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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JASON ROSS DeMARE, DOC #S20908,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-2959

Opinion filed June 26, 2020.

Appeal from the Circuit Court for Sarasota County; Stephen Walker and Charles E. Williams, Judges.

Andrea Flynn Mogensen of Law Office of Andrea Flynn Mogensen, P.A., Sarasota, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Peter Koclanes, Assistant Attorney General, Tampa, for Appellee.

SILBERMAN, Judge.

Jason Ross DeMare seeks review of his judgment and sentence for traveling to meet a minor in violation of section 847.0135(4)(a), Florida Statutes (2017). DeMare entered an open plea to the charge while reserving the right to appeal the

denial of his dispositive motion to dismiss. We reverse because the undisputed facts fail to rebut DeMare's subjective entrapment defense.

The charges[1] against DeMare arose from a sting operation in which law enforcement set up a fictitious profile of an eighteen-year-old woman named "Amber" on the dating website Meetme.com. Using a bait-and-switch tactic, a detective posing as Amber chatted and flirted with DeMare online and via text message for four days as an adult before revealing on the fifth day that she was actually a minor. DeMare was arrested when he traveled to meet the fictitious Amber at her home later that day.

The State charged DeMare with violating section 847.0135(4)(a), which proscribes traveling in Florida for the purpose of engaging in unlawful sexual conduct with a minor or a person believed to be a minor after using an electronic communication device "to seduce, solicit, lure, or entice the child or person that the defendant believed to be a child to engage in the illegal act or other unlawful sexual conduct or to attempt to do so." Byun v. State, 44 Fla. L. Weekly D644, D645 (Fla. 2d DCA Mar. 6, 2019).

DeMare filed a motion to dismiss in which he asserted, among other things, that he was subjectively entrapped by law enforcement. DeMare attached as exhibits a screenshot of "Amber's" Meetme.com profile and transcripts of the chats, text messages, and telephone call that the State provided during discovery.[2]

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[1]DeMare was originally charged with two additional felonies arising out of the same facts, but the State nolle prossed those counts when he entered his plea to traveling to meet a minor.

[2]DeMare also attached transcripts of statements he made after he was arrested, but those statements do not contain any facts material to our analysis of the subjective entrapment defense.

The earliest communication established that Amber and DeMare began chatting as adults on May 16, 2018. Just after midnight on May 20, 2018, they switched to text messaging and flirted for about forty minutes. Their flirting included some sexual innuendo, and the detective sent DeMare a photo purporting to be of Amber. They resumed texting in earnest at 1:31 p.m. The conversation became more intimate as they planned to meet. They also exchanged more photos. When their plans became concrete, Amber "admitted" that she was only fourteen years old. This occurred at 3:49 p.m.

DeMare immediately tried to end the relationship, but Amber suggested they could still be friends. DeMare agreed but emphasized that the couple could not have sex because it was illegal. Amber told him that she liked older men and repeatedly attempted to convince him that a sexual relationship was still possible despite her age. DeMare remained reluctant but eventually responded to Amber's suggestions with sexual innuendo about what he would do <u>if</u> she were eighteen. Amber sent another photo. DeMare asked for more photos but specified that she not send nudes.

At 4:51 p.m., the pair agreed to speak on the phone. They also continued to exchange texts. DeMare asked if Amber was "really fourteen" and reminded her that he could get into legal trouble if they had a sexual relationship. Amber was undeterred and told DeMare that her parents were out of town and that she wanted to take advantage of it. DeMare was sheepish but offered to send Amber some selfies. Amber said she would see him when he got there and to send more photos while she got

ready. DeMare sent the selfies, and Amber asked if he had any "abs shots." DeMare sent a shirtless selfie.

While the couple continued to engage in banter, DeMare vacillated from sexual innuendo about their upcoming meeting to suggesting the couple just hang out as friends and smoke pot. Amber continued to press DeMare to make sexual comments, encouraging him by telling him how excited she was, asking for specifics, and asking if he had condoms. When DeMare reverted to talking about just meeting as friends, Amber used various tactics to change his mind. She cajoled him, complained about his reluctance, accused him of being scared, and assured him he could trust her. But even when DeMare relented, he was hesitant and equivocal. Amber nonetheless asked him to come over and provided her address. DeMare was arrested at 6:07 p.m. when he pulled into the driveway of the address. He was not carrying any drugs or condoms.

The State filed a traverse in which it agreed that the exhibits were accurate and relevant to understand the chronology and nature of the communications. At an evidentiary hearing on the motion to dismiss, the trial court stated that DeMare had met his threshold burden to establish lack of predisposition to engage in the crime. However, after hearing the State's evidence, the trial court determined that the State had established a prima facie case of traveling to meet a minor and that DeMare failed to establish an entrapment defense. We disagree and conclude that DeMare established his subjective entrapment defense.

> A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the

> commission of a crime, he or she induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.

§ 777.201(1), Fla. Stat. (2017); see also Munoz v. State, 629 So. 2d 90, 99 (Fla. 1993). The defendant must prove this subjective entrapment defense by a preponderance of the evidence. § 777.201(2).

Under this statute, the first question to be determined is whether law enforcement induced the defendant to commit the charged offense. Munoz, 629 So. 2d at 99. If the answer is yes, then the second question is whether the defendant was predisposed to commit the charged offense. Id. The defendant bears the initial burden of proving a lack of predisposition. However, when the defendant produces evidence of a lack of predisposition, the burden shifts to the State to rebut the evidence beyond a reasonable doubt. Id.

The third and final question is whether the defense should be submitted to a jury or decided as a matter of law. Id. at 100. Generally, the issues regarding subjective entrapment present questions of disputed facts for the jury to resolve. Id. However, the issue may be ruled on as a matter of law if the material facts are undisputed, the defendant meets his burden of proof, and the State is unable to rebut the evidence of lack of predisposition. Id.

As to the first question, based on the undisputed facts set out above, we conclude without hesitation that law enforcement induced DeMare to commit the offense of traveling to meet a minor. Cf. Gennette v. State, 124 So. 3d 273, 278 (Fla. 1st DCA 2013); Farley v. State, 848 So. 2d 393, 396 (Fla. 4th DCA 2003). As to the

second question, a defendant is predisposed if he "was awaiting any propitious opportunity or was ready and willing, without persuasion, to commit the offense." Munoz, 629 So. 2d at 99. "[P]redisposition is not the same as *mens rea*. The former involves the defendant's character and criminal inclinations; the latter involves the defendant's state of mind while carrying out the allegedly criminal act." Herrera v. State, 594 So. 2d 275, 278 (Fla. 1992) (quoting State v. Rockholt, 476 A.2d 1236, 1242 (N.J. 1984)).

DeMare did not have a prior record of offenses against minors, and there was no evidence he was ever investigated for or engaged in such an offense. In fact, he responded to a profile of an eighteen-year-old woman in the adult section of Meetme.com. Thus, DeMare met his burden of presenting evidence of lack of predisposition. See Robichaud v. State, 658 So. 2d 166, 169 (Fla. 2d DCA 1995) (holding that the defendant established a lack of predisposition to sell drugs because the police had no information he had conducted such activity and he had no criminal record); Farley, 848 So. 2d at 396 (holding that the defendant established a lack of predisposition to purchase child pornography because there was no evidence he had ever purchased it, no pornographic materials were found in his home, and he had no criminal record).

The burden therefore shifted to the State to establish beyond a reasonable doubt that DeMare "was awaiting any propitious opportunity or was ready and willing, without persuasion, to commit the offense." Munoz, 629 So. 2d at 99 (emphasis added). The State failed to meet this burden. When DeMare contacted Amber on Meetme.com, he thought she was an adult and was led to believe he was speaking with

an adult for four days. When law enforcement finally "admitted" that Amber was only fourteen, DeMare immediately tried to end the relationship. But Amber persuaded him to remain friends and then went about seducing and luring him into entertaining the idea of having a sexual relationship. DeMare repeatedly expressed an unwillingness to engage in sex with a minor. His reluctance to violate the law was overcome by law enforcement inducement.

"Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." Munoz, 629 So. 2d at 99 (quoting Jacobsen v. United States, 503 U.S. 540, 548 (1992)). The facts of this case are analogous to those in Gennette, 124 So. 3d 273. Gennette got caught up in a similar sting operation when he responded by e-mail to an ad for what appeared to be legal activity posted by a nineteen-year-old woman seeking a sexual encounter that included her sister. Id. at 275. The fictional adult, who was also named Amber, immediately told Gennette that her sister was fourteen and asked if he was "ok with that." Id. at 276. Gennette equivocated and asked what Amber had in mind. Amber sent him a fake photo of her and her sister and told him they were interested in "fun." Id.

Gennette continued to e-mail Amber and generally responded in the singular to her suggestive messages. But Amber continued to respond in the plural. When Gennette invited Amber over, she replied, "we host only" and again repeated that if Gennette came over it would be for some "fun." Id. When Gennette failed to mention sex in his responses, Amber "repeatedly steered the conversation back to sexual

activity with a minor." Id. at 278. Late on the second day, Gennette finally showed interest in the underage sister. Id. at 277. The messages continued into the third day, becoming increasingly suggestive and including references to sex with the minor. Id.

Gennette entered a plea to unlawful use of a two-way communications device to facilitate a felony and reserved the right to appeal the denial of his motion to dismiss. Id. at 274. The First District concluded that the trial court erred in denying Gennette's motion to dismiss based on his subjective entrapment defense. Id. at 279. The court ruled that law enforcement "induced or encouraged [Gennette], and due to his lack of predisposition, caused him by methods of persuasion to commit the offenses charged." Id. at 278. The court explained that it was the agent who took the lead in the conversation, initially suggested sex with a minor, and kept redirecting Gennette to that topic. The agent "coaxed and cajoled [Gennette] for more details and challenged [Gennette's] reluctance by impugning his nerve and suggesting he was 'scared.' " Id. "The agent's persistent urging to overcome [Gennette's] obvious reluctance to commit or even describe illegal activity in his e-mail messages easily fits the statutory definition of entrapment." Id.

In this case, as in Gennette, law enforcement took the lead in the conversation, initially suggested a sexual relationship between DeMare and a minor, coaxed and cajoled DeMare for more details, and challenged his reluctance by impugning his nerve and suggesting he was scared. As in Gennette, law enforcement's persistent urging eventually overcame DeMare's reluctance to commit or even describe sexual activity with a minor.

This leads us to the third question to be determined under section 777.201 and Munoz: whether the defense should be decided as a matter of law or submitted to the jury. As in Gennette, all the communications that made up the charge were contained in the record so there was no dispute of any material facts. See 124 So. 3d at 275. Because DeMare established that law enforcement induced him to commit the charged offense and the undisputed evidence failed to rebut the defense, DeMare's subjective entrapment defense should have been decided as a matter of law. Accordingly, the trial court erred in denying DeMare's motion to dismiss. We therefore reverse DeMare's judgment and sentence and remand for discharge.

Reversed and remanded for discharge.

SLEET and SMITH, JJ., Concur.