Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-203

JUNE TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
v.	}	Criminal Division
	}	
	}	
Kenneth Atwood	}	DOCKET NO. 1527-5-15 Cncr
		Trial Judge: A. Gregory Rainville

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a jury conviction of luring a child, in violation of 13 V.S.A. § 2828, arguing that police entrapped him into committing the crime. We affirm.

Defendant was charged with luring a child after he arranged a meeting with a person he had been chatting with online—a person whom he believed to be a thirteen-year-old girl, but who in fact was a police officer. Before trial, defendant moved to dismiss the charge on grounds of entrapment, arguing that there was no realistic threat that he would have committed a crime but for the officer's involvement. Defendant stated in his motion that there were no disputed facts because all of the communications between him and the officer had been preserved, and thus "[t]he only question to be answered is whether the actions of the police constitute entrapment as a matter of law." Following a non-evidentiary hearing, the superior court denied the motion. Noting that defendant initiated the discussion of sex after learning that the online persona with whom he was chatting was only thirteen years old, the court concluded that it was unable to find as a matter of law that the officer induced or encouraged defendant to engage in the charged offense by employing methods creating a substantial risk of defendant committing the crime without having been prepared to do so.

A jury trial was held on January 19, 2016. The only witness was the officer who had engaged defendant in the internet conversations. At the close of the State's evidence, defendant renewed his motion to dismiss on grounds of entrapment, without making any further argument. The trial court denied the renewed motion. Examining the State's evidence most favorably to the State, the court found that most of the communications between defendant and the officer's persona were initiated by defendant, who continued to pursue a sexual encounter while believing that he was communicating with an underage girl. Defendant rested after the court denied the motion. The jury found defendant guilty of the charged offense, and the court sentenced defendant to one-to-three years, split to serve ninety days.

The record reveals the following facts. On March 31, 2015, Officer Sarah Superneau, a detective with the South Burlington Police Department who investigates crimes against children as part of her duties, saw a personal ad on Craigslist entitled, "dominant man looking for young submissive female." The body of the ad read as follows:

> I am seeking a female looking to be submissive and see how she likes it as I am very interested in that lifestyle. If you are please get in touch with me and please live around the Burlington area. Also this could turn into a LTR. I am single and 63 and love sex, cuddling and everything that goes with it!!

Using the persona of a thirteen-year-old girl named Taylor, Detective Superneau responded to the ad and the following exchange occurred that same day:

> Taylor: i know im probley to young but I was just bored and curius.
>
> Defendant: you can never be too young . . . I would still want to do you . . . write back if you're interested
>
> Taylor: lol but im only 13. . .
>
> Defendant: well I don't feel like going to jail. lol
>
> Taylor: lol what do you mean?
>
> Defendant: you are interested but under 16 so I would go to jail if caught
>
> Taylor: oh sorry . . . i don't want u to go to jail . . .
>
> Defendant: do you like to have sex . . .

When defendant expressed the wish that she were sixteen "so we could have some fun," Taylor responded "i know . . . it sucks being 13 . . . can't do anything." Defendant then asked, "do you want to have some sex." When Taylor responded that she did not know, and wondered if she were too young, defendant stated, "you have your whole life to think about it . . . if you don't know don't rush into it." He further stated, "we can still be friends and when you feel like you're ready for it let me know . . . do you have Facebook." After some further chatting, defendant requested a photograph and asked "when could we meet up and where."

After seeing Taylor's photograph on Facebook (an actual photograph of Detective Superneau), defendant said that she looked older than thirteen and was very good looking. He sympathized with Taylor's wish to be older than thirteen, explaining, "I would love to have sex with you!" He asked if she was on birth control, to which she replied in the negative.

Early the following morning, April 1, defendant sent Taylor a good morning message. Again, he brought up the subject of when they could meet. After some chatting, defendant asked Taylor if she knew what "submissive" meant, and then explained that "it is like to submit yourself to having different types of sex, stuff like that" and "dominant means you want them to tell you what to do." He further explained, "I could say, I want to ride you, what would mean is I want to be on top of you doing it the regular way."

The following day, April 2, defendant asked Taylor when she might go on birth control so that he "could teach [her] some sex stuff in person." He also asked Taylor if his picture on Craigslist had been a "face pic" or a "dick pic" and stated that he would "love to show you when we are alone" everything she wanted to know about "doing it." A week later, on April 9, defendant sent Taylor a photograph of what was later identified as his own penis. Defendant asked her if she liked it, to which she replied, "yea, its kinda kool iv never seen a real one before." Defendant then asked her if she would like to see it up close up and in person, to which Taylor replied that she would. Defendant then asked when they could meet.

On April 25, following chats discussing sex and when the two could meet, defendant wrote to Taylor that he wanted "to get together with you and have some sex with you." When Taylor later suggested meeting on May 9 when her mom was working, defendant asked Taylor questions about the timing of her period and stated, "I will make you so horny you won't want to leave. . . . we can have sex all day."

On May 9, defendant told Taylor where to go so he could meet her, and then, after a brief delay when he noticed that "the cops are on a stakeout near there," defendant pulled up his vehicle alongside where Detective Superneau was walking. At that point, he was placed under arrest. During an ensuing interview, defendant told police he intended to take Taylor out for breakfast to chat, and he agreed that "if sex happened it happened."

On appeal, defendant makes two related arguments. He first argues that in denying his pretrial motion to dismiss, the trial court erroneously focused on his predisposition to commit the charged crime rather than on the police conduct that induced him to commit the crime. Similarly, he argues that, in denying his motion for judgment of acquittal, the court once again focused on his predisposition to commit the crime rather than on the police conduct.

Entrapment is an affirmative defense that a defendant must prove by a preponderance of the evidence. State v. Wilkens, 144 Vt. 22, 25 (1983). The question of entrapment is determined by the trial court as a matter of law unless there is a dispute as to the facts or the inferences to be drawn from those facts. State v. Hayes, 170 Vt. 618, 619-20 (2000). Because the purpose of the entrapment defense "is to deter improper governmental activity in the enforcement of the criminal laws," this Court, like many other courts, has adopted an objective test that focuses on the conduct of government agents rather than the predisposition of the defendant. Wilkens, 144 Vt. at 28-29. In Wilkens, we adopted the objective test articulated in the Model Penal Code:

> A public law enforcement official or a person acting in cooperation with such an official perpetuates an entrapment if for the purpose of obtaining evidence of the commission of an offense, [he or she] induces or encourages another person to engage in conduct constituting such offense by . . . employing methods of persuasion or inducement [that] create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

144 Vt. at 29 (quoting Model Penal Code § 2.13(1)(b) (Proposed Official Draft 1962)).

Defendant argues that although the trial court cited this standard, it in fact applied a subjective standard that focused on his predisposition to commit the charged offense. In making this argument, defendant cites the trial court's reliance on his initiation of the discussion of sex rather than the fact that Detective Superneau's persona was essentially bait and that her initial response to defendant's personal ad could be construed as a proposition. Defendant points out that he had no criminal history involving sex with minors and that he is not a known pedophile listed on the sex offender registry. He asserts that his ad was not specifically directed at minors and did not suggest he was looking to do anything illegal. He argues that but for Detective Superneau's proactive response to his ad, no crime would have been committed. He contends that he was lured into committing the crime over a five-week relationship that was nothing more than a police phishing operation. According to defendant, in denying his pretrial motion to dismiss and his renewed motion at the close of the State's evidence, the court wrongly focused on his actions rather than the actions of the police in inducing him to commit the charged offense.

Defendant's arguments are based on a misconception of the nature of the objective test for entrapment. Although the test focuses on police conduct, the critical question is whether the police

employed methods of persuasion or inducement creating a substantial risk that defendant would commit a crime that he was otherwise not ready to commit. In answering this question, courts may examine a defendant's communications and conduct while interacting with government agents with respect to the circumstances of the charged offense, which is what the court did here. In Wilkens, this Court rejected a subjective test based on predisposition to commit the crime, which would have lead to admission of highly prejudicial evidence concerning the defendant's reputation and prior criminal activities. 144 Vt. at 27. We declined to accept a test that led to different results depending on the identity of the defendant or the defendant's past or present inclinations toward criminality. Id. at 27-28.

Here, in denying defendant's motion to dismiss based on entrapment, the trial court did not focus on defendant's predisposition to commit the charged offense, but rather examined the communications of both Detective Superneau and defendant that led to defendant being charged with the crime. Defendant placed a personal ad indicating he desired sexual contact with a young submissive female. In her initial response to the ad, Taylor indicated that she was only thirteen years old, but that did not deter defendant from pursuing a sexual encounter with her. As the trial court found, defendant was the principal initiator of discussions about sex and when they could meet to have sex. The fact that defendant did not have a criminal history is irrelevant for reasons suggested by defendant—his predisposition to commit the charged offense is not a factor under the objective test for entrapment. Moreover, police did not spend five weeks developing a relationship with defendant, as he asserts. Immediately upon being contacted by Taylor, defendant pursued his desire to have sex with her, despite his belief that she was underaged.

In short, defendant failed to prove by a preponderance of the evidence that he was a person who was not ready to have sex with a thirteen-year-old girl but who was persuaded to do so through the encouraging communications of the police persona of a thirteen-year-old girl. Cf. Squyres v. State, 476 S.W.3d 839, 843 (Ark. Ct. App. 2015) (concluding "that the conduct of law enforcement merely afforded [the defendant] the opportunity to arrange a meeting with the person whom he believed to be fifteen for the purpose of engaging in sexual intercourse . . . and thus does not constitute entrapment"); People v. Fromuth, 2 Cal. App. 5th 91, 112 (Ct. App. 2016) (concluding that trial court did not err in declining instruction on entrapment because there was no evidence defendant "engaged in any conduct that could have persuaded a normally law-abiding man to agree to a sexual rendezvous with a 15-year-old girl"). The issue is not, as defendant states, whether he could have committed the crime but for the fictitious reply to his personal ad. Of course, defendant could not have committed the charged offense had the police not responded to his ad. But the purpose of these types of police internet investigations is to proactively prevent people from committing crimes with real children and to discourage others from using the internet to locate children for sexual encounters. While the objective test focuses on police conduct, it does not require a but-for causal connection between the police conduct and the commission of the crime.

Affirmed.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

Beth Robinson, Associate Justice

_____

Harold E. Eaton, Jr., Associate Justice