercept application failed to show why recording oral communication was necessary and that other investigatory methods were inadequate in light of the

incriminating text messages between Firoved and Piper. Brief of Appellant at 8-10. Firoved points out that police routinely rely on written communication in child sex offense investigations, that O'Neill's application in fact relied on the text messages to establish probable cause, and that the volume of text messages between Firoved and Piper belies O'Neill's claim that the text messages alone were insufficient. Id. The argument is unpersuasive.

Detective O'Neill's application established that he had considered several other investigatory techniques and reasonably believed that each was unlikely to succeed. O'Neill also demonstrated that the text messages alone were insufficient to prove that a crime occurred given the inherent difficulties of proving an anticipatory offense as well as the unique circumstances in this case. Any one of these reasons establishes the necessary minimal showing to justify the intercept order.

O'Neill indicated that he had considered pairing Piper with an undercover detective or replacing her with an undercover detective. CP 61-62. O'Neill explained that neither of these options was likely to succeed because Firoved was comfortable talking to Piper about his plans, considered her a conspirator, and was unlikely to speak to anyone else about it. CP 61-62. With

respect to the investigation into Firoved's claim to have had sexual contact with his minor niece, O'Neill explained that he had considered and rejected a more direct investigation including interviewing the child because the crime had not been reported to police, the victim may not be cooperative and may report any police inquiry to Firoved, jeopardizing both investigations. CP 63. Because the application "shows that police gave 'serious consideration to other methods' and explains why those methods are inadequate," it satisfies the requirement of RCW 9.73.130(3)(f). Constance, 154 Wn. App. at 881. See also State v. Irwin, 43 Wn. App. 553, 718 P.2d 826 (1986) (affidavit alleging that undercover officer could not be substituted for the consenting person because suspect would not deal with anyone else satisfied statutory requirement); Cisneros, 63 Wn. App. 724 (application indicating that it would be impossible to introduce an undercover officer satisfies RCW 9.73.130(3)(f)).

O'Neill further explained that Firoved would likely claim that he was not seriously planning to have sex with a child but was merely fantasizing or kidding about it, and claim that he was falsely boasting to Piper about his past sexual contact with minors:

> Possession of all the actual verbal exchanges between the suspect and the cooperating witness, in the form of a recording, are necessary to resolve these issues. A recording of conversations between the suspect and the cooperating witness will provide evidence of exactly what is said by who, thus providing investigators with evidence that will be critical to sorting out who planned or is planning the crimes, and whether that person is being encouraged in any way to commit crimes that he wouldn't otherwise commit, or to admit to prior crimes that he hasn't actually committed.

CP 64. Recording the conversations was thus necessary to permit the jury to evaluate Firoved's true intentions. See Constance, 154 Wn. App. at 883 (in an investigation into solicitation to commit murder, "a recording of all of the conversations is appropriate and helpful to prove that the scheme originates in the mind of Constance and that he is not entrapped into committing the crime"). See also Lopez, 70 Wn. App. at 267; State v. Kichinko, 26 Wn. App. 304, 311, 613 P.2d 792 (1980) (recording the conversation provided an accurate and objective representation of the events leading up to the crime).

Detective O'Neill also explained why the text messages, standing alone, do not adequately establish Firoved's intended felony rape of a child. CP 62-64. Although Firoved was eventually charged and convicted of attempted rape of a child, he was initially

investigated for conspiracy to commit rape of a child. CP 62. Both conspiracy and attempt require proof of intent. RCW 9A.28.020(1); RCW 9A.28.040(1). Firoved was careful in his text messages to avoid any specific details that would betray his intent, but according to Piper, he was more forthcoming in his phone calls. CP 54, 63. As O'Neill's application explains:

> The actual content, tone, inflection, speech patterns, and volume of the suspect's and cooperating witnesses' own voices, as well as the context of the suspect's statements, because they convey meaning outside that contained in the spoken words themselves, will be critical to a determination of the suspect's actual plan and intentions regarding the above-described crimes. Only the suspect's own words will provide adequate evidence of the suspect's mental state as the suspect discusses the above-described crimes with the cooperating witness and discusses the prior events and/or conversations that motivate the suspect to plan the described crimes. The delivery is at least as important as the words themselves in determining whether the suspect genuinely intends to commit the felony crimes that were first suggested and requested by the suspect. This can never be adequately conveyed by testimony about the conversation.

CP 62-63. A showing that the investigation "has turned up circumstantial evidence that points to the defendant but is insufficient to convict" satisfies the necessity requirement. Babcock, 168 Wn. App. at 610 (conspiracy to commit murder reported by Babcock's cellmate); State v. Knight, 54 Wn. App. at

151 (need for exact recording of conversations "was obvious" where crime requires proof that defendant knew he was dealing with property that was stolen). Inflections and speech patterns cannot be adequately communicated without a recording. State v. Coe, 101 Wn.2d 364, 373, 679 P.2d 353 (1984). A recording of Piper and Firoved's conversations was important to understanding whether Firoved's text messages revealed mere fantasizing, or were evidence that he actually intended to sexually assault Piper's 9-year-old daughter.

O'Neill also explained that he needed to record the conversations because "[c]onspiracy to commit Rape of a Child is a verbal crime, generally proven exclusively upon the words spoken by the suspect and the suspect's intent, as expressed in those words, to promote or facilitate the commission of intended felony crimes by himself with the assistance of another person." CP 62. Intent to commit a crime in the future is a necessary element that the court should consider in determining necessity, as is the fact that the crime is typically committed primarily by words alone. Babcock, 168 Wn. App. at 610 (conspiracy to commit murder investigation); Constance, 154 Wn. App. at 883 (murder solicitation investigation).

O'Neill also explained that Firoved was conscious that he was scheming to commit a felony crime, and had been careful even in his interactions with Piper, someone he trusted. CP 61. O'Neill observed that Firoved made his most incriminating statements by telephone or face-to-face; not in written form. CP 54, 61. Since Firoved knew from his past felony conviction that engaging in sexual contact with minors is criminal behavior that carries stiff penalties, he was unlikely to discuss his own involvement in the presence or within earshot of anyone other than a conspirator. CP 61-62. This explains another difficulty with proving the crime, and further establishes the necessity of recording the conversations. See Babcock, 168 Wn. App. at 610; Constance, 154 Wn. App. at 883; Lopez, 70 Wn. App. at 267; Knight, 54 Wn. App. at 151.

Another difficulty in this case was Piper's credibility, which was undermined by her continued involvement with Firoved following his disclosure of sexual misconduct with minors and his interest in molesting Piper's own daughter. Additionally, the history of their relationship, including his refusal to leave his wife and Piper's reaction to Firoved's apparent loss of interest in her, suggested a motive to cause Firoved trouble. See 4RP 87-88.

Without the recorded conversations to show the tone, emphasis, and context of Firoved's exact words, neither O'Neill nor the jury could adequately evaluate Firoved's actual intentions regarding his sexual assault of Piper's 9-year-old daughter. The recording was thus necessary to O'Neill's decision whether he should refer the case for prosecution, to support Piper's credibility, and to avoid a "one-on-one swearing contest" between her and Firoved. See Babcock, 168 Wn. App. at 610 (circumstances sufficient to show a likely failure of normal investigative procedures include where recording is needed to avoid a "one-on-one swearing contest"); Cisneros, 63 Wn. App. at 727, 729-30 (necessity of enhancing credibility of informant with criminal record and avoid swearing contest among reasons justifying order to record).

At the hearing on Firoved's motion to suppress, O'Neill elaborated on the necessity for recording Firoved and Piper's conversations. One reason was because it was impossible to know for sure whether Firoved was the person sending the text messages. 1RP 121. Another was that text messages did not convey the author's state of mind as effectively as oral communications. 1RP 123-24. Another was that O'Neill could not be sure that Piper had provided every text message she had sent

to Firoved and did not know if she had culpability in the matter; recording the phone calls would ensure that he had the complete context of the conversations they were having. 1RP 125-27.

O'Neill also elaborated on the investigatory techniques he had considered and rejected. It was not feasible to have an officer physically present for an in-person conversation between Firoved and Piper because the conversations occurred in private. 2RP 9-10. Confronting Firoved about his conversations with Piper was not likely to advance the investigation because criminal suspects do not generally freely discuss the crimes they are planning with the police. 2RP 10.

In rejecting Firoved's motion to suppress, the trial court found that "[i]t would be impossible to tell from the text messages that had been exchanged between Piper and Firoved whether Firoved was joking or whether he was serious." CP 121 (Finding 3(e)). The court also found that it was "impossible to tell from the text messages whether Firoved was the one actually sending the text messages"; that it was not feasible to introduce an undercover officer; that the text messages themselves were insufficient to prove the charge; and that the recordings were necessary to discern Firoved's true intent. CP 122 (Findings 3(g),

(h), (l)). Based upon these findings, which are fully supported by O'Neill's application and his testimony at the CrR 3.6 hearing, the trial court properly concluded that the recordings were lawfully authorized and admissible. CP 122 (Conclusions 4(a)-(e)).

This Court's deferential review should not disturb the determinations of the issuing and trial judges below. As in the cases discussed above, the police here needed to record Firoved's exact words in order to determine whether the crime under investigation had actually been committed and to avoid sufficiency and credibility issues. This Court should affirm.

2. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED ENTRY OF CrR 3.6 FINDINGS.

Firoved points out that the trial court failed to timely enter findings of fact and conclusions of law as required by CrR 3.6(b). On July 1, 2014, the trial court entered the required written findings. CP 120-23.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and

conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, this Court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of Firoved's appeal. There is no resulting prejudice.

Nor can Firoved establish unfairness or prejudice resulting from the content of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. CP 120-23. The language of the findings is consistent with the trial court's oral ruling. 2RP 64-65. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. CP 124-25.

In light of the above, Firoved can demonstrate neither an appearance of unfairness nor prejudice. The trial court's CrR 3.6 findings of fact and conclusions of law are properly before this Court.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Firoved's conviction for attempted rape of a child in the first degree.

DATED this 24th day of July, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. RYAN FIROVED, Cause No. 71155-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 24 day of July, 2014

Name
Done in Seattle, Washington