STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0609

State of Minnesota,
Appellant,

vs.

Trina Lea Bourdeaux,
Respondent.

Filed October 7, 2013
Reversed and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-CR-12-37261

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan L. Segal, Minneapolis City Attorney, Jennifer Saunders, Assistant City Attorney, Minneapolis, Minnesota (for appellant)

William Ward, Chief Public Defender, Jordan Deckenbach, Assistant Public Defender, Minneapolis, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Connolly, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant the State of Minnesota challenges the district court's dismissal of a complaint charging respondent with gross misdemeanor prostitution, arguing that the district court erred in its determination that language that an undercover police officer used while making the arrest violated respondent's due-process rights. Because we conclude that the officer's language was not sufficiently outrageous to constitute a due-process violation, we reverse and remand.

FACTS

A police officer, in plain clothes and driving an unmarked car, pulled over to the curb near where he saw respondent Trina Bourdeaux standing. After some preliminary conversation, he asked her if she would have oral sex with him. She asked how much he was willing to spend; he said $30, and she told him she usually charged $40. He then asked if, for $40, she would let him ejaculate on her breasts, and she agreed.[1] The officer then identified himself and arrested her.

Respondent was charged with gross misdemeanor prostitution and moved to dismiss the complaint on the ground that the officer violated her due-process rights because of the language he used. The district court granted her motion. The state appeals, arguing that the officer's language was not sufficiently outrageous to constitute a violation of respondent's due-process rights.

[1] The officer specifically asked if he could "splash on her tits."

D E C I S I O N

Whether a trial court properly applied the due-process defense is a question of law and is therefore reviewed de novo. *State v. Morris*, 272 N.W.2d 35, 36 (Minn. 1978).

Although the fundamental fairness inherent in the due-process requirement prevents a conviction if the government's conduct "in . . . inducing the commission of the crime is sufficiently outrageous, . . . it is clear that there will be few cases in which the defense will succeed." *Id.* (citing *Hampton v. United States*, 425 U.S. 484, 96 S. Ct. 1646 (1976). "Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." *Hampton*, 425 U.S. at 495, 96 S. Ct. at 1653, n.7, *quoted in Morris*, 272 N.W.2d at 36.

Morris concluded that the conduct of a police officer who complied with the defendant's requirement that he first expose himself to her was not sufficiently outrageous to bar the defendant's conviction of engaging in prostitution. *Id.; see also State v. Crist*, 281 N.W.2d 657 (Minn. 1979) (same). Here, the officer's language in asking respondent if, for $40, he could ejaculate on her breasts was less outrageous than exposing himself. Respondent relies on *State v. Burkland*, 775 N.W.2d 372, 376 (Minn. App. 2009) (holding that, "when a police officer's conduct in a prostitution investigation involves the initiation of sexual contact that is not required for the collection of evidence to establish the elements of the offense," the officer's conduct is "sufficiently outrageous" to violate due process).[2] In that case, a police officer posed as a customer at

[2] *Burkland* concluded that, "because the nature of a controlled-substance investigation differs significantly from that of a prostitution investigation," the factors for determining

a massage establishment, offered to pay an additional amount if the defendant would perform the massage topless, initiated sexual contact by asking the defendant if he could touch her breasts, asked if a release, i.e., a massage until orgasm occurred, was included in the price, and asked for additional sexual services if he used a condom. *Id.* at 373. *Burkland* distinguished *Morris* and *Crist* on three grounds: (1) none of the officer's conduct was a response to the defendant's effort to ascertain that he was not a police officer; (2) the defendant made no effort to determine whether her massage customer was a police officer; and (3) the officer did not need to initiate sexual contact to collect evidence. *Id*. at 376. "[U]nlike the facts of *Morris* and *Crist*, the officer's initiation of sexual contact and assent to the escalation of that contact was unnecessary to any reasonable investigation and offensive to due process." *Id.*

Here, as in *Morris* and *Crist*, and not as in *Burkland*, the officer did not initiate sexual contact or assent to its escalation. But that is not the end of our inquiry. The key language in *Burkland* that we must apply in determining the existence of a due-process violation is "whether [the officer's] conduct is justified by the need to gather evidence sufficient to arrest the target of the investigation for the offense." *Id.* at 375.

Respondent's counsel argues that the crime had been committed and the offer made when respondent stated that she usually charged $40 and that the arrest should have been made at this point. Respondent's counsel argues further that the subsequent

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whether an officer's conduct violates due-process rights set out in a controlled-substance case, *State v. James*, 484 N.W.2d 799, 802 (Minn. App. 1992), *review denied* (Minn. June 30, 1992), did not apply in a prostitution investigation. *Burkland*, 775 N.W.2d at 375. We agree with this reasoning and conclude that the *James* factors do not apply here.

language was both gratuitous and unnecessary to gather evidence. We disagree. The statute dealing with the elements of prostitution provides:

> Whoever, while acting as a prostitute, intentionally does any of the following while in a public place is guilty of a gross misdemeanor:
>
> (1) engages in prostitution with an individual 18 years of age or older; or
>
> (2) is hired, offers to be hired, or agrees to be hired by an individual 18 years of age or older to engage in sexual penetration or sexual contact.

Minn. Stat. § 609.324, subd. 6 (2012). To say that one *usually* charges $40 to engage in sexual conduct is neither a specific offer nor a specific agreement to engage in sexual conduct. Therefore, the officer's language was necessary to provide evidence of respondent's intent to engage in prostitution. *See State v. Kelly*, 379 N.W.2d 649, 652 (Minn. App. 1986) (holding that a prostitution offense is not complete until there is an offer of sexual services for money).

We must now address whether, even if the language was necessary to make the arrest, it was nevertheless sufficiently outrageous to warrant the dismissal of this charge. As a threshold matter, we specifically decline to adopt the proposition that mere language alone could *never* constitute outrageous conduct. As the district court properly noted, we can conceive of circumstances where an intentional, sustained diatribe of vicious racial epithets that serves no investigative purpose might indeed violate due process. But that is not this case, and we do not need to reach that issue to make our decision.

Rather, the standard we apply is whether the exact language used, in these circumstances, is so outrageous as to shock the conscience. *See State v. Christianson*,

827 N.W.2d 436, 442 (Minn. App. 2012) (quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209 (1952), which "sets the bar [for police conduct that violates due process] at conduct that 'shocks the conscience'"), *review denied* (Minn. Feb. 19, 2013). At the outset, respondent's counsel argues that respondent was "vulnerable," but, as counsel conceded at oral argument, there is no evidence in the record that respondent suffered from any mental impairment. The only evidence in the record concerning respondent is that she was five feet, three inches tall, 36 years old, and Native American.[3] The police report further notes that respondent did not require medical treatment and had no prior injury. These facts are insufficient to show vulnerability. We also reject the argument that the officer's position of authority made her vulnerable during their conversation because respondent was not aware of the officer's identity until just before the arrest.

There is no doubt that the language used by the officer would be offensive if used in a school room, a church, or in what is usually described as "polite society." However, in this case, it was used in the context of an undercover officer making a case for a vice arrest with an alleged prostitute. This language, while lewd, given its context, simply does not rise to the level of outrage that shocks the conscience and violates due process.

While we applaud the district court's vigilance in working to ensure that our police treat all members of society with respect and courtesy, we disagree with its conclusion that respondent's due-process rights were violated in this instance.

[3] This case was submitted to the district court based on the parties' stipulated admission of the arresting officer's report and supplement. No other exhibits were offered, nor did the parties elicit any testimony from any witnesses.

To summarize, because the officer's language in asking, if, for $40, respondent would allow him to ejaculate on her breasts, was not an initiation of sexual contact or an assent to its escalation and was necessary to provide evidence of respondent's intent to engage in prostitution, that language did not violate respondent's due-process rights.

Reversed and remanded.