IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

HO YEAON SEO,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-3179

Opinion filed August 14, 2014.

An appeal from the Circuit Court for Leon County.
Charles W. Dodson, Judge.

Michael Ufferman of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant/Cross-Appellee.

Pamela Jo Bondi, Attorney General; Donna A. Gerace and Justin D. Chapman, Assistant Attorneys General, Tallahassee, for Appellee/Cross-Appellant.

PER CURIAM.

Ho Yeaon Seo appeals his judgment and sentence. The state cross-appeals the sentence as an impermissible downward departure. We affirm.

After responding to an advertisement posted on the Craigslist website stating "fresh yung fun – w4m (franklin/wakulla) / lookin 2 find someone 2 show me the

ropes," Mr. Seo communicated online for several hours with an undercover officer posing as a 14-year old girl. During the conversation, Mr. Seo described in graphic detail the sexual acts that he intended to engage in with the minor and he arranged to meet her in person. Mr. Seo then drove across town to what he thought was the minor's house in order to have sex with her, whereupon he was arrested with a condom in his pocket.

Mr. Seo was charged with unlawful use of a computer service in violation of section 847.0135(3)(a), Florida Statutes (2011), and traveling to meet a minor in violation of section 847.0135(4)(a). Prior to trial, Mr. Seo filed a motion to dismiss the charges based upon subjective entrapment. The motion was denied after a hearing. At trial, Mr. Seo requested a jury instruction on entrapment. The request was denied. The jury found Mr. Seo guilty as charged, and over the State's objection, the trial court sentenced Mr. Seo to a downward departure sentence of 11 months and 29 days in jail followed by a period of probation. This timely appeal and cross-appeal followed.

Mr. Seo raises four issues on appeal: 1) whether the trial court abused its discretion in denying his request for a jury instruction on entrapment; 2) whether the trial court erred in denying his motion to dismiss based upon subjective entrapment; 3) whether the trial court erred in denying his motion in limine to exclude his post-arrest statements; and 4) whether his dual convictions violate the

prohibition against of double jeopardy. We affirm the first and third issues without discussion;[1] we affirm the second issue based upon Cantrell v. State, 132 So. 3d 931 (Fla. 1st DCA 2014); and we affirm the fourth issue based upon State v. Murphy, 124 So. 3d 323 (Fla. 1st DCA 2013), and its progeny.[2] Additionally, as we have done in several post-Murphy cases, we certify conflict with Shelley v. State, 134 So. 3d 1138 (Fla. 2d DCA 2014), Hartley v. State, 129 So. 3d 486 (Fla. 4th DCA 2014), and Pinder v. State, 128 So. 3d 141 (Fla. 5th DCA 2013).

On cross-appeal, the State contends that the trial court erred in imposing a downward departure under section 921.0026(2)(j), Florida Statutes (2011). We affirm based upon Murphy and State v. Davis, 39 Fla. L. Weekly D1333 (Fla. 1st

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[1] On the first issue, we find the case relied on by Mr. Seo – Morgan v. State, 112 So. 3d 122 (Fla. 5th DCA 2013) – distinguishable because, unlike the defendant in that case, Mr. Seo's theory of defense was that he did not commit the charged crimes because he thought that he was communicating with and traveling to meet an adult who was "role-playing," and not a minor. A material element of the crimes for which Mr. Seo was charged is that the person the defendant is communicating with or traveling to meet is "believed by the [defendant] to be a child." § 847.0135(3)(a), (4)(a), Fla. Stat. (2011); see also Fla. Std. Jury Instr. (Crim.) 11.17(a), 11.17(c). Thus, contrary to the argument in the concurring in part and dissenting in part opinion, because Mr. Seo testified under oath that he did not believe that the person being portrayed by the undercover officers was actually a child, the trial court properly denied Mr. Seo's request for a jury instruction on entrapment. See Wilson v. State, 577 So. 2d 1300, 1302 (Fla. 1991) (holding that a request for an instruction on entrapment should be refused even if there is evidence to support the defense "if the defendant has denied under oath the acts constituting the crime that is charged").

[2] State v. Davis, 39 Fla. L. Weekly D1333 (Fla. 1st DCA June 25, 2014); Griffis v. State, 133 So. 3d 653 (Fla. 1st DCA 2014); Cantrell v. State, 132 So. 3d 931 (Fla. 1st DCA 2014); Elsberry v. State, 130 So. 3d 798 (Fla. 1st DCA 2014).

DCA June 25, 2014), wherein this court affirmed downward departure sentences based upon this statute under materially similar circumstances as this case. Contra State v. Fureman, 39 Fla. L. Weekly D408 (Fla. 5th DCA Feb. 21, 2014) (disagreeing with Murphy and reversing downward departure sentence under materially similar circumstances as this case because the defendant undertook "several distinctive and deliberate steps" to complete the crime and because "using a computer to commit a crime evinces a level of sophistication that would not support a downward departure").

AFFIRMED; CONFLICT CERTIFIED.

WETHERELL and MARSTILLER, JJ., CONCUR; BENTON, J., CONCURS IN PART AND DISSENTS IN PART WITH OPINION.

BENTON, J., concurring in part and dissenting in part.

I respectfully dissent from that portion of the decision affirming Mr. Seo's conviction, because I believe he was entitled to the jury instruction on entrapment that he requested. But, since a majority has voted to uphold the conviction, I concur in affirming on the state's cross-appeal challenging the downward departure sentence. See State v. Davis, 39 Fla. L. Weekly D1333 (Fla. 1st DCA June 25, 2014).

There was, to be sure, evidence from which the jury could find that Mr. Seo was guilty of the charged offenses. But the rule regarding instructions on affirmative defenses is that in "determining the appropriateness of [an] instruction, the trial court should 'examine the evidence in the light most favorable to the defendant to decide whether the necessary elements of the defense have been placed before the jury.'" Butler v. State, 14 So. 3d 269, 271 (Fla. 1st DCA 2009) (citation omitted). If so, the defendant is entitled to a jury instruction on the defense.

"In criminal proceedings, . . . [t]he threshold for the giving of an instruction on a legally permissible theory of defense is low. To warrant the giving of such an instruction in a case where entrapment is being argued, the defense must show some evidence which suggests the possibility of entrapment. Once this threshold is met, regardless of how weak or improbable the evidence may be, the defense is

entitled to the instruction." Morgan v. State, 112 So. 3d 122, 124 (Fla. 5th DCA 2013). See also Terwilliger v. State, 535 So. 2d 346, 347 (Fla. 1st DCA 1988) ("It is axiomatic that a defendant has the right to have the jury instructed on the law of entrapment when evidence is presented which tends to prove such defense. Once the defendant has shown some evidence which suggests the possibility of entrapment, the issue of entrapment must be submitted to the jury with the appropriate instruction. It is not necessary that the defendant convince the trial judge of the merits of the entrapment defense because the trial judge may not weigh the evidence before him in determining whether the instruction is appropriate; it is enough if the defense is suggested by the evidence presented." (citations omitted)).

Law enforcement officers posted their ad ("Casual Encounters," under the category "Women for Men") in the personals section of the Craigslist website. This section of the website asked that no one under the age of 18 make use of it. Assuming the ad to which Mr. Seo responded was the one identified at trial by the officer posing as "Maddy," neither the initial posting ("fresh yung fun – w4m (franklin/wakulla)") nor the full ad ("lookin 2 find someone 2 show me the ropes") stated that a reader responding to the ad would be corresponding with a child under the age of eighteen, in violation of the site restrictions.[3]

[3] The officer portraying Maddy testified she was "almost positive" that she

On October 15, 2011, at 6:41 a.m., Mr. Seo responded to the task force ad with the following e-mail: "Male FSU Student here, willing to provide you what you want. Without further ado, Wanna chat online sometime?" At 9:51 p.m. that night, the officer posing as "Maddy" responded: "would luv 2 how old r u?" At 11:00 p.m., Mr. Seo replied: "I am 24, You can get me at yahoo messenger, SN is aminocarboxylic." At 11:30 p.m., the officer and Mr. Seo began a Yahoo Messenger exchange that lasted more than two hours.

During their "chat," Mr. Seo asked several times for a picture of "Maddy." At 12:52 a.m., "Maddy" asked if he had received the picture she had sent (in fact a picture of a 25-year-old female communications officer for the sheriff's office). After the picture reached him, Mr. Seo wrote "Maddy" that she was "quite beautiful," and that he "bet a lot of boys wanna ask you out." "Maddy" responded with "not really not much experience....lookin to learn." Mr. Seo asked, "Well, is there anything I can help you with? Possibly? I don't think I can't even touch you but I can tell you what I know since I can be within 10 miles radius of you."

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had placed the ad to which Mr. Seo responded, including an initial posting that included "fresh yung fun – w4m," but acknowledged that she posted "quite a few ads," and could not remember the exact terminology in all of them. She testified that she posted some ads that just said things like "needs experience in Crawfordville" without any reference to "young."

Mr. Seo, a 24-year-old, full-time college student at the time of his arrest, testified that the Craigslist ad he responded to did not state either "yung fun," or "show me the ropes."

"Maddy" responded "well tell me wat u would do?" At that point, for the first time, Mr. Seo began discussing sexual acts. When he later said "Well, we can def hang out for sure[.] Just chill together, it will be an experience for me as well. Two bored people can hang together," "Maddy" responded "i dont just want to chill boo."

At 1:54 a.m., "Maddy" gave Mr. Seo the address of what purported to be a private home in a Tallahassee neighborhood, rented by the Tallahassee Police Department, where the undercover operation was taking place. At 2:08 a.m., he sent "Maddy" a message to let her know he was outside in the driveway. At 2:15 a.m., he was arrested inside the garage at the house.

Mr. Seo testified that when he first responded to the ad, he thought he was corresponding with someone at least eighteen years of age because the ad was on Craigslist. He testified he had previously responded to ads on Craigslist and had never encountered anybody underage. He also stated that people on such websites "role play" because "you can be anyone you want on the Internet." Specifically, he testified he was not concerned that he was communicating with a minor when "Maddy" mentioned being in the ninth grade because he "thought she was just role-playing." He was concerned, however, when she said she did not even have a learner's driving permit, he testified, so he again asked for a picture. He also testified that, until he received the picture (approximately one hour and fifteen

minutes after he and "Maddy" began exchanging messages on Yahoo Messenger), he was not interested in meeting "Maddy" in person.

With the foregoing evidence in the record, trial counsel asked for the standard instruction on entrapment. Mr. Seo met his burden of presenting sufficient evidence in support of an entrapment defense to warrant a jury instruction on entrapment. He testified that law enforcement officers induced him to commit the offenses with which he was charged and that he lacked any predisposition to seduce a minor. Subjective entrapment is defined by statute:

> 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 perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he or she induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.

§ 777.201(1), Fla. Stat. (2011).

> The first question to be addressed under the subjective test [for entrapment] is whether an agent of the government induced the accused to commit the offense charged. On this issue, the accused has the burden of proof and, pursuant to section 777.201, must establish this factor by a preponderance of the evidence. If the first question is answered affirmatively, then a second question arises as to whether the accused was predisposed to commit the offense charged. . . . On this second question, . . . the defendant initially has the

> burden to establish lack of predisposition. However, as soon as the defendant produces evidence of no predisposition, the burden then shifts to the prosecution to rebut this evidence beyond a reasonable doubt.

Munoz v. State, 629 So. 2d 90, 99 (Fla. 1993). "The state may prove predisposition with evidence of 'the defendant's prior criminal activities, his reputation for such activities, reasonable suspicion of his involvement in such activity, or his ready acquiescence in the commission of the crime.'" Jones v. State, 114 So. 3d 1123, 1126 (Fla. 1st DCA 2013) (citation omitted)).

There was no evidence that Mr. Seo had previously met a minor for the purpose of engaging in sexual activity, or that he had ever before sought out persons under the age of legal consent for the purpose of engaging in sexual activity with them. There is no evidence that he would have tried to get up with a person under the age of legal consent in the present case, but for governmental inducement. See Munoz, 629 So. 2d at 99 ("[C]are must be taken in establishing the predisposition of a defendant based on conduct that results from the inducement."); Farley v. State, 848 So. 2d 393, 396 (Fla. 4th DCA 2003) (noting that the state's assertion that the fact that Farley ordered the videos indicated he had a predisposition to possess child pornography "overlooks even the common connotation of the word 'pre disposition,'" and that the "prefix pre- indicates that the disposition must exist before first contact with the government").

"'[T]he failure to give a requested jury instruction constitutes reversible error where the complaining party establishes that: (1) The requested instruction accurately states the applicable law, (2) the facts in the case support giving the instruction, and (3) the instruction was necessary to allow the jury to properly resolve all issues in the case.'" Truett v. State, 105 So. 3d 656, 658 (Fla. 1st DCA 2013) (quoting Langston v. State, 789 So. 2d 1024, 1026 (Fla. 1st DCA 2001)). The present case meets this three-part test. The majority opinion's claim that Morgan is distinguishable is perplexing:

> At trial, Morgan testified that he had only one sexual encounter before, which took place when he was eighteen with an older woman, and that he had never had sex with anyone from Craigslist. On the night in question, he responded to multiple advertisements in an effort to have a casual sexual encounter, and the detective was the only person who replied. Morgan noted that the advertisement's title did not mention a child and asserted that the detective first proposed the idea that he be intimate—what he understood to mean having a sexual encounter—with the imaginary daughter. He disavowed any intention of having a sexual encounter with the child.

Morgan, 112 So. 3d at 124 (footnotes omitted). It could not be clearer that Morgan, like the appellant here, defended in part on the basis that he had no intention to engage sexually with a minor.

That the requested entrapment instruction (the Florida-Supreme-Court-approved standard entrapment instruction) accurately reflects the law is not in dispute. Because Mr. Seo introduced evidence from which the jury could find he

was entrapped, the instruction he sought was appropriate, and necessary to allow the jury to evaluate one of the main issues in the case properly. His version of the facts supported giving the instruction. Mr. Seo presented evidence that, if accepted by the jury, would establish that officers induced or encouraged him to engage in conduct constituting crimes which he was not predisposed to commit.

This was not a case in which the defendant set up an alibi or "denied under oath the acts constituting the crime that [was] charged." Wilson v. State, 577 So. 2d 1300, 1302 (Fla. 1991) (affirming refusal to give instruction on entrapment where defendant maintained somebody else had committed the crime). On the contrary, the appellant never denied driving to meet "Maddy," apocryphal though she proved to be. See Mathews v. United States, 485 U.S. 58, 62-63 (1988) (noting that "a valid entrapment defense has two related elements: government[al] inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct" and holding that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment"); Wilson, 577 So. 2d at 1302 ("'Asserting the entrapment defense is not necessarily inconsistent with denial of the crime even when it is admitted that the requisite acts occurred, for the defendant might nonetheless claim that he lacked the requisite bad state of mind.'" (quoting W. LaFave and J. Israel, Criminal

Procedure § 5.3, at 154-55 (1985))); Medina v. State, 634 So. 2d 1149, 1151 (Fla. 4th DCA 1994) (concluding Medina had the right to an instruction on entrapment when "he admitted that he committed the acts that resulted in the drug deal, even though he denied knowing that the deal was going down when it did"); Terwilliger, 535 So. 2d at 347 ("Even a defendant who denies one of the elements of the offense for which he is charged is entitled to an entrapment instruction.").

There was no question that Mr. Seo drove to a residential neighborhood hoping for a sexual encounter with the woman whose picture had been sent to him. The question was whether he was disposed to prey on girls under eighteen before law enforcement agents suggested it. This was a jury question as to which the defense was entitled to the jury instruction it asked for.