

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,

Appellant,

v.

PEDRO JAIME LOPEZ-GARCIA,

Appellee.

No. 2D21-1492

November 16, 2022

Appeal from the Circuit Court for Sarasota County; Thomas W. Krug, Judge.

Ashley Moody, Attorney General, Tallahassee, and Johnny T. Salgado, Assistant Attorney General, Tampa; and Taylor A. Schell, Assistant Attorney General, Tampa (substituted as counsel of record), for Appellant.

Andrea Flynn Mogensen of The Law Office of Andrea Flynn Mogensen, Sarasota, for Appellee.

SLEET, Judge.

The State challenges the trial court's order granting Pedro Lopez-Garcia's motion to dismiss charges of traveling to seduce/solicit/entice a child to commit a sex act, attempted lewd or lascivious battery on a victim aged twelve to sixteen, use of a computer to seduce/solicit/entice a child to commit a sex act, and transmission of material harmful to minors. The trial court based its dismissal on its conclusion that Lopez-Garcia had been subjectively entrapped by the actions of law enforcement. Because we conclude that the defense of entrapment should have been presented to the jury rather than decided by the trial court as a matter of law, we reverse and remand for further proceedings.¹

¹ Lopez-Garcia filed a notice of cross-appeal purportedly challenging what he identified as "the partial grant and partial denial" of his motion to dismiss. However, the trial court's order only granted his motion to dismiss, albeit on only one of the bases for dismissal that Lopez-Garcia raised in his motion to dismiss: subjective entrapment. As to the other argument raised in that motion, objective entrapment, the trial court did not deny the motion but rather specifically stated, "Because the Court has granted Defendant's motion on the basis of subjective entrapment, the Court does not reach the issue of objective entrapment which was also raised in the Defendant's Second Amended Motion to Dismiss." But even had the trial court denied the motion in part on that basis, Lopez-Garcia would not be entitled to appeal that ruling because an order denying a motion to dismiss is not an appealable nonfinal order pursuant to Florida Rule of Appellate Procedure

Section 777.201(1), Florida Statutes (2020), provides:

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.

"To establish this defense, the defendant has the burden to first prove by a preponderance of the evidence that a government agent induced him to commit the charged offense." *Rivera v. State*, 180 So. 3d 1195, 1197 (Fla. 2d DCA 2015). "Under this statute, the first question to be determined is whether law enforcement induced the defendant to commit the charged offense. If the answer is yes, then the second question is whether the defendant was predisposed to commit the charged offense." *DeMare v. State*, 298 So. 3d 1269, 1273 (Fla. 2d DCA 2020) (citation omitted) (citing *Munoz v. State*, 629 So. 2d 90, 99 (Fla. 1993)).

9.140(b)(1). As such, we in no way address Lopez-Garcia's objective entrapment argument.

Generally, the issues regarding subjective entrapment present questions of disputed facts for the jury to resolve. 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. (emphasis added) (citation omitted) (citing *Munoz*, 629 So. 2d at 100).

Here, Lopez-Garcia based his subjective entrapment claim on a series of text communications between himself and an undercover police officer posing online as "Ashlie." The factual issue of what each party typed in these text communications was not in dispute. However, because reasonable persons could draw different conclusions as to what each person meant by what they typed, Lopez-Garcia did not establish inducement as a matter of law and a factual issue remained as to whether he lacked predisposition to commit the crime. As such, his subjective entrapment defense should have been resolved by the jury, as the trier of fact, instead of ruled on by the trial court as a matter of law.

I. Inducement

"Inducement is defined as including 'persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of

reward, or pleas based on need, sympathy[,] or friendship.' "

Rivera, 180 So. 3d at 1197 (quoting *State v. Henderson*, 955 So. 2d 1193, 1195 (Fla. 4th DCA 2007)); *see also State v. Harper*, 254 So. 3d 479, 486 (Fla. 4th DCA 2018). "Inducement cannot be found by prompting or creating an opportunity." *Harper*, 254 So. 3d at 486 (quoting *Marreel v. State*, 841 So. 2d 600, 603 (Fla. 4th DCA 2003)). Here, Lopez-Garcia maintains that the undercover officer's actions during the text communications induced him to commit the charged crimes.

A complete recitation of the facts is necessary to our analysis. Lopez-Garcia met "Ashlie" on the Skout phone app, which is an over-eighteen app on which her profile indicated that she was twenty-one years old. They began communicating at 10:41 p.m. on July 17, 2019. At 8:55 p.m. on July 18, "Ashlie" first informed Lopez-Garcia that she was actually fourteen years old.

Lopez-Garcia initially indicated that the two could continue to communicate with each other but that nothing more could occur, and the undercover officer responded, "I don't want to just chat."

Lopez-Garcia replied, "[W]e can chat But no we cant meet."²

The officer then stated that she wanted to "have fun hang out."

When Lopez-Garcia pressed "Ashlie" on what she meant, the officer made the conversation more sexual by stating, "I'm inexperienced that's why I prefer older guys." Lopez-Garcia did not shy away from the sexual implication, replying, "mmm I see. But what's on your mind. I know a lot technology this days so I know u know exactly what u would like to do. Just tell me don't be shy." This occurred at 9 p.m. on July 18—five minutes after he learned that "Ashlie" was fourteen. After some back and forth, he persisted, "I just want to know," and she responded, "Y what would U want to do." He then sent five texts in rapid succession imploring her to tell him what she would like to do sexually: (1) "If u tell me I will tell u," (2) "But tell me first," (3) "Just would like to know," (4) "?," and (5) "Are you going to tell me or not?" The undercover officer responded, "Wat ur not gonna hang with me so what's the point." Lopez-Garcia responded, "If u tell me wat u want do I will think about it. But you need to tell me first." The undercover officer again gave a sexual

² Quotations from text messages will appear in this opinion as is without spelling or grammatical corrections.

response, "No that's not y Im here looking for an older guy to take the reins I don't know anything." Lopez-Garcia seemingly kept the conversation sexual by texting, "Just tell me how hard it is"; "If u tell me I will tell u too"; and "Ok send me some pics of your self first and I will tell you."

These three texts were sent in rapid succession, which is a pattern on the part of Lopez-Garcia throughout the text communications. Multiple times, he sent several texts right in a row asking "Ashlie" to respond to him. At one point later in the conversation, he asked her why she was taking so long to respond although only three minutes had passed. In this way, he could be viewed as being responsible for—or at the very least participating in—keeping the conversation going.

After saying that she is "shy," the officer sent a photo, to which Lopez-Garcia responded, "With less clothes? Maybe just bikini?" Lopez-Garcia continued to press for a photo of "how u look right now," but the officer steered the conversation back to an in-person meeting, "Y r u even going to come or not."

The conversation continued in a sexual direction with the two discussing why a fourteen year old would be talking to an older

man. Lopez-Garcia asked, "Have u done stuff with an older guy before?" The officer replied, "No I'm a virgin." Lopez-Garcia then asked, "So u never giving head or played with a guys thing before?" and "No one touched you before?" The officer replied, "No I haven't told u Im inexperience. Looking to learn new things." Lopez-Garcia responded, "What's your phone number?" and then asked where she lived. When she said Sarasota, he responded, "So we can't be just friends?" The officer again stated, "Looking to hang out." Lopez-Garcia then wrote, "Oh I see so not just friends." The officer indicated "maybe," and he said, "Tell me its ok."

When she indicated "ok," Lopez-Garcia wrote in several rapid-fire texts, "So what you want to do if we hang out. I really don't want to do anything sexual with you. U are young. Im not that old but u underage." Again she responded "ok," and then Lopez-Garcia wrote, "Is that what u were looking for?" The officer responded, "I'm looking for fun that's all so." Lopez-Garcia then asked what is fun for her, and she replied, "Ur wasting my time."

The conversation then moved off the Skout app and onto cell phone texts. Lopez-Garcia asked for a photo of "Ashlie," and when she did not respond, he continued the conversation by asking, "So

can we hang out or not." There was some back and forth about her sending him a photo, and the officer eventually sent him one of "Ashlie" fully clothed sitting on a couch, writing, "Now U send one." Although this is an outright request by the officer to have Lopez-Garcia transmit a photo to a minor, because the officer did not explicitly ask for a nude photo and made the request in conjunction with providing Lopez-Garcia a photo of "Ashlie" fully clothed, a factual issue existed as to Lopez-Garcia's intent that should have been resolved by the jury.

After some small talk, Lopez-Garcia steered the conversation back to a sexual nature by writing, "What u wearing? I'm naked I hate sleeping with clothes on." The officer responded, "I gonna send me a pic now or not." He asked what she was wearing, and she typed, "I'm telling till U send me a pic." Again, whether these statements amount to inducement should have been determined by the jury as it is not clear what the officer meant by the request. She did not explicitly request a nude photo of Lopez-Garcia but she did make the request after he had informed her that he was naked. For his part, Lopez-Garcia did not interpret the request as one for a nude photo as he responded by sending a photo of himself shirtless

from the waist up. The officer then sent another photo of herself fully clothed, and Lopez-Garcia voluntarily responded, "Take it off." Some back and forth small talk followed, and then Lopez-Garcia sent a picture of a penis, saying, "Hope u like it." Although the officer had asked twice for Lopez-Garcia to send a picture of himself—and did so after Lopez-Garcia told her he was naked—after he sent the bare-chested photo, the officer stopped asking for photos and never requested a photo of his penis. Under these circumstances, viewed in the larger conversation, whether this was inducement should not have been determined by the trial court as a matter of law; because the statements made throughout the conversation are open to interpretation, the issue of inducement should have been a question for the jury. This is especially true because it was Lopez-Garcia who often steered the conversation in a sexual direction, as he did by sending the unsolicited naked penis photo. After sending the photo, he asked if "Ashlie" liked it and commented that it was "[l]ike 7 or 8 inches," to which the officer replied, "I'm still virgin."

At that point in the conversation, Lopez-Garcia indicated that he was not sure which girl from the Skout app he was conversing

with because he had been communicating with more than one. But when the officer again repeated that she was fourteen, Lopez-Garcia did not back off from the sexual nature of the conversation, again asking if she liked the photo of his penis. When "Ashlie" responded that she "hadn't seen many" and that "I'm kind of young," he responded with a vulgar statement about his penis. When she did not respond to two more inquiries, he wrote, "If u don't Like it I wont send anymore." The officer then stated that "Ashlie" was just inexperienced, and she asked Lopez-Garcia how old he was. He responded, "20 and U," and then he asked, "U said u 21 aint it . . . on ur skout." The officer again stated that "Ashlie" was fourteen: "I'm 14 but super mature for my age. ur super cute." Lopez-Garcia did not even flinch at the mention of her age, responding twenty-one seconds later, "But what about my dick?" and nine seconds after that, "U like it or not?" He then sent a series of inquiries regarding what "Ashlie" thought she might like to do with his penis. The officer responded by asking what he would like her to do and if he would show her how.

The officer then asked Lopez-Garcia to come see her because her parents were out of town. Lopez-Garcia, however, continued to

press her for nude photos of herself. She responded, "You can come see it in person hehe." He then repeatedly asked her for a nude photo, and she repeatedly said no, instead asking, "Why don't you just come see me!" Eventually, Lopez-Garcia asked for her address but then waived, asking her to come see him. She responded that she could not because she was only fourteen and too young to drive.

The conversation ended there for the night, and despite the officer's final comment the night before that "Ashlie" could not drive because she was only fourteen, the next morning Lopez-Garcia voluntarily rebooted the conversation by texting, "Hey what you doing." The officer did not respond until later that afternoon when the conversation returned to the subject of an in-person meeting, with the officer asking Lopez-Garcia, "Will u cum see me?" At some point the two spoke on the phone, and during that conversation, the officer asked what Lopez-Garcia was doing that night and he asked if she was alone in the house. She answered that she was and asked if he wanted to hang out. He responded that he would shower and then text her. The texts then continued, and the officer provided an address. Lopez-Garcia then asked, "so what u want do when I get there?" The officer replied, "Thought you wanted my

virginity." And Lopez-Garcia responded, "Well no I don't want take your virginity." The officer replied, "Oh rilly? I mean whatever u want comfortable w I'm ok wit u just comin to the house." When he avoided answering by asking to see her underwear, the office again asked, "I'm fr serious abt meeting we can video chat ill prove Im real" and "Why r u nervous?"

Counsel for Lopez-Garica argued below and argues on appeal that this and some other of the officer's statements were attempts to chide, embarrass, and humiliate Lopez-Garcia into acting criminally. But this was a supposed fourteen year old who Lopez-Garcia had never met in person and had only been communicating with for a little over a day. Whether such comments from a virtual stranger amounted to inducement in this context is a factual issue for the jury to resolve.

After more conversation about her sending him photos, Lopez-Garcia asked if he could shower at "Ashlie's" place. He then said, "U young," and she responded, "Whatev ok then don't come ovr" and "I want to c u but if u dnt want to then don't." Ultimately, the officer told Lopez-Garcia, "Making this way 2 difficult." He then agreed to go to "Ashlie's" house. When he asks if she was mad at

him, she assured him, "no not at all." They agreed that he would bring alcohol. He later texted that he arrived.

Although there is no dispute as to what was written in the text communication between Lopez-Garcia and the undercover officer, many of the statements are open to more than one interpretation. Although the officer attempted on at least four occasions to get Lopez-Garcia to agree to travel to see "Ashlie," the question of whether she used "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy[,] or friendship," *Rivera*, 180 So. 3d at 1197 (quoting *Henderson*, 955 So. 2d at 1195), or in the alternative merely prompted him to act or created an opportunity for him to act, *see Harper*, 254 So. 3d at 486, is not clear.

Because a factual issue remained as to the meaning of many of the statements made by the officer and Lopez-Garcia during their text communications, Lopez-Garcia has not met his burden of establishing inducement as a matter of law that would entitle him to a dismissal of the charges without the question being presented to a jury. Based on the facts of this case, Lopez-Garcia has not established that the State "employ[ed] methods of persuasion or

inducement which create a substantial risk that such crime [was] committed by a person other than one who is ready to commit it." § 777.201(1) (emphasis added). Whether he was a willing participant seeking to arrange a sexual encounter with a minor victim or in the alternative had righteous motives that were overcome by law enforcement coercion was a question for the jury. *See Marreel*, 841 So. 2d at 603 ("[I]nducement refers to government conduct that persuades a person to turn 'from a righteous path to an iniquitous one.' " (quoting *United States v. Gifford*, 17 F.3d 462, 468 (1st Cir. 1994))).

II. Predisposition

The subjective entrapment defense also should have been presented to the jury because the State introduced evidence to rebut Lopez-Garcia's proof of his lack of predisposition to commit the crime. *See Munoz*, 629 So. 2d at 100 ("[W]e construe section 777.201 as requiring the question of predisposition to be submitted to a jury when factual issues are in dispute or when reasonable persons could draw different conclusions from the facts." (emphasis added)).

"Predisposition refers to 'whether the accused was awaiting any propitious opportunity or was ready and willing, without persuasion, to commit the offense.' " *Harper*, 254 So. 3d at 486 (quoting *Munoz*, 629 So. 2d at 99). "Predisposition . . . focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Jones v. State*, 114 So. 3d 1123, 1126 (Fla. 1st DCA 2013) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)). "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." *DeMare*, 298 So. 3d at 1273. Because the State produced evidence here of predisposition on Lopez-Garcia's part, rebutting his proof of lack of predisposition, the question of whether the State established predisposition beyond a reasonable doubt should have been left for the jury to resolve. The trial court therefore erred in determining the issue as a matter of law and dismissing the charges. *Cf. Jimenez v. State*, 993 So. 2d 553, 555 (Fla. 2d DCA 2008) ("If the State cannot produce evidence beyond a reasonable doubt that the

defendant possessed a predisposition to commit the offense, a defendant is entitled to dismissal of the charge.").

Although Lopez-Garcia met his initial burden of establishing a lack of predisposition to commit the charged offenses by showing that he had never been investigated for or charged with such offenses in the past, *cf. Harper*, 254 So. 3d at 487 ("Predisposition can be shown through evidence of the defendant's prior convictions."), after the burden shifted to the State, *see DeMare*, 298 So. 3d at 1273; *Harper*, 254 So. 3d at 486-87, it rebutted his lack of predisposition by presenting evidence of Lopez-Garcia's conduct during the text communications between himself and the undercover officer.

"While 'care must be taken in establishing the predisposition of a defendant based on conduct that results from the inducement,' post-inducement [sic] acts and statements can, in appropriate circumstances, be relevant to prove that the defendant was predisposed to commit the crime before he was induced to do so." *Blanco v. State*, 218 So. 3d 939, 943 (Fla. 3d DCA 2017) (citation omitted) (quoting *Munoz*, 629 So. 2d at 99)); *see also Jones*, 114 So. 3d at 1126 (explaining that the Florida Supreme Court has

"indicated that post-inducement [sic] acts *can* be relevant to proving predisposition" but that "care must be taken in establishing the predisposition of a defendant *based on conduct that results from the inducement*" (quoting *Munoz*, 629 So. 2d at 99)). "[P]ost-inducement [sic] evidence can be admissible if it tends to show that the defendant was predisposed to commit the crime before the government induced him." *Blanco*, 218 So. 3d at 945. "In other words, the evidence may arise post-inducement [sic], but it must tend to establish that the defendant was predisposed to commit the crime before the inducement." *Id.* "[W]hen a government agent simply provides the defendant 'with the opportunity to commit a crime . . . the ready commission of the criminal act amply demonstrates the defendant's predisposition.'" *Rivera*, 180 So. 3d at 1197 (quoting *State v. Bennett*, 710 So. 2d 661, 662 (Fla. 2d DCA 1998)).

Here, the State presented evidence that after he learned that "Ashlie" was fourteen years old, Lopez-Garcia asked her several times to send nude photos of herself, repeatedly steered the conversation in a sexual direction—often using vulgar, explicit language—and sent her what were arguably unsolicited penis

photos. Although, upon first learning that the girl was fourteen, Lopez-Garcia immediately said they could only chat and could not meet and later definitively said that he would not take her virginity, he seemingly contradicted these statements by repeatedly requesting nude photos of "Ashlie" and inquiring into what she wanted to do sexually and wanted to do with his penis. In presenting this evidence, the State created an issue of fact as to whether Lopez-Garcia was predisposed to commit the charged offenses independent of any action by the undercover officer. As such, dismissal was improper, and the issue of predisposition should have been resolved by the jury. *See Munoz*, 629 So. 2d at 100 (stating that section 777.201 requires the question of predisposition to be determined by the jury "when reasonable persons could draw different conclusions from the facts").³

³ We acknowledge that this same sting operation was the subject of this court's opinion in *DeMare*, 298 So. 3d 1269, in which this court reversed DeMare's conviction for traveling to meet a minor based on the conclusion that DeMare had been subjectively entrapped to the commit the offense. In fact, the trial court in this case took judicial notice of the text communication in that case. However, the issue of entrapment is a fact-based inquiry dependent upon the evidence presented in each individual case and should be decided on a case-by-case basis. *See generally* § 777.201(2) (stating

III. Conclusion

Based on the reasons discussed, we reverse the trial court's order granting Lopez-Garcia's motion to dismiss as to the charges of traveling to seduce/solicit/entice a child to commit a sex act and attempted lewd or lascivious battery on a victim aged twelve to sixteen. The trial court also dismissed the use of a computer to

that entrapment must be proven by a "preponderance of the evidence" and "tried by the trier of fact").

DeMare, 298 So. 3d at 1271-72, is factually distinguishable from the instant case in that DeMare communicated with the undercover police officer for four days believing she was an eighteen-year-old woman before the officer "admitted" she was fourteen. In the instant case, Lopez-Garcia learned that the girl he was communicating with was fourteen years old less than twenty-four hours after the initial communication. Additionally, the day after Lopez-Garcia learned that "Ashlie" was fourteen, he sent what appear to be unsolicited penis pictures to her, asked her several lewd questions about the pictures, and repeatedly requested nude photos of her. DeMare tried to end his text relationship when he learned the girl was fourteen, *id.* at 1272; Lopez-Garcia continued the conversation, often steering it back to sexual topics and using graphic language. Although DeMare did make statements about what he would do to "Amber" if she was eighteen years old, he did so in response to the undercover officer's inquiry. *Id.* The communications in *DeMare* indicate that DeMare wanted to hang out and smoke pot with the fourteen-year-old "Amber." *Id.* But the communications in the instant case indicate no other motive than a sexual one on the part of Lopez-Garcia.

In any event, *DeMare* does not create a bright line rule that sting operations of this sort amount to per se inducement. Each case must be resolved on the facts thereof.

seduce/solicit/entice a child to commit a sex act and transmission of material harmful to minors counts against Lopez-Garcia, concluding that the conduct on which these charges are based occurred after the original inducement. Our conclusion that the question of inducement cannot be settled as a matter of law and instead must go to the jury requires that we reverse the order granting Lopez-Garcia's motion to dismiss as to these counts as well.

Reversed and remanded for further proceedings.

NORTHCUTT, J., Concurs.

ATKINSON, J., Concurs in result only.

Opinion subject to revision prior to official publication.