ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION III

CACR07-1069

APRIL 23, 2008

CHRISTOPHER EUGENE WAGNON APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. MC-2006-80]
V.	HON. JAMES O. COX, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Christopher Wagnon appeals his conviction from the Sebastian County Circuit Court on a charge of loitering with the purpose of engaging in sexually deviant conduct, for which he was sentenced to fourteen days' incarceration in the Sebastian County jail and fined $100. On appeal he argues the circuit court erred in denying his motion for directed verdict, based upon the ground that he was entrapped as a matter of law, and in refusing to give the jury instruction he proffered regarding the entrapment defense. We affirm.

On January 13, 2006, Detective Danny Baker from the Fort Smith Police Department was working an undercover assignment as part of the Street Crimes Unit. This unit was formed to address, in part, nuisance-type crimes such as loitering in parks, prostitution, and

noise complaints. Detective Baker was at Fort Smith Park on an assignment specifically related to loitering and deviate sexual activity. Detective Baker posed as a man looking to engage in sexual activity, while his back-up officer, Officer Comeau, remained out of sight in the undercover van.

Based upon his training and experience, Detective Baker initially observed individuals to see if they were acting in such a way as to indicate that they were looking to engage in sexual activity. Various indicative actions included the direction in which individuals parked their cars, the tapping of brake lights at night, initiating direct and obvious eye contact with a stranger, and other body-language type signals.

While Detective Baker was sitting in his van parked by a picnic table, appellant pulled up into a parking space approximately twenty to thirty feet from Detective Baker, although there were no other vehicles in the area. Appellant exited his vehicle and walked to the nearest bathroom, and Detective Baker watched to see when he would exit the building. Upon noticing appellant's lengthy stay in the restroom, which was another apparent "signal", Detective Baker followed him into the restroom. Detective Baker left the bathroom when he failed to notice any unusual activity and returned to the playground where he simply stood around until appellant came out of the bathroom.

Appellant then walked over to a picnic table just a few feet from where Detective Baker's van was parked, where he smoked a cigarette and began typing on a PDA. Detective Baker walked over to the picnic table, leaned against a pole, made eye contact with appellant, but did not speak. Appellant made a casual comment about the weather, and a few minutes

later he moved from approximately twenty feet away to about ten feet away from Detective Baker.

Appellant put his PDA away, looked directly at Detective Baker, turned around, and walked back to the same bathroom he had previously exited. Detective Baker turned around to watch appellant and, as he reached a point approximately ten feet from the entrance, appellant turned around and looked straight at Detective Baker before entering the bathroom. Based upon his experience in these cases, Detective Baker interpreted the look as a request to follow him, which he did. Detective Baker asked him if he was looking for anything, which was a code phrase in conversations between two men looking to engage in sexual activity. Instead of a response such as "I'm looking for a place to go to the bathroom" or "I'm looking for you to leave me alone," appellant said "I don't know, are you?"

Detective Baker told appellant he was looking for a good time, and appellant asked him what he meant by that statement. Detective Baker told appellant that he liked to give as well as receive oral sex, and appellant merely nodded. Detective Baker explained that he did not want to make appellant uncomfortable, and that if that was not what appellant was there for, it was fine and he would leave. Appellant's only response was that the bathroom was not very private. Detective Baker told appellant they could leave and do it in appellant's car or stay in the bathroom, then suggested they go to the vehicle. Appellant agreed, and the two men left the bathroom and walked toward the vehicle.

At that time, Detective Baker realized that they would have to pass his van where Officer Comeru was located. Detective Baker then suggested that they go down into the

woods instead to an area that was a regular location for this type of activity. Appellant agreed, and the two talked as they walked, with Detective Baker asking appellant if he came out to the park often. He replied that he had been there a couple of times and then specifically asked Detective Baker if he was a cop. Detective Baker told him he was not a cop and proceeded to ask appellant whether he wanted to give or receive oral sex, to which appellant responded "a little of both." Appellant followed Detective Baker down to the woody brushy area where he stopped, turned around and faced Detective Baker, who then produced his badge and informed appellant that he was under arrest.

After being convicted in district court, appellant appealed and had a jury trial in circuit court on April 19, 2007. Appellant moved for a directed verdict at the close of the State's case on the ground that the case constituted entrapment as a matter of law, as no question was left for the jury to decide. The circuit court denied the motion as well as the renewed motion made immediately after appellant's counsel informed the circuit court that the defense would not offer any evidence. The circuit court also refused to instruct the jury with the proffered instruction submitted by appellant, instead giving AMCI 2d 601, which the circuit court deemed closer to the model jury instruction regarding the entrapment defense. Appellant was convicted and sentenced as previously set forth. The order was entered on April 13, 2007, and appellant filed a timely notice of appeal on April 19, 2007. This appeal follows.

I. Entrapment as a Matter of Law

Arkansas Code Annotated section 5-2-209(b)(1) (Repl. 2006) provides that entrapment occurs when, "a law enforcement officer or any person acting in cooperation with a law enforcement officer induces the commission of an offense by using persuasion or other means likely to cause a normally law-abiding person to commit the offense." Conduct merely affording the person an opportunity to commit an offense does not constitute entrapment. Ark. Code Ann. § 5-2-209(b)(2). Our law has been that, if a defendant denies committing an offense, he cannot assert that he was entrapped into committing the offense. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996).

Appellant acknowledges that entrapment is an affirmative defense for which he bears the burden of proof by a preponderance of the evidence. *See White v. State*, 298 Ark. 163, 765 S.W.2d 949 (1989). This normally means that the issue of entrapment is a question for the jury to discern; however, appellant asserts that when the evidence is viewed in the light most favorable to the State and there is no factual issue to be resolved, then entrapment as a matter of law may be established. *Elders v. State*, 321 Ark. 60, 900 S.W.2d 170 (1995). In *Elders*, our supreme court stated that, "[i]n assessing whether entrapment occurred as a matter of law, we have stated that more importance attaches to the conduct of the law enforcement officers than to the predisposition of the defendant, and we have focused on the effect that the conduct would have on normally law-abiding persons." *Id.* at 64-65, 900 S.W.2d at 173.

In this case, two witnesses presented evidence, Detective Baker and Officer Ed Smalley. Detective Baker testified that: (1) he initiated conversation with appellant; (2) he specifically initiated conversation about sex; (3) appellant was uneasy about engaging in sex

acts in the bathroom; (4) he suggested to appellant that they go to the car; (5) he subsequently suggested going down into the woods; (6) appellant had not made any sexual comments up to the point that Detective Baker suggested going into the woods.

Appellant contends that there can be no doubt that Detective Baker was inducing him to commit the acts. He points out that, when he expressed that he was not interested because the bathroom was not a private place, Detective Baker pressed the issue by encouraging going to other locations. Appellant reiterates Detective Baker's testimony indicating that, when he first began speaking with appellant, he had no evidence that appellant was in the park to engage in sexual activity. When asked if he had any information that appellant was predisposed to commit the act, Detective Baker replied that he did not. Appellant asked Detective Baker what he meant when Detective Baker said he was looking for a good time and stated that the bathroom was not a very private place when Detective Baker told him that he liked to give and receive oral sex. Appellant claims that the evidence clearly shows that Detective Baker induced him to commit the act and there is no evidence that he was in any way predisposed to do so. Accordingly, he asserts that the circuit court erred by failing to find that this was a situation of entrapment as a matter of law.

The State initially contends that the affirmative defense is not available to appellant because he denied committing the offense charged. *See Montgomery v. State*, 367 Ark. 485, 241 S.W.3d 753 (2006). Before trial, appellant's counsel stated in opening statements that the defense would require the State to prove every element of the offense of loitering for the solicitation of or engaging in deviant sexual behavior. The State maintains that, by taking that

position, appellant denied that he committed the crime, therefore making the affirmative defense of entrapment unavailable. *Id.*

Although the circuit court denied appellant's motion for directed verdict and found that the State had made a prima facie case, the circuit court also found there was a jury question as to whether Detective Baker's conduct amounted to entrapment. When asserting the affirmative defense of entrapment, a defendant has the burden of proving by a preponderance of the evidence that the actions of police *caused* him to commit the crime. Here, the only testimony "offered" by the defense was the cross-examination testimony of Detective Baker. During that cross-examination, appellant's counsel attempted to re-characterize Detective Baker's testimony in such a way that the jury would believe that he was the one who induced the commission of the crime.

We hold that Detective Baker merely presented an opportunity for appellant to commit the offense. There was a factual question before the jury, specifically whether Detective Baker's actions induced a normally law-abiding citizen to commit the crime. As such, appellant was not entitled to a finding of entrapment as a matter of law. Alternatively, sufficient evidence was presented to prove that appellant was predisposed to the commission of the offense charged.

As to whether appellant was predisposed to commit the act, appellant cites *Jacobson v. United States*, 503 U.S. 540 (1992), in which the Supreme Court stated, "where the [g]overnment has induced an individual to break the law and the defense of entrapment is at issue. . . . the prosecution must prove beyond reasonable doubt that the defendant was

disposed to commit the criminal act prior to first being approached by [g]overnment agents." *Id*. at 549. The issue of predisposition turns on what a normally law-abiding person would have done in the same circumstance. *Elders*, *supra*. Appellant was arrested after agreeing to engage in oral sex with Detective Baker. Detective Baker testified regarding certain behavior from appellant that indicated to him, based upon his training and experience, that appellant was indeed loitering in the park looking for sex. Specifically, appellant: (1) parked near Detective Baker's car even though no other vehicles were around; (2) stood in the same grassy play area as Detective Baker; (3) moved closer to Detective Baker after Detective Baker walked to the picnic table near his van; (4) engaged Detective Baker in conversation; (5) made eye contact with Detective Baker before walking toward the restroom, then turned and pointedly made eye contact with Detective Baker just before going into the restroom, as if to signal him to follow.

Detective Baker asked appellant the common code question, "Are you looking for anything?", which was indicative of sexual solicitation. Instead of offering a response such as, "I'm looking for a place to go to the bathroom" or "I'm looking for you to leave me alone," appellant said "I don't know, are you?" Appellant then asked what that meant and nodded in agreement when Detective Baker described oral sex. Appellant's responses were not typical of a normally law-abiding citizen who was at the park for purposes other than sexual solicitation. Detective Baker gave appellant ample opportunity to extricate himself from the situation, yet appellant failed to do so. Based upon the evidence before us, we are

not convinced that Detective Baker forced or overtly coaxed appellant into agreeing to something about which he was uncomfortable.

Further, as the two men were walking into the wooded area, Detective Baker asked appellant if he came to the park often, to which appellant responded that he had been there a couple of times. Appellant then pointedly asked Detective Baker if he was a cop, and Detective Baker told him no and asked him about the specifics of the proposed sexual act. That comment, in and of itself, is sufficient to lead jurors to believe that appellant understood that he was about to engage in criminal behavior.

This case is distinguishable from *Sorrells v. United States*, 287 U.S. 435 (1932). In *Sorrells,* an undercover officer took advantage of the sentiment aroused by reminiscences of his and the defendant's common experiences as World War I veterans to convince him to purchase liquor for him after two prior refusals. An inducement was found, and the facts differ from the current situation where Detective Baker simply initiated the conversation and suggested possible locations for the illicit activity. Detective Baker did nothing to try and persuade appellant through the use of either sentiment or force. *See Sherman v. United States*, 356 U.S. 369 (1958)(finding that a government informer entrapped an addict into obtaining illegal narcotics for him after the two sought treatment in the same place, and the informer appealed to the defendant's compassion by telling him the treatment was not working).

The facts of *Jacobson*, *supra*, in which the investigation through which law-enforcement officials "lured" an allegedly otherwise innocent person into deviant behavior took place over twenty-six months and included mailings from fictitious organizations offering pornographic

materials also differ from the instant case. The Supreme Court held in *Jacobson* that the issue turned on the protracted bombardment of the defendant with materials he did not request, which were couched in vague constitutional terms that were under attack by the government. The defendant ordered some materials, the content of which was uncertain, and he was subsequently arrested. Although the Supreme Court determined that by the time the defendant ordered the materials he had a predisposition to do so, it was not convinced he had the predisposition prior to the lengthy investigation.

Each of the three cases clearly demonstrates an improper inducement by government officials, either by excessive or repeated pressure, trickery, or fraud that exceeded simply offering an opportunity to commit a crime. In the instant case, there was no such improper inducement, and appellant exhibited behaviors that led Detective Baker to believe that he was at the park for the purpose of seeking sexual activity. Additionally, appellant never refused to participate, never rejected Detective Baker's proposition, and never attempted to remove himself from the situation. To the contrary, appellant was amenable to the proposition and even indicated his concern about being arrested, as evidenced by his question as to whether Detective Baker was a cop. A person who is not predisposed to engage in the conduct in question would have declined to even engage in the conversation and, absent force or coercion, would not have gone into the woods with Detective Baker. Accordingly, even if Detective Baker's actions were somewhat coercive, appellant was still not entitled to entrapment as a matter of law because there is evidence to support that he was predisposed to commit the offense. Appellant failed to satisfy his burden of proof of showing by a

preponderance of the evidence that he was a normally law-abiding citizen not pre-disposed to commit the acts.

II. Jury Instruction

A circuit court's ruling on whether to submit a jury instruction will not be reversed absent an abuse of discretion. *See Fondren v. State*, 364 Ark. 498, 221 S.W.3d 333 (2006). AMCI instructions are required to be used when instructing a jury unless the judge finds that the text of the instruction does not accurately state the law. *Hutcheson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005). If there is no AMCI instruction on a subject upon which the judge determines the jury should be instructed, an alternative appropriate instruction may be given. *Id.*

Appellant argues that the circuit court also erred in giving the jury the model-jury instruction, AMCI 2d 601[1], related to entrapment instead of the one he proffered. Appellant contends that the model-jury instruction given was faulty and incorrectly stated the law. Although the model instruction provided that appellant must initially prove by a preponderance of the evidence that he was induced to commit the offense, appellant alleges that it failed to explain the State's subsequent requirement to prove beyond a reasonable doubt that appellant was predisposed to commit the offense. He claims the model instruction

[1]AMCI 2d 601 is the general format for the instruction, but it is actually 607 that provides the substantive section, which states, "[Appellant] asserts the affirmative defense of entrapment to the charge of loitering. To establish this defense, [appellant] must prove that a law enforcement officer induced the commission of the offense by using persuasion or other means likely to cause a normally law abiding persons [sic] to commit the offense. Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment."

left the impression that appellant must demonstrate that he was *not* predisposed to commit the act, which is an incorrect statement of the law. *See Jacobson*, *supra*. Appellant argues that his proffered instruction was a more correct statement of the law regarding entrapment and that it should have been the one issued by the circuit court. Appellant's proffered instruction, although not submitted to the jury, read as follows:

Entrapment Defense

> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of entrapment.
>
> On the other hand, where a person already has the predisposition to break the law, the mere fact that a police officer provides what appears to be a favorable opportunity is no defense.
>
> If, beyond a reasonable doubt, you should find from the evidence that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit a crime such as that charged in the information whenever opportunity was offered, and the police merely offered the opportunity, the defendant is not entitled to the defense of entrapment.

The State disagrees and further asserts that, because no evidence was presented to support the proffered instruction, the circuit court did not err in refusing to give it. *See Heritage*, *supra*.

The instruction actually given to the jury by the circuit court is in the format of AMCI 2d 601 with the relevant substantive section from AMCI 2d 607 as follows:

> [Appellant] asserts the affirmative defense of entrapment to the charge of loitering. To establish this defense, [appellant] must prove that a law enforcement officer induced the commission of the offense by using persuasion or other means likely to cause a normally law abiding persons [sic] to commit the offense. Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

The instruction given by the circuit court clearly tracks the model instruction, and the instruction proffered by appellant did not even address the issue he raises here. We hold that the circuit court did not abuse its discretion in refusing to submit appellant's instruction to the jury.

Affirmed.

GRIFFEN and BAKER, JJ., agree.