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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK THOMAS FRICK,

APPELLANT

APPELLATE CASE NO. 2025-000611

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by refusing to instruct the jury on the affirmative defense of entrapment when there was evidence to support the charge?

STATEMENT OF THE CASE

A Lexington County grand jury indicted Appellant on August 7, 2023, for criminal solicitation of a minor, and on March 10, 2025, for attempted sexual exploitation of a minor in the first degree. R. * (Indictments). His case was called to trial on March 24, 2025, before the Honorable Debra McCaslin, and a jury. Tr. 1. Assistant Attorneys General Stephen Ryan and Michelle Pappas represented the state. Stephen Story and Erin Conroy represented Appellant. Tr. 1.

At the conclusion of the trial on March 26, 2025, the jury found Appellant guilty as indicted. Tr. 27, ll. 3-10. He was sentenced to ten years for attempted sexual exploitation of a minor in the first degree and four years for criminal solicitation of a minor. The sentences were ordered to be served consecutively for an aggregate sentence of fourteen years imprisonment. Tr. 43, ll. 17-23.

This appeal follows.

STANDARD OF REVIEW

"Because the question of entrapment is generally one for the jury, an appellate court reviews the trial court's decision not to give an entrapment instruction *de novo*." State v. Brown, 362 S.C. 258, 264, 607 S.E.2d 93, 96 (Ct. App. 2004) (citing United States v. Singh, 54 F.3d 1182, 1189 (4th Cir. 1995) ("The district court's decision not to give an entrapment instruction is a question of law which we review *de novo*.")).

ARGUMENT

The trial judge erred by refusing to instruct the jury on the affirmative defense of entrapment when there was evidence to support the charge.

Relevant Facts

In August 2021, Investigator Kenneth Clark with the Mount Pleasant Police Department was involved in an undercover operation in Lexington County as part of the Internet Crimes Against Children Task Force. Clark participated in the operation as a "chatter." While sitting in the training facility of the Lexington County Sheriff's Office, Clark used various applications, such as Whisper, Kik, and Omegle, to chat with strangers online. During this operation, he used the username AllieM14 and pretended to be a fourteen year old girl. Tr. 81, l. 17 – 83, l. 24.

While using the Whisper application, Clark engaged in a conversation with a user named Ambient_Poppins, who was later discovered to be Appellant. The two talked on a few occasions between the afternoon of August 11, 2021, and the night of August 12, 2021. Clark, using the name AllieM14, invited Appellant to AllieM14's house in Lexington where she was supposedly staying with her aunt. AllieM14 repeatedly asked Appellant what he wanted to do with AllieM14 when he arrived. Appellant responded, "Just bring you food" and "Hold your hand and hug you than go home." AllieM14 replied, "Ughh. I want 2 have funn." After Appellant again stated he would bring AllieM14 food, AllieM14 responded, "Whatt we gone doo after we eatt." Appellant told AllieM14 that she was "trying to get me in trouble lol." AllieM14 replied, "Noo I'm nottt. I'm nott tellin an no1 hereee lol." Appellant finally said, "wacth you." AllieM14 responded, "Watch me what lol." When Appellant said, "Watch you play with your self," AllieM14 said, "How." When Appellant merely responded, "At your house," AllieM14 replied, "Like what wud I be doin." It was only then that Appellant said, "Rubbing your pussy

while wearing panties." AllieM14 agreed to that and asked what Appellant would be doing. Appellant responded, "Jerking." See R. * (State's Exhibit No. 3 – USB Chats).

Appellant eventually agreed to bring AllieM14 food. He bought food from McDonald's and drove to the address provided by AllieM14. Once Appellant opened the front door of the residence, he was arrested. Tr. 100, l. 19 – 101, l. 24.

After his arrest, Appellant was interviewed by Jason Hughes, then an investigator with the Attorney General's Office, at the Lexington County Sheriff's Office. The interview was audio recorded. The recording was admitted as State's Exhibit No. 5. Tr. 109, l. 2 – 113, l. 17. During Appellant's interview, he admitted to talking with a girl on Whisper. Appellant said the girl "kept bugging me to come see her" and Appellant "kept telling her basically no." See State's Exhibit No. 5. He eventually agreed to come see the girl. Appellant further admitted to telling the girl that "she was going to play with her thing while I sit over there and play with mine basically." See State's Exhibit No. 5. However, Appellant said he would not have engaged in such activity and that he only said such things because the girl "kept bugging me to say that." See State's Exhibit No. 5. Appellant explained that he only planned to bring the girl food and he was "gullible" and "always trusting everyone." See State's Exhibit No. 5. Finally, while Appellant admitted to speaking to other people on Whisper, he denied ever talking to other minors "about sexual acts." See State's Exhibit No. 5. He again repeated that he never would have engaged in any sexual activity with AllieM14. See State's Exhibit No. 5.

Christine Belk, Appellant's cousin, testified that Appellant is "an honest person" and has a reputation in the community for honesty. She further stated that Appellant is easily influenced. She explained, "Mark [Appellant] is simple-minded. Very naive. He's a pushover. People take advantage of him. He has a hard time telling people no." Tr. 127, l. 15 – 128, l. 16. Lastly, Belk

testified that Appellant worked for the Library for the Blind until he retired, that he worked for Papa John's for a long time, and that he currently worked for Pizza Hut. Tr. 130, ll. 2-5.

Heather Kirkland, Appellant's longtime family friend, testified that Appellant is "very brutally honest" and that anyone who knows Appellant "knows how honest he is." She also testified that Appellant is "gullible" and "naive." Tr. 133, l. 21 – 134, l. 5.

After the presentation of evidence, Appellant requested the judge instruct the jury on the defense of entrapment. Defense counsel argued there was sufficient evidence presented to support the two elements of entrapment. More specifically, counsel asserted there was evidence of government inducement as the undercover officer repeatedly reengaged in conversation with Appellant and attempted to get Appellant to travel to the arrest location. Counsel also argued Appellant did not have a predisposition to commit the crime. He provided the judge with a specific proposed instruction. The language of Appellant's proposed instruction was taken "substantially" from "Judge Anderson's proposed jury instruction book." Tr. 136, l. 20 – 137, l. 10; See R. * (Defendant's Proposed Jury Instructions).

The assistant attorney general argued there was no evidence presented to support an instruction on entrapment. Citing to State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008), the prosecutor asserted Appellant was merely provided an opportunity to commit the crime. Tr. 137, l. 12 – 138, l. 14.

Defense counsel countered that the standard to obtain a jury instruction is whether there is any evidence to support the charge. He argued there was some evidence to support both elements of the defense. Tr. 138, ll. 16-23.

The trial judge refused to charge entrapment. She found the evidence showed Appellant was merely given the opportunity to commit the crime and there was no government inducement.

She further found Appellant "seized" upon the opportunity and demonstrated a "readiness to continue the conversation." Tr. 138, l. 24 – 139, l. 14.

Discussion

The trial judge erred by refusing to instruct the jury on the affirmative defense of entrapment when there was evidence to support the charge.

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Brown, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004) (citing State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002)). "The law to be charged to the jury is determined by the evidence presented at trial." Id. at 261-62, 607 S.E.2d at 95 (quoting State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)) (internal quotation marks omitted). "If there is any evidence to support a jury charge, the trial judge should grant the request." Id. at 262, 607 S.E.2d at 95 (citing State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. (citing State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000)).

"The affirmative defense of entrapment is available where there is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer." Id. (quoting State v. Johnson, 295 S.C. 215, 216, 367 S.E.2d 700, 701 (1988)) (internal quotation marks omitted); See State v. Jacobs, 238 S.C. 234, 244, 119 S.E.2d 735, 740 (1961). "It is a well settled principle of law that the defense of entrapment is not available to a defendant exhibiting a predisposition to commit a crime independent of governmental inducement and influence." Id. (quoting Johnson, 295 S.C. at 217, 367 S.E.2d at 701) (internal quotation marks omitted). "Thus, the

entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition." Id. (citing Matthews v. United States, 485 U.S. 58, 63 (1988)).

The United States Supreme Court explained the rationale underlying the defense of entrapment as follows:

> When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

Id. (quoting Sorrells v. United States, 287 U.S. 435, 445 (1932)).

"One pleading entrapment has the burden of showing that he was induced, tricked or incited to commit a crime, which he would not otherwise have committed." Id. (quoting Johnson, 295 S.C. at 217, 367 S.E.2d at 701) (internal quotation marks omitted); See Babb v. State, 240 S.C. 235, 237, 125 S.E.2d 467, 467 (1962) ("Entrapment is an affirmative defense to the crime charged and imposes upon the accused the burden of showing that he was induced to commit the act for which he is being prosecuted."). "The defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." Id. at 263, 607 S.E.2d at 95 (quoting United States v. Sligh, 142 F.3d 761, 762 (4th Cir. 1998)) (internal quotation marks omitted). "A defendant is not entitled to an entrapment instruction unless he can meet this initial burden of producing some evidence of government inducement." Id. (quoting Sligh, 142 F.3d at 762-63). "Thus, 'the court may find as a matter of law that no entrapment existed, when there is no evidence in the record that, if believed by the jury, would show that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready and willing to commit it.'" Id. (quoting United States v. Osborne, 935 F.2d 32, 38 (4th Cir. 1991)).

In State v. Brown, this Court held the trial judge erred by refusing to instruct the jury on the defense of entrapment. Brown was charged with distribution of cocaine after he sold cocaine to a confidential informant working with the South Carolina Law Enforcement Division (SLED). Agent William Kimble met with Harold Anderson, a paid confidential informant, to conduct a controlled purchase of cocaine from Brown in Beaufort. Id. at 260, 607 S.E.2d at 94. The operation was initiated by SLED as a result of a discussion with the Georgia Bureau of Investigations, the organization for which Anderson, who had pending charges in Georgia, primarily worked. Id. "Although several officers with the narcotics division of the Beaufort County Sheriff's Department assisted in the operation, they had no prior knowledge of any alleged drug dealing by Brown." Id.

Anderson spoke with Brown several times by telephone during the day of the controlled buy to arrange the deal. Id. Based on these conversations, Kimble and Anderson drove together to Brown's place of employment. Id. Brown met with them inside, but did not conduct the requested transaction. Id. Instead, he asked Anderson and Kimble to wait an hour so that he could get the drugs. Id. Brown called after that time and the group agreed to meet at Burger King. Id. Because Brown refused to deal directly with Kimble, Kimble gave Anderson $200 in marked cash to complete the transaction. Id. When Anderson got into the car with Brown, he gave Brown the money in exchange for 3.16 grams of cocaine. Id. at 260-61, 607 S.E.2d at 94.

This Court held there was evidence to suggest that law enforcement instigated the drug transaction because Anderson, Brown's friend and a paid informant, initiated the meeting by calling Brown several times the day of the transaction. Id. at 264, 607 S.E.2d at 96. The Court concluded this was some evidence of inducement.

The Court also determined there was evidence indicating Brown's lack of predisposition to commit the offense of distribution, including (1) Brown was a retired Army first sergeant who was honorably discharged; (2) he was gainfully employed and declined to conduct the transaction at his place of business; (3) the cocaine was not readily accessible to Brown given Anderson and Kimble had to wait approximately an hour and a half between the time of the request and the actual sale; (4) at the time of his arrest, Brown did not have any other drugs in his possession or a significant amount of cash other than the $200 in marked money; (5) aside from the controlled buy, SLED agents and officers with the Beaufort County Sheriff's Department had not previously purchased drugs from Brown nor did they have any knowledge that Brown had engaged in drug activity; (6) there was no evidence of any prior drug transactions between Anderson and Brown; and (7) when Brown gave a statement to investigating officers, he denied being a drug dealer and claimed that he made the sale for a friend. Id. at 264-65, 607 S.E.2d at 96.

This Court ultimately reversed Brown's conviction holding he was prejudiced by the trial judge's failure to charge entrapment because entrapment was Brown's only defense. Id. at 265, 607 S.E.2d at 97.

By comparison, however, in State v. Cooper, this Court held the trial judge correctly declined to charge the jury on the defense of entrapment. 302 S.C. 184, 185, 394 S.E.2d 717, 718 (Ct. App. 1990). Cooper was convicted of criminal conspiracy and distribution of crack cocaine. Id. Cooper bought crack cocaine from a dealer with money supplied by an undercover agent and then delivered the crack cocaine to the agent. Id. This Court found Cooper was predisposed to commit distribution of crack cocaine given that she was "an admitted purchaser and two to three times a week user of crack cocaine." Id. This Court emphasized that Cooper's

"own testimony shows she participated in the drug buy expecting to share in the purchase . . . [and] the undercover agent gave her a portion of the crack cocaine." Id. at 186, 394 S.E.2d at 718. Finally, this Court concluded that the evidence showed "Cooper engaged in illegal activity because of her town preexisting readiness to do so and not because of incessant demands made upon her by the undercover agent." Id.

Additionally, in State v. Gaines, our Supreme Court held Gaines was not entitled to a jury instruction on the affirmative defense of entrapment during his trial for three counts of criminal solicitation of a minor. 380 S.C. at 26, 667 S.E.2d at 730. Using the name HMMRTHEGRT8, Gaines communicated in online chat rooms with a person he believed to be a twelve year old girl in Philadelphia. Id. Gaines encouraged the girl, LilAshleyPA, to travel to Greenville, South Carolina to see him and repeatedly made detailed sexual references as to how he wanted to spend time with her when she arrived in South Carolina. Id. at 26-27, 667 S.E.2d at 730. LilAshleyPA was actually an undercover detective in Pennsylvania. Id. at 27, 667 S.E.2d at 730. Upon obtaining Gaines' identification and discovering he lived in South Carolina, the detective referred the matter to law enforcement in South Carolina. Id. Thereafter, SLED agents created the screen name Allyinsc13 and contacted HMMRTHEGRT8 online saying "hey." Id. Gaines responded and the two began to chat. Id. After learning that Allyinsc13 was a thirteen year old living in Columbia and disclosing that he was twenty-eight years old, Gaines suggested the two meet for the purpose of engaging in sexual intercourse. Id. The chats continued for roughly three months during which Gaines proposed renting a hotel room and theorized the details of their first sexual encounter. Id. Law enforcement received a court order to obtain HMMRTHEGRT8's records from AOL and executed a search warrant at the home he shared with his parents. Id.

The Supreme Court held "the mere fact that Gaines' initial contact with Allyinsc13 was instigated by a SLED agent contacting him and stating, 'hey' does not entitle him to an entrapment instruction." Id. at 31, 667 S.E.2d at 732. The Court concluded that the initial contact merely afforded Gaines the opportunity to solicit sex and that Gaines was in no way induced to commit the crime of criminal solicitation of a minor. Id. Accordingly, the Court held the trial judge properly denied Gaines' request for an entrapment instruction. Id.

In this case, there was evidence to support both elements of entrapment. There was evidence Appellant was induced, tricked, incited, and persuaded to commit the crime by law enforcement. While Appellant offered to come see AllieM14, his offer was limited to bringing her pizza or some other food and giving her a hug. It was only after AllieM14's repeated encouragement and persuasion that Appellant stated he would engage in other activities. For example, after AllieM14's urging, Appellant said he would hold her hand, kiss her hand, give her a hug, but would then "go home." This was unsatisfactory to AllieM14. She responded, "Ughh. I want 2 have funn." She then asked Appellant what they were going to do after they ate. Appellant told her that she was trying to get him into trouble. AllieM14 assured Appellant that she was not, that she would not tell anyone, and that no one else was present. After this trickery, Appellant then said he would watch her. AllieM14 continued to encourage Appellant to engage in this illegal conduct. She asked him, "Watch me what lol." When Appellant said, "Watch you play with your self," AllieM14 said, "How." When Appellant merely responded, "At your house," AllieM14 replied, "Like what wud I be doin." It was only then, after this repeated incitement, that Appellant said, "Rubbing your pussy while wearing panties." AllieM14 agreed to that and asked what Appellant would be doing. Appellant responded, "Jerking." AllieM14 then asked Appellant what time he was coming over continuing to induce Appellant to commit

the crime. The chat itself is evidence that law enforcement, pretending to be a fourteen year old girl, induced, encouraged, and incited Appellant to commit the crime.

This evidence differs significantly from the evidence in Gaines, where our Supreme Court held Gaines was not entitled to an instruction on entrapment. In Gaines, the defendant suggested he and the thirteen year old girl meet for the purpose of engaging in sexual intercourse. Gaines proposed renting a hotel room and he theorized the details of their first sexual encounter. Gaines, 380 S.C. at 27, 667 S.E.2d at 730. However, here, Appellant made no similar suggestion. Appellant merely offered to bring AllieM14 pizza or other food and give her a hug. It was only after AllieM14's repeated encouragement and incitement that Appellant stated he would watch her engage in sexual activity.

Additionally, there was evidence Appellant was not predisposed to commit the crime, including (1) Appellant had a reputation for honesty in the community; (2) he was a lonely, naive, and gullible person; (3) he was gainfully employed and had no prior criminal record; (4) Appellant told AllieM14 that she was trying to get him into trouble and he was very reluctant, indicating he was not inclined to engage in the conduct and only did so at her behest; (5) when Appellant gave a statement to law enforcement he denied ever talking to other minors "about sexual acts" and maintained he would not have engaged in any sexual activity with AllieM14 and only said such things because the girl "kept bugging me to say that;" and (6) there was no evidence Appellant had attempted to solicit a minor before or had previously engaged in sexual conduct with a minor. Again, this evidence differs significantly from the evidence in Gaines, where law enforcement was aware Gaines had previously solicited a minor in Pennsylvania and Gaines readily and repeatedly suggested he and Allyinsc13 meet to engage in sexual intercourse. Gaines, 380 S.C. at 26-27, 667 S.E.2d at 730.

Accordingly, the trial judge erred as a matter of law by denying Appellant's request to instruct the jury on the defense of entrapment because there was evidence to support the charge. Moreover, Appellant was undeniably prejudiced by the trial judge's refusal to charge entrapment since entrapment was Appellant's sole defense.

Respectfully, this Court should hold the trial judge erred by refusing to instruct the jury on the defense of entrapment, reverse Appellant's convictions, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of December, 2025.