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

STATE OF FLORIDA,
Plaintiff,
v. **CASE NO: 2012-CF-003160**

ANDREW MANISCALCO,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS

This matter came before the Court on Defendant's "Amended Motion to Dismiss," filed on May 3, 2013; and the hearing that was held on May 28, 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, a law enforcement officer, posing as "Jess," placed an ad on Craig's List,[1] with the subject of "Any good guys out there." The body of the ad stated "just recently moved to the area looking to meet and make some new friends. I fun to be around like to hang if interested chat me back."[2] In order to place such an ad, the officer had to verify being at least eighteen (18) years of age or older.

In response to the ad, Defendant sent "Jess" an email saying, "Hello, I'm Andrew. I am from Tampa. I am 25, and would like to know more about you." Once "Jess" received

[1] www.craigslist.org is a community-based website for local classified advertisements and community forums.

[2] To avoid redundancy and promote ease of reading, the Court will not "sic" all of the errors in the parties' communications. All matters in quotes are taken verbatim from the communications that were introduced at the hearing.

(2) ✓

Defendant's email, she informed him that she was 14, and that she was trying to make new friends. Surprised, Defendant responded, "Are you really 14? You do realize I am 25 right? . . . ." Upon receiving a picture of "Jess," and her assurance that she was really 14, Defendant stated, "You are actually really cute. . . . Too bad you aren't a little older." In a follow-up email, Defendant also stated, "You look older. I would say if you were 18 or 19. Would have like to meet you sometime." "Jess" responded by stating that she was "sorry if your not interested." At this point, the following conversation ensued:

> Defendant: "I am interested in talking to you. After all you are cute and you don't look your age. I was just saying its too bad we didn't meet in person. So you just looking to make friends and talk online?"
>
> "Jess": "r u looking for more"
>
> Defendant: "Not really. Could hang out if it was mutual, but I am fine with just have someone to talk to."
>
> Defendant: "I mean, if you are not than I am fine with emailing, or texting, or skipping or whatever. Talking and making friends is good. I mostly meet people around my age is all, but age is but a number for friends"
>
> "Jess": "Well i am single and ur right age is just a number lol"

Following this conversation, Defendant and "Jess" discussed the possibility of meeting and talked about what they liked to do for fun. "Jess" then interjected, reminding Defendant that she was only 14. Defendant assured her that it was not a problem, stating, "I don't mind that you are 14 yo. I do want to chat and I do want to meet you, hang out and see if anything comes from it. If anything we will just end up friends. You are really pretty, and I don't care about the age. I hope you don't either." Defendant then provided "Jess" with his phone number, which she called, and the two had a brief conversation and arranged for Defendant to go to "Jess's house" to go swimming.

After the phone call, "Jess" and Defendant engaged in a text-message conversation; however, Defendant asked "Jess" to call him again, because he could not text and drive. During this second phone call, Defendant asks if there is anything "Jess" wants him to bring to the house, and "Jess" says that she's nervous about Defendant coming over. Defendant tells "Jess" more about his interests, assures her that he is "normal," and tells her that he just wants to swim and hang out.

Thereafter, the parties continued to text one another, and "Jess" says "im not sure if im interested it seems like ur playing games may b were not on the same page." In response, Defendant swears that he's "not playing games" and again asks "Jess" what she wants to do. "Jess" says that she does not know, and she turns the question back to Defendant, starting the following conversation:

> "Jess": "idk that is what I was asking u what were u interested n doing"
>
> Defendant: "Spending time with you"
>
> Defendant: "Swimming and getting to know you and having fun"
>
> "Jess": "obviously ur look at more then jus swim lol"
>
> Defendant: "I just want to swim and hang out. Yes you are beautiful but I do not take advantage of people."
>
> "Jess": "who said u were takin advantage of anyone"
>
> . . . .
>
> "Jess": "it seem lik u wanted to hook up from ur email lik mor then friends"
>
> Defendant: "I want to get to know you more. Like talk with you in person."
>
> . . . .

Defendant: "Not looking for anything sexual."

"Jess": "oh i thought you were interested n me more then friends"

Defendant: "I don't want just a hook up. I want more like a relationship. What I meant was I want to enjoy your company, and if something happened then it happens. You are beautiful and I would be lucky to be in a relationship with u"

Defendant: "I'm almost to Palmetto. Does that mean you don't want to swim or even see me?"

"Jess": "what if something happened what r u prepared to do I need details lol"

Defendant: "Like what? If we kissed or made out."

Defendant: "What u mean prepared?"

"Jess": "ya like if u kissed me and were alone what would u do i need details lol"

Defendant: "Kiss you slowly and softly. After the first move is made, it's up to you if you want to move on."

Defendant: "Do you want me to be sexual?"

"Jess": "maybe lol"

At this point, after three hours, several emails, multiple phone calls, and numerous text messages, Defendant finally started to send sexually explicit text messages to "Jess." As a result, Defendant was arrested upon his arrival at "Jess's house," and subsequently charged by Information with one count of Travel to Seduce/Solicit/Entice a Child to Commit a Sex Act, pursuant to Fla. Stat. § 847.0135(4)(a).

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 the present case, the Court concludes that the government conduct was not so egregious as to constitute a due process violation. Therefore, the Court will focus solely on the defense of subjective entrapment.

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 the present case, the State argued repeatedly at the hearing that Defendant was not induced because "law enforcement was never the one to bring up anything sexual." This Court disagrees. When pushed by "Jess" about what he wanted to do and what he wanted from "Jess," Defendant repeatedly stated that he just wanted to swim and "hang out" and that he was not looking for anything sexual. Specifically, Defendant stated, "I just want to swim and hang out. Yes you are beautiful but I do not take advantage of people." Where upon, "Jess" inserted a sexually charged comment, asking, "who said u were takin advantage of anyone?" "Jess" followed this comment with "it seem lik u wanted to hook up from ur email lik mor then

friends." Thus, it was "Jess," not Defendant, who first sent the conversation in a sexual direction.

Nevertheless, even upon this prodding from "Jess," Defendant still stated that he was not looking for anything sexual and that he just wanted to get to know her better. However, "Jess" was undeterred; she continued to push Defendant by saying "what if something happened what r u prepared to do I need details lol." Confused, Defendant asked, "Like what? If we kissed or made out . . . What u mean prepared?" "Jess" responded in the affirmative and once again asked for more details about what Defendant would do "if u kissed me and [we] were alone." Therefore, it is clear from the record that on *two* occasions, the State actively attempted to steer Defendant into engaging in a sexual discussion.

For this reason, the present case is clearly distinguishable from *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.

Here, it is clear that Defendant was not already on the "iniquitous path"; the State had to lead him there. Upon learning that "Jess" was only 14, Defendant immediately stated that he was just interested in talking and that he hoped that they could be friends. Moreover, Defendant repeatedly indicated that he was not looking for anything sexual and that he just wanted to meet and "hang out." When the conversation *did* finally turn sexual, it was "Jess," not Defendant, who initiated this discussion. Therefore, this Court concludes that the present case is clearly distinguishable from *Mareel.*

On the other hand, the Court concludes that the conduct of the government in this case is comparable to that in *Farley v. State*, 848 So. 2d 393 (Fla. 4th DCA 2001). In *Farley*, 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 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.

Just as in *Farley*, the Defendant in this case was targeted arbitrarily, without any evidence that he was already engaged in criminal activity. Thereafter, the government made a concerted effort to lure him into committing a crime. Like in *Farley*, the parties in this case engaged in an exchange of correspondence that consisted of the government seeking more and more detailed information. Here, "Jess" repeatedly asked Defendant for details, stating, "what if something happened what r u prepared to do I need details lol," and "ya like if u kissed me and were alone what would u do i need details lol." Accordingly, the exchange of text messages in this case was similar to the emails in *Farley*. More importantly, in this case, unlike the defendant in *Farley*, Defendant did not respond to the advertisement by immediately seeking an encounter with a minor. Instead, Defendant sought only to meet a girl of unknown age looking for a "good guy." When he learned that this girl was 14, his immediate response was that they could talk and be

friends. Therefore, the Defendant here required much more inducement than the defendant in *Farley*.

Accordingly, 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 crime 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 here has satisfied his burden of proving that he was not predisposed to commit the offenses at issue. *See 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,"[3] those are not the facts of this case. The Defendant in this case repeatedly stated that he was not interested in anything sexual, and he had to be pressured repeatedly by the government before he engaged in any sexual chatter. Therefore, the Court concludes that this conduct does not constitute the "ready commission of the criminal act." As such, when the only evidence of predisposition is not 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.

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

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 is **GRANTED**.

DONE AND ORDERED in Chambers, at Bradenton, Manatee County, Florida, this 6th day of June 2013.

John F. Lakin, Circuit Judge

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing order was furnished by U.S. mail to Michael S. Perry, Esq., 49 East Ave. North, Sarasota, FL 34237; and by electronic mail to the **Office of the State Attorney, attn: Garrett Franzen** on this 10th day of June 2013.

R.B. "Chips" Shore, Clerk of the Court

By: _____
Deputy Clerk