**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA**

**STATE OF FLORIDA,**
**Plaintiff,**
**v.** **CASE NO: 2012-CF-003179**

**SIVASANKAR JOTHILINGAM,**
**Defendant.**
_____/

**ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS BASED ON ENTRAPMENT**

This matter came before the Court on Defendant's "Amended Motion to Dismiss Based on Entrapment," filed April 16, 2013, pursuant to Fla. R. Crim. P. 3.190(b); and the hearing that was held on May 22, 2013. The Court has reviewed the motion, the evidence, the oral arguments, and the applicable law, and is otherwise duly advised in the premises.

**Factual Background**

The undisputed facts of this case, as presented at the hearing, are as follows. On or around September 12, 2012, Special Agent Keesha Woessner,[1] with the Florida Department of Law Enforcement, placed an ad in the "Casual Encounters" section of Craig's List,[2] with the subject of "too taboo for you?" in the "women for men" category. In order to place such an ad, Agent Woessner had to verify that she was at least eighteen (18) years of age or older.

In response to the advertisement, Defendant sent Agent Woessner an electronic mail message stating, "26 years old thin indian guy here..interested?"[3] Agent Woessner replied by stating that she was a "hot single mom of one looking to explore outside societal norms," and she

[1] Agent Woessner represented herself as "Vanessa Lange."
[2] www.craigslist.org is a community-based website for local classified advertisements and community forums.
[3] To avoid redundancy and promote ease of reading, the Court will not "sic" all of the errors in the parties' email conversations. All matters in quotes are taken verbatim from the emails that were introduced at the hearing.

asked Defendant what he was "willing to do." Thereafter, the two engaged in a discussion of the meaning of "outside societal norms" and Agent Woessner pressed Defendant to tell her what he was interested in. Defendant responded with a description of sexual acts that he wanted to perform with Agent Woessner, whom he believed to be a "hot single mom of one."

At that point, Agent Woessner shifted the conversation and stated, "I'm looking more for my 14 year old daughter . . . if you want me to be frank." As a result, the following email discussion ensued:

> Defendant: "oh..you are asking me satisfy you & your daughter or all we 3 together???"
>
> Woessner: "for the time being I would like the focus to be on her . . ."
>
> Defendant: "oh..great..i am ok with it if you both don't have any issues.."
>
> . . . .
>
> Defendant: "hey i have a questionn since she is 14 years old is it not a problem to have sex legally? If cops come to know wont be in trouble? will it be safe?
>
> Woessner: "i don't know! are you a cop? you're scaring me."
>
> Defendant: "Hey no no am not..since am new to USA I just asked..did u see my pic? Liked it?"
>
> Woessner: "I just want her to get some experience and learn what it is to be a woman. I just need to right man to do it so i'm very picky. What would you be willing to teach her?"
>
> Defendant: "ok..ok I can teach her how a guy will look like without dress, how to behave with a guy in bed, how to please a guy..how to make sex safe.. is this fine? or do you want more?"
>
> Woessner: "what exactly would you teach her in bed and how would you teach to be safe?"

At this point, after the parties had exchanged some 28 emails over a 5-hour period of time, Defendant provided Woessner with an explicit description of the sexual acts he would perform with the minor.

Thereafter, the two arranged a time and place to meet, and Defendant continued to express his interest in Woessner, the "hot single mom," by asking for her picture, asking to "Skype" with her, and saying he was excited to see her. On September 13, 2012, Defendant arrived at the designated location and was immediately arrested. As a result, Defendant was charged by Information with Traveling to Meet a Parent to Solicit/Entice a Child to Commit a Sex Act, pursuant to Fla. Stat. § 847.0135(4)(b) (Count I); and Use of a Computer to Solicit a Parent to Commit Sex Acts with a Child, pursuant to Fla. Stat. § 847.0135(3)(b) (Count II).

## Legal Analysis

In the present motion, Defendant moves for a dismissal of his charges on the grounds that he was entrapped by the government. An entrapment defense is meant to prevent a government agent from "originat[ing] a criminal design, implant[ing] in an innocent person's mind the disposition to commit a criminal act, and then induc[ing] commission of the crime so that the government may prosecute." *Jacobson v. United States*, 503 U.S. 540, 548 (1992).

Florida law recognizes both a due process entrapment defense and a subjective entrapment defense. *Cabrera v. State*, 766 So. 2d 1131, 1133 (Fla. 2d DCA 2000). The due process entrapment theory, which is often referred to as the objective theory of entrapment, "operates as a bar to prosecution in those instances where the government's conduct 'so offends decency or a sense of justice' that it amounts to a denial of due process." *Davis v. State*, 937 So. 2d 300, 302 (Fla. 4th DCA 2006) (quoting *State v. Blanco*, 896 So. 2d 900, 901 (Fla. 4th DCA

2005); *see also Munoz v. State*, 629 So. 2d 90, 98-99 (Fla. 1993). In the absence of egregious law enforcement conduct, a subjective entrapment analysis, as codified in Fla. Stat. § 777.201, is to be applied. *Munoz*, 629 So. 2d at 99. In his present motion, Defendant relies only on the subjective entrapment defense.

The subjective entrapment analysis focuses on three issues. First, the defendant must prove by a preponderance of the evidence that 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 induced the defendant to commit the offense charged. Fla. Stat. § 777.201; and *Munoz*, 629 So. 2d at 99. Second, the defendant must prove that he or she was not predisposed to commit the offense. *Id.* Once the defendant has satisfied this initial burden, the prosecution has the burden to rebut the defendant's evidence and prove predisposition beyond a reasonable doubt. *Id.* Third, the court must decide "whether the entrapment evaluation should be submitted to a jury" because factual issues are in dispute or because reasonable persons could draw different conclusions from the facts. *Id.* at 100.

**A. Inducement Analysis**

Inducement is "[a]ny government act creating substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent misrepresentations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship." *Farley v. State*, 848 So. 2d 393, 395 (Fla. 4th DCA 2001) (*quoting United States v. Davis*, 36 F. 3d 1424, 1430 (9th Cir. 1994). Accordingly, "[a]n 'inducement' consists of an 'opportunity' *plus* something else—typically excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive."

*United States v. Gendron*, 18 F. 3d 955 (1st Cir. 1994). Thus, "the government may not play on the weaknesses of an innocent party and beguile him into committing crimes which he otherwise would not have attempted." *Jacobson v. United States*, 503 U.S. 540, 553 (1992).

In support of his assertion that he was induced to commit the instant crimes, Defendant compares the government's actions in this case to those in *Munoz v. State*, 629 So. 2d 90 (Fla. 1993); *Beattie v. State*, 636 So. 2d 744 (Fla. 2d DCA 1994); and *Farley v. State*, 848 So. 2d 393 (Fla. 4th DCA 2001). In *Munoz*, the defendant was the owner of a video store that provided X-rated video tapes. Although the government had no complaints that the defendant had been providing these tapes to minors, it sent a sixteen-year-old female into the store to rent one of these tapes. The girl was given a store membership card belonging to a thirty-four-year-old male. Upon entering the store, the girl entered a separate room with a sign posted on the door that explicitly stated that no person under the age of 18 was allowed to enter the room. The girl chose a video from the room and proceeded to the counter to rent the video. She provided the membership card of the thirty-four-year-old male and instructed the defendant that she was his girlfriend. As a result, the girl was permitted to rent the X-rated video. On a second attempt, the defendant asked the girl her age and she lied, explaining that she had forgotten her driver's license and insisting that she had rented one of these movies before. Again, the girl claimed to be either the girlfriend or the sister of the man to whom the membership belonged. The defendant again allowed the girl to rent the X-rated video, and he was subsequently charged with the sale or distribution of harmful materials to a minor. Without much discussion, the Supreme Court concluded that these facts "clearly establish" that the government had induced the defendant to rent the video tapes to the girl.

In *Beattie v. State*, 636 So. 2d 744 (Fla. 2d DCA 1994), U.S. customs officials placed an advertisement in a local, free shopping publication, providing the name and address for a distributor of "hard to find Foreign videos/magazines in Miniature & Young Love." The defendant read the advertisement and responded by letter stating that he was interested in videos "with very young people and with Black men, white women." Thereafter, the customs officials and the defendant exchanged several letters discussing the types of movies available, film titles, prices, and usual lengths of time from order to delivery. Eventually, the customs officials and the defendant set up a time to meet to provide the defendant with a child pornography tape. After the exchange was made, the defendant was arrested by Florida law enforcement officials. In a sworn motion, the defendant alleged that prior to the offense, the defendant had never possessed or attempted to possess any child pornography materials and that he had never been investigated for such an offense.

Applying the test set forth in *Munoz*, the Second District Court of Appeal concluded that the defendant had been entrapped as a matter of law. Again, without much discussion, the court stated that "[b]y his sworn motion, [the defendant] satisfied his burden on the first question by proving that an agent of the government induced [him] to commit the offense of possession of illegal contraband relating to a sexual performance by a child." *Id.* at 746.

Finally, in *Farley v. State*, 848 So. 2d 393 (Fla. 4th DCA 2001), the Broward County Sheriff's Office was alerted that the defendant's name was found on a list uncovered in a child pornography investigation in Texas. As a result, the Sheriff's Office sent the defendant a spam email inviting those looking for "hard to find" sexual materials to visit a fictitious company website. The email also contained assurances that any communication with the company would be protected from government interference. Upon receiving the email, the defendant visited the

website and input a request for specific pictures of teenage boys. In response, a detective sent the defendant an email requesting more specific details regarding the defendant's preferences. After an exchange of emails in which the detective sought, and the defendant provided, more and more specific details, the detective provided the defendant with an order form and the defendant placed his order. Thereafter, the two arranged to meet for the delivery of the videos, and the defendant was subsequently arrested.

The defendant raised the defense of entrapment, and the Fourth District Court of Appeal concluded that he had been entrapped as a matter of law. In reaching this conclusion, the Court relied on the Second District's opinion in *Beattie* and found that the conduct of the government had progressed from "innocent lure" to "frank offer," as required for inducement. Specifically, the Court noted that "[w]hat began as a plan to possibly uncover an offender from the Texas list, became a concerted effort to lure Farley into committing a crime." *Id.* at 396.

In each of these three cases, the courts found it significant that the defendants had been targeted arbitrarily, without any evidence that the defendant was already engaged in criminal activity. In addition, in *Beattie* and *Farley*, the courts showed concern over the exchange of correspondence that ensued between the government officials and the defendants after the initial advertisement.

Just as in the other cases, the Defendant in this case was not targeted due to any suspicion that he was currently engaged in some criminal activity. To the contrary, Defendant responded to a widely disseminated advertisement, just as the defendant in *Beattie* did. In this case, however, the advertisement did not allude to "young love"; the advertisement here referred only to a consensual sexual encounter between adults. More importantly, unlike the defendants in *Beattie* and *Farley*, the Defendant in this case did not respond to the advertisement by

immediately seeking an encounter with a minor. Instead, Defendant sought only to meet the "hot single mom of one." In fact, Defendant did not manifest any intent to perform sexual acts with the minor until there had been an exchange of several emails and prodding by Agent Woessen. Accordingly, the Court concludes that the government conduct in the present case exceeds that in *Beattie* and *Farley*.

The State, on the other hand, contends that Defendant's circumstances are more similar to those in *Mareel v. State*, 841 So. 2d 600 (Fla. 4th DCA 2003), in which the Fourth District Court of Appeal concluded that the defendant had not been entrapped. In *Mareel*, a special agent entered a chatroom entitled "Married Wants Affair" and posed as a fifteen-year-old girl named Kelly. The defendant entered the same chatroom and engaged "Kelly" in conversation. When the defendant asked "Kelly" if she was married, "Kelly" told the defendant that she was only 15. Upon learning that "Kelly" was a minor, the defendant asked her for a picture, asked if she was looking for "older guys," and asked if she was "looking for just a sexual relationship." When "Kelly" responded that she was "maybe" looking for something sexual, the two discussed the possibility of meeting and the sexual "touching" that would occur if they met. Throughout the next several weeks, the defendant and "Kelly" engaged in many emails, online chats, and telephone calls. Eventually, they arranged to meet at a local McDonalds, and the defendant was arrested.

In a pre-trial motion to dismiss, the defendant argued that he had been entrapped. The trial court disagreed. Significantly, the court noted that "Kelly" had immediately identified herself as a minor; yet, the defendant was undeterred and asked her if she was interested in a sexual relationship within the first 14 minutes of talking to her. On appeal, the Fourth District Court agreed, stating that "'Kelly' merely created an opportunity for appellant to attempt to lure

or entice a minor to participate in sexual activities. There were no coercive tactics or 'arm-twisting' on the part of law enforcement; [the defendant] was already on the 'iniquitous path.'" *Id.* at 603.

This Court concludes that *Mareel* is distinguishable from the instant case. In *Mareel*, the agent immediately identified himself as a "15-year-old girl"; whereas in this case, Agent Woessen played the part of an adult female and did not mention the idea of a minor until several hours and many emails into the conversation. More importantly, when the defendant in *Mareel* learned that he was dealing with a minor, he immediately asked if she was interested in a sexual relationship, without any prodding or encouragement from the special agent. In this case, on the other hand, it was Agent Woessen, not Defendant, who initiated the idea of the sexual encounter with a minor. Moreover, upon learning that this was Agent Woessen's intent, Defendant did not immediately jump at the opportunity to engage in sexual acts with the minor. First, Defendant clarified with Agent Woessen that she did, in fact, want Defendant to engage in sexual acts with her "daughter." Second, Defendant asked if this was even legal. Then, when Agent Woessen asked Defendant what he could teach her "daughter," he gave a description of acts that was less than explicit. Finally, after Agent Woessen asked Defendant for additional details on what exactly Defendant would teach the "daughter" in bed, Defendant provided Agent Woessen with the sexual description that she had apparently been looking for. Accordingly, Agent Woessen did more than merely create an opportunity for Defendant to attempt to participate in sexual activities with a minor; she made a concerted effort to lead Defendant down a path which he would not otherwise have taken. Therefore, the Court concludes that it is not bound by the decision in *Mareel*.

Another case, on the other hand, is much more on point with the present matter. In fact, the facts in *Morgan v. State*, 38 Fla. L. Weekly D991 (Fla. 5th DCA 2013) are nearly identical to those in this case. In *Morgan*, which was decided by the Fifth District Court of Appeal only a month ago, a detective placed an advertisement in the "casual encounters" section of Craig's List, entitled "Open Minded Mom looking to share intimate fun—w4m—38."[4] The defendant responded to the advertisement, and eventually, the idea of a fictional 12-year-old "daughter" was introduced into the equation. The defendant "repeatedly expressed reservations about the daughter, but did not terminate the dialogue. He indicated his desire to be intimate with the 'mother' and kept hedging as to any involvement with the daughter . . . ." *Id.* Eventually, the parties set up a location to meet, and the defendant was arrested.

On appeal, the Fifth District Court noted, without discussion, that the trial court had properly denied a motion to dismiss based on entrapment. However, the court ultimately held that the trial court had erred when it declined to instruct the jury on the defense of entrapment. In reaching this conclusion, the Court stated:

> Unlike circumstances where the suspect is communicating with a person believed to be a minor, the defendant responded to an advertisement for a casual encounter with an adult female. When the law enforcement officer interjected the prospect of including a minor, Morgan expressed reservations and was equivocal in his responses. We recognize that most within our society would immediately terminate the conversation upon the mention of the involvement of a minor, and perhaps the jury will reject the defense. However, there is at least some evidence with which the defense could suggest that Morgan was entrapped. The failure to give a jury instruction on entrapment was error.

Accordingly, the Fifth District Court of Appeal recognized that the scenario we have in this case is sufficient to support the defense of entrapment. Unfortunately, the court declined to

[4] "w4m" signifies a woman seeking a man; "38" indicates her age.

provide more specific factual circumstances with respect to the government's actions in this case and whether those actions amounted to "inducement." As such, this Court is left to conclude that there were factual discrepancies in *Morgan*, with respect to either the government inducement or the defendant's predisposition, that were left to the province of the jury. *See Munoz*, 629 So. 2d at 100. Nevertheless, the Court finds that the Fifth District's concern over the law enforcement officer interjecting the prospect of a minor into the equation is significant.

Therefore, upon extensive review of the case law as applied to the instant facts, the Court concludes that Defendant has met his burden of demonstrating that he was induced to commit the crimes of which he is now charged.

**B. Predisposition Analysis**

Having concluded that Defendant was induced to commit the present crimes, the Court must now turn to the issue of predisposition. Predisposition turns on "whether the accused was awaiting any propitious opportunity or was ready and willing, without persuasion, to commit the offense." *Munoz*, 629 So. 2d at 99. "Predisposition is . . . not present when [a defendant] has no prior criminal history related to the offense at issue." *Farley*, 848 So. 2d at 396. A defendant has also been found not to be predisposed where the defendant was not targeted by law enforcement and "was not known for deviant behavior" prior to the incident at issue. *Id.* "Evidence of predisposition is limited to the extent it demonstrates predisposition on the part of the accused both prior to and independent of the government acts. Further, care must be taken in establishing the predisposition of a defendant based on conduct that results from the inducement." *Munoz*, 629 So. 2d at 99.

In the present case, Defendant has demonstrated that he was not under investigation by law enforcement prior to committing this crime. Moreover, Defendant has no criminal history, let alone criminal history related to the instant offense. Accordingly, the facts of this case, with respect to Defendant's predisposition, are similar to those in *Farley*, 848 So. 2d at396, in which the court found it significant that the defendant had never been arrested for anything in his life, let alone for the offense for which he was currently charged. The court also noted that the defendant had not been "involved in an existing criminal undertaking in need of detection by law enforcement; rather, [the government] sought to manufacture crime based on a list of names and addresses of unknown origin." *Id.* at 397.

Therefore, the Court finds that the Defendant has satisfied his burden of proving that he was not predisposed to commit the offenses at issue. *See Munoz, supra*; *Farley, supra.* Thus, the burden shifts to the prosecution to rebut this evidence beyond a reasonable doubt. *Munoz*, 629 So. 2d at 99.

"In rebutting the defendant's lack of predisposition, the prosecution may make 'an appropriate and searching inquiry' into the conduct of the accused and present evidence of the accused's prior criminal history." *Id.* Here, the only evidence presented by the State to support a finding of predisposition is the exchange of emails. Although the "ready commission of the criminal act amply demonstrates the defendant's predisposition,"[5] those are not the facts of this case. The Defendant in this case was hesitant when the issue of a minor was introduced, and he required guidance by Agent Woessen before committing the crime. *C.f. United States v. Gendron*, 18 F. 3d 955 (1st Cir. 1994) (finding predisposition when the defendant met the initial opportunity "with enthusiasim"). Accordingly, when the only evidence of predisposition is not

[5] *Jacobson v. United States*, 503 U.S. 540, 549 (1992).

independent but rather is a product of the government's inducement to commit the offense, the state's burden has not been met. *See Jacobson v. U.S.*, 503 U.S. 540, 550 (1992). Therefore, the Court concludes that the State has failed to demonstrate beyond a reasonable doubt that Defendant was predisposed to commit this crime. *See Munoz*, 629 So. 2d at 99.

**C. Analysis of Submission to a Jury**

Finally, "[t]he third question under the subjective test is whether the entrapment evaluation should be submitted to a jury." *Id.* at 100. Fla. Stat. § 777.201 provides that the issue of entrapment shall be submitted to the trier of fact; "[h]owever, when the factual issues . . . are not in dispute, 'then the trial judge has the authority to rule on the issue of predisposition as a matter of law.'" *State v. Ramos*, 632 So. 2d 1078, 1079 (Fla. 3d DCA 1994) (*citing Munoz*, 629 So. 2d at 100). In the present case, the issues of fact are not in dispute. Therefore, upon diligent consideration, the Court finds that the Defendant was entrapped as a matter of law.

Accordingly, it is hereby,

**ORDERED AND ADJUDGED** that Defendant's "Amended Motion to Dismiss Based on Entrapment" is **GRANTED**.

**DONE AND ORDERED** in Chambers, at Bradenton, Manatee County, Florida, this 12 day of June 2013.

**John F. Lakin, Circuit Judge**

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing order was furnished by fax to E. Jon Weiffenbach, Esquire and by copy to Courtney Hollen, Esquire on this 4 day of June, 2013.

Judicial Assistant