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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2017-CA-000663-MR

SHAWN GREEN

APPELLANT

v.

APPEAL FROM NICHOLAS CIRCUIT COURT  
HONORABLE JAY DELANEY, JUDGE  
ACTION NO. 16-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Shawn Green appeals from the Nicholas Circuit Court's final judgment entered April 3, 2017, following conviction at jury trial.

The jury found Green guilty of one count of unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in

sexual or other prohibited activities,<sup>1</sup> and Green was thereafter sentenced to one year's imprisonment. We affirm the trial court.

On May 19, 2016, Officer Lewis Boyer of the Carlisle Police Department in Nicholas County, Kentucky found an advertisement for a “casual encounter” in the personals section of the Lexington-area Craigslist website.<sup>2</sup> This advertisement, posted by Green, read in its entirety as follows:

Young & want experience? – 40

Are you young & want to explore your sexuality with a real man? Are you curious about something but don't know how do [sic] approach it? Are you shy? I remember what it's like to be shy and not sure of what I was doing, and incredibly curious to learn more about sex. My first time was with a 26 year old when I was 17. Changed my world . . .

I'd like to do that for a young lady. I want to show you all the things you're curious about but too shy or unsure of how to approach it. Let me teach you, answer questions, show you. There's no such thing as too wild or kinky for me either, so feel free to open up.

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<sup>1</sup> Kentucky Revised Statutes (KRS) 510.155, a Class D felony.

<sup>2</sup> The personals section of Craigslist no longer exists. “Congress just passed HR 1865, ‘FOSTA’, seeking to subject websites to criminal and civil liability when third parties (users) misuse online personals unlawfully. Any tool or service can be misused. We can't take such risk without jeopardizing all our other services, so we are regrettably taking craigslist personals offline.” CRAIGSLIST, <https://www.craigslist.org/about/FOSTA> (last visited August 7, 2018). FOSTA, formally known as the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017,” was signed into federal law on April 11, 2018. *See* <https://www.congress.gov/bill/115th-congress/house-bill/1865> (last visited August 7, 2018).

I'm 40 years old. I'm a good guy, real, safe, and completely clean of drugs & diseases. I am single, no wife, no girlfriend. I was a shy, introverted guy when I was young, but not anymore.

Drop me a response and tell me about yourself. Pictures are always welcome, and I can always travel to meet you.

Officer Boyer suspected the advertisement, with its emphasis on youth and inexperience, signified a possibility that the posting individual was an online predator. To investigate, the officer invented an alias and email account for himself as "Leslie Booker," a fourteen-year-old girl. Officer Boyer, as "Leslie," emailed Green: "Hi! 14f in the Paris ky area! R u still looking on ad?" Two minutes later, Green replied, "14 is pretty young. How do I know your [sic] real?"

Green and "Leslie" exchanged a series of messages over the next two days. In many of those messages, Green requested photographs and videos of Leslie. The images of Leslie were supplied by Officer Boyer's wife, who is employed by the Carlisle Police Department at a rate of one dollar per year to provide photographs and videos for these types of cases. At one point, Green wanted a photograph of Leslie with one breast exposed, to prove she was "real" and not working for law enforcement. Officer Boyer, as Leslie, refused to send any nude photographs or videos. Nonetheless, Green wanted a rendezvous with Leslie to help her "explore [her] body" and "show [her] how to take care of" him.

Green arranged to meet with Leslie in the Carlisle cemetery at some point during the late evening hours of May 20, 2016. Green traveled from his home in Ohio to the cemetery, only to find Officer Boyer and several other officers awaiting his arrival. The officers stopped Green's truck, removed Green from the vehicle, and gave Green his *Miranda*<sup>3</sup> warnings. Officer Boyer asked Green why he was in the cemetery. Green admitted he was there to meet a girl and, when pressed further, admitted that the girl was fourteen years old. The officers thereafter transported Green to the police department. Following a recorded interview with Officer Boyer, in which he admitted the substance of the aforementioned events, Green signed the following confession:

I posted an ad on Craigslist looking for younger women. I read a response from a girl claiming to be 14. I talked with her, asked her to send pictures and videos. She agreed to meet me Friday night. I drove down and attempted to meet her for play with no intentions of having sex. I let curiosity get the best of me, when inside me everything screamed "no."

The Nicholas County grand jury indicted Green on one count of unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities. In Green's one-day jury trial, held January 19, 2017, the Commonwealth's evidence consisted of significant evidence, including the

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<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

following: testimony from Officer Boyer recounting his investigation; copies of the officer's email exchanges with Green; the extracted contents of Green's cellphone, which contained photographs and videos of "Leslie"; video and audio recordings of Green's admissions at the police department; and Green's signed confession.

For his defense at trial, Green vigorously cross-examined Officer Boyer on various aspects of his investigation. Green emphasized there was never an actual victim in the case, only a decoy, and that he had no prior criminal history. He further stressed how the advertisement only requested an encounter with a *young* female, not an *underage* one. Green also pointed out there was never an explicit proposition for sex in the email exchanges. Additionally, in his signed confession, Green denied any intent to engage in sex with Leslie on the evening they were supposed to meet. After the close of the Commonwealth's proof, Green's defense consisted of character witnesses, who described him as a caring, considerate, law-abiding citizen.

Following deliberation, the jury returned a guilty verdict and recommended a sentence of one year's imprisonment. The trial court entered final judgment on April 3, 2017, sentencing Green in accord with the jury's recommendation. This appeal follows.

Green was convicted of unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities, proscribed under KRS 510.155. This offense requires the Commonwealth to prove a defendant:

knowingly use[d] a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation of KRS 510.040, 510.050, 510.060, 510.070, 510.080, 510.090, 510.110, 529.100 where that offense involves commercial sexual activity, or 530.064(1)(a), or KRS Chapter 531.

...

The solicitation of a minor through electronic communication under subsection (1) of this section shall be prima facie evidence of the person's intent to commit the offense, and the offense is complete at that point without regard to whether the person met or attempted to meet the minor.

KRS 510.155(1)-(3). The enumerated statutes triggering application of this statute recount various sexual offenses, including rape, sodomy, sexual abuse, human trafficking, unlawful transaction with a minor, and pornography. Although not explicitly referenced, Green's jury convicted him using an instruction patterned on first-degree sexual abuse, KRS 510.110(1)(c)(1), finding he

knowingly used a cellular telephone for the purpose of procuring a police officer, posing as a minor, who the defendant believed to be a minor, for the purpose of subjecting that person to sexual contact . . . believ[ing] the minor to be less than sixteen (16) years old . . . [and] at the time of such occurrence, the defendant was 21 years old or older.

For his sole issue on appeal, Green argues the trial court erroneously declined to provide the jury with a requested instruction on entrapment. “In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony.” *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999) (citing Kentucky Rule of Criminal Procedure (RCr) 9.54(1) and *Kelly v. Commonwealth*, 267 S.W.2d 536, 539 (Ky. 1954)). “However, the trial court has no duty to instruct on theories of the case that are not supported by the evidence.” *Hunt v. Commonwealth*, 304 S.W.3d 15, 30 (Ky. 2009) (citing *Payne v. Commonwealth*, 656 S.W.2d 719, 721 (Ky. 1983)).

An entrapment defense, codified in KRS 505.010, has specific requirements which must be fulfilled before a defendant may present it to the jury:

Entrapment is an available defense when a defendant “was induced or encouraged to engage in [the criminal] conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and [a]t the time of the inducement or

encouragement, he was not otherwise disposed to engage in such conduct.”

*Wyatt v. Commonwealth*, 219 S.W.3d 751, 756 (Ky. 2007) (quoting KRS 505.010).

“Entitlement to the defense requires satisfaction of both prongs of the test, inducement and absence of predisposition.” *Morrow v. Commonwealth*, 286 S.W.3d 206, 209 (Ky. 2009) (citing *Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988)). Of these two prongs, predisposition to commit the crime is particularly important. “[I]f the evidence is that the defendant otherwise is disposed to engage in the criminal activity, then inducement or encouragement does not constitute entrapment.” *Mackey v. Commonwealth*, 407 S.W.3d 554, 559 (Ky. 2013) (quoting *Commonwealth v. Sanders*, 736 S.W.2d 338, 340 (Ky. 1987)).

In the case *sub judice*, the trial court found the facts did not warrant an instruction on entrapment. In its first bench conference discussing the subject, the trial court pointed out “the evidence right now is that [Green] initiated an ad seeking younger women, possibly implied that they’d be under eighteen.” In a later bench conference, following the close of all evidence, the trial court noted how Green responded to Leslie’s email within two minutes. Further, Green’s actions afterward never showed a lack of predisposition toward the offense. Instead, the trial court found Green was chiefly concerned about not getting caught violating the law: “There was never any backing off; it was all just concern over



getting in trouble.” The trial court reasoned that the essence of entrapment is police turning someone into a criminal who would not otherwise be one.

Ultimately, the trial court declined to instruct the jury on the entrapment defense.

The trial court correctly declined Green’s entrapment defense instruction. The entrapment defense is not available when “[t]he public servant or the person acting in cooperation with a public servant merely affords the defendant an opportunity to commit an offense[.]” KRS 505.010(2)(a). In addition, “evidence that a defendant was predisposed to commit the criminal act may be shown where the accused has engaged in a course of similar crimes, where the defendant was merely afforded an opportunity to commit a preconceived plan, or where willingness to commit the crime is apparent by ready compliance.” *Wyatt*, 219 S.W.3d at 757 (citation omitted). When Officer Boyer contacted Green about his advertisement, representing himself to be a fourteen-year-old girl, Green was not pressured or encouraged to engage in any criminal conduct based on the representation. Officer Boyer, a public servant, merely afforded Green an opportunity to commit the offense, making the entrapment defense unavailable to him under KRS 505.010(2)(a) and *Wyatt*.

Moreover, the Commonwealth’s evidence showed Green demonstrated a “ready compliance” indicating predisposition under *Wyatt, supra*. Green could have rejected or ignored “Leslie’s” email as being from someone far

too young. Instead, he demonstrated ready compliance by electing to respond *within two minutes* asking if she were “real.” Even though the trial court did not specifically quote *Wyatt*’s language on ready compliance, it nonetheless correctly found Green’s hasty and willing reception of Leslie’s response indicated a predisposition to commit the offense.

“In the instant case the uncontradicted evidence shows that the criminal intent originated in the mind[] of appellant[] and that [he] acted of [his] own volition. The court therefore did not err in failing to give an instruction on entrapment.” *Sanders*, 736 S.W.2d at 340 (quoting *Alford v. Commonwealth*, 240 Ky. 513, 42 S.W.2d 711, 713 (1931)).

For the foregoing reasons, we affirm the Nicholas Circuit Court’s judgment of conviction entered April 3, 2017.

ALL CONCUR.

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