Trapped but not Entrapped? State v. Keller

Author : Phil Dixon

Categories : Crimes and Elements

Tagged as : affirmative defenses, computer solicitation, defenses, entrapment, inducement, jury instructions, predisposition, state v. keller

Date : August 20, 2019

Back in May, a divided Court of Appeals affirmed the trial court's ruling that the defendant was not entitled to a jury instruction on entrapment in an online solicitation of a minor case. Entrapment isn't exactly a common defense (as Jeff noted here). When it comes up, it's often in drug cases, but it can also arise in computer solicitation cases where law enforcement officers pretend to be underage. *State v. Keller*, ___ N.C. App. ___, 828 S.E.2d 578 (May 21, 2019), *review allowed,* ___ N.C. ___ (August 14, 2019), is an example of such a case and appears to be the second reported decision dealing directly with the defense in this context, so I wanted to flag it for readers. Fair warning, this post recounts some of the sexually graphic discussions at issue in the case.

Entrapment Basics. Let's start with the fundamentals: "The defense of entrapment is available when there are acts of persuasion, trickery, or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the origin of the criminal intent lies with the law enforcement agencies." *Id.* at 7 (citation omitted). It is the defendant's burden to offer credible evidence supporting the defense—that is, that the government induced the defendant to commit the crime and that the defendant was not otherwise predisposed to commit the crime. *See* Rubin, John, *The Entrapment Defense in North Carolina,* § 6(a), at 78 (2001). A court may find entrapment as a matter of law and dismiss the case in certain circumstances. *See State v. Stanley*, 288 N.C. 19 (1975); *Sherman v. U.S.*, 356 U.S. 369 (1958). More commonly, where evidence of entrapment conflicts, the issue should be submitted to the jury. The defendant's burden of proof is "to the jury's satisfaction," a standard akin to the preponderance of the evidence. *State v. Davis*, 126 N.C. App. 415 (1997); *State v. Miller*, 812 S.E.2d 692 (2018).

Facts in *Keller*. An undercover detective in Lincolnton posed as a fifteen-year old male "Kelly" and posted an ad on the (now-defunct) casual encounters section of Craigslist, seeking sex with a man for the first time. The ad was titled "Boy Needs a Man." The website required age verification and the ad did not indicate that the poster was underage on its face. The defendant replied to the ad, stating that he was "looking for a young guy to take care of" and wanted "a boytoy." Slip op. at 2. The two began texting and the defendant made sexual remarks. When the defendant suggested that the two could live together at the defendant's home, "Kelly" replied that he "may be too young but [needed] a place to go . . ." because his guardian was considering placing him back into foster care. *Id.* at 3. "Kelly" said he would run away from home before letting that happen. "Kelly" informed the defendant that his parents were in prison and he was "suffering." The defendant asked "Kelly's" age, and "Kelly" responded that he was "not quiet [*sic*] 16 . . ." *Id.* at 3. The defendant then asked for a picture of "Kelly's" face and ultimately told him: "I could let you live here with me and take care of you. But we could not have sex until you was [*sic*] old enough . . . I do not want to go to jail. I had one boy I played with when he was 16 but turned 17 the next week[.]" *Id.* at 3-4. Later, the following exchange occurred:

> [Detective]: How do I know if I am[.] And if I come there and we can't be sexual it might be a mistake
>
> [Defendant]: I said we could
>
> [Detective]: You said we could when I am old enough for u
>
> [Defendant]: Well like I said I don't want to talk through text. But will talk to you in person about it

> [Detective]: You said I said we could do so does that mean yes cuz if not I may have to find someone else first to see what its like
>
> [Defendant]: Don't find anyone else. Please
>
> [Detective]: Only if we can have oral sex and anal tomorrow so I will know, just give me a yes or no and I will shut up about it
>
> [Defendant]: Yes

The defendant indicated other times that he did not wish to discuss sex, but the detective continued trying to engage the defendant in sexual conversation. The detective pressed the defendant to meet soon, and the defendant ultimately agreed to do so. Upon his arrival, the defendant was arrested for solicitation of a minor by computer and appearing at a meeting place to commit an unlawful sex act in violation of G.S. 14-202.3 (a class G felony and "sexually violent offense" requiring lifetime registration).

Defendant's evidence. The defendant testified at trial that he had no intention of soliciting a minor. He stated that he had been using Craigslist for years to meet men and met several men there that eventually lived with him. He used Craigslist specifically because it required age verification that users were 18 years old or older. He stated that he initially responded to the ad in order to make his current partner jealous, but that he became concerned for the welfare of the "child" during their conversation. He testified that he enjoys taking care of people and would often meet someone and "help them out" for a time. He acknowledged that sex was sometimes a part of what he got in return but indicated that his primary motivations were "companionship" and "being needed and taking care of somebody." He met and lived with several men this way where the relationship remained platonic (along with others where the relationships were sexual). All the men he had met this way were 18 years old or older, and he denied every having solicited a minor under any circumstances. He testified that he initially didn't understand that "Kelly" was 15 years old during the conversation, and that he was first under the impression the person was 17. Referring to the comment that he had been with a 16-year old before, he explained that this incident occurred when the defendant was 19 himself (33 years ago). He testified that at the time he responded to the ad, he believed he was speaking to an adult, and that he ceased all sexual messages with the person once he realized "Kelly's" age. He stated he would not have sex with anyone underage. Finally, he explained that he only assented to the request for sex to "shut him up" and because he was afraid "Kelly" would run away or seek another, potentially dangerous, encounter with another man.

Majority opinion. The majority ruled that the defendant here wasn't entitled to an instruction on entrapment because he intended to commit the crime without any governmental influence and because his evidence failed to show a lack of predisposition. According to the majority, the fact that the defendant responded to an ad seeking a "boy" and the defendant's use of "boy" in his initial communications with the officer showed his willingness to solicit a minor. The court pointed out that the defendant remained engaged with "Kelly" after being informed the person was a minor, even asking for a picture. On the majority's reading of the facts, even after these events, the defendant then engaged in "sexually explicit messages" and "readily agreed" to meet to have sex, including attempting to meet in real life. This demonstrated the defendant's willingness and a lack of inducement by the government, even when viewed in the light most favorable to the defendant.

The majority also found the defendant predisposed to commit the crime. His history of finding men online, the earlier sexual experience with a 16-year old, and his admission that sex was a part of what he got in return for taking care of young men all showed predisposition to solicit a minor. Thus, the trial court did not err in denying the instruction. In so ruling, the court relied on the other published decision about entrapment in this context, *State v. Morse*, 194 N.C. App. 685 (2009) (entrapment instruction properly denied where defendant "took an active role in both the sexually charged conversation and in planning their meeting" and admitted sexual intent with undercover clearly posing as a 14-year old). In other words, while the defendant may have fallen into the trap laid by law enforcement, he was not legally

entrapped.

Dissent. Judge Inman would have granted a new trial, finding that the trial court committed reversible error by denying the instruction. The dissent objected to the evidence relied upon by the majority opinion, arguing it omitted or mischaracterized key defense evidence. That the defendant had met men on Craigslist before, lived with men he'd met online, and had sex with men he'd met online that lived with him were improper considerations in the dissent's view. "I would not hold, as a matter of law, that a man's prior sexual experience with consenting male partners, all above the age of consent, indicate that he is predisposed to engaging in sexual activity with a child." *Keller* Slip op. at 23, n. 1 (Inman, J., dissenting). Further, while the majority found that the defendant had hosted and had sex with a 16 year old in his home, the evidence at trial showed that the incident occurred "when [the defendant] was nineteen and living in another state"— an event that plainly did not occur in the defendant's North Carolina home. *Id*. at 23.

The dissent also argued that the majority repeatedly failed to consider the evidence in the light most favorable to the defendant. For instance, the defendant testified about the context and meaning of many of the texts, including his use of the word "boy," which he used to refer to younger adult men. According to the dissent, the texts showed the defendant clearly and repeatedly stated an intention *not* to have sex with "Kelly" while he was underage. While the defendant continued texting "Kelly" after being told he was underage, the defendant claimed he did not initially realize the person was 15 and believed he was 17. After that text conversation, the defendant did not mention sex again until the detective brought it back up. The continued communications between the two were "not inconsistent with an intent to have sex only once 'Kelly' was of age." *Id*. at 21 (Inman, J., dissenting). True, the defendant asked for a picture of Kelly's *face* after being informed that the person was underage, but he testified at trial that he did so to attempt to verify "Kelly's" age. Categorizing "Kelly's" threat to "find someone else" unless they could have sex the next day as an "ultimatum," the dissent also pointed to the repeated requests by the undercover officer to meet. Twice the defendant did not respond at all to these requests, and the defendant agreed to meet only after "Kelly" threatened to find someone else. This is reminiscent of the type of "emotional manipulation" present in the case Jeff blogged about linked at the top of this post, *State v. Foster*, 235 N.C. App. 365, 375 (2014) (finding entrapment instruction warranted due to officer "creating a false relationship and then taking advantage of the defendant's desire to maintain that relationship."). These facts, combined with the testimony that he met the person out of concern for the child, not for sex, all showed that the defendant met his burden of demonstrating government inducement and a lack of predisposition, at least when viewing the evidence in the light most favorable to the defendant. The dissent also distinguished *Morse* and found it inapplicable to defendant's case. Concluding, Judge Inman observed:

> Defendant's evidence, taken in the light most favorable to him, would allow a reasonable juror to infer that he was not predisposed to commit the crime for which he was convicted, and that he assented to Detective Heavner's plan after repeated denials and only when he believed the alternative would place "Kelly" in danger. Defendant was entitled to the entrapment instruction so the jury could evaluate and determine for itself whether Defendant was entrapped. *Id*. at 26.

Judge Inman would have found this error prejudicial, given that the jury requested clarification on the definition of "intent to have sex with a minor" and that the jury initially came back without a unanimous decision. The jury would be free to reject the entrapment defense at trial but should have been able to consider it.

Practice Tips. As noted above, the North Carolina Supreme Court granted review in this case last week. I may have more to say about it when that decision comes down, but in the meantime, I'll close with some procedural tips for defense attorneys dealing with entrapment or thinking of using the defense. G.S. 15A-905(c) requires the defendant to give written notice of intent to rely on the defense within 20 working days of trial. Under 15A-905(c)(1)(b), notice of entrapment requires "specific information about the nature and extent of the defense." I noted above that entrapment may be established as a matter of law. An unpublished case indicates that failing to raise that argument likely waives the issue for appellate review. *See State v. Disorda*, 822 S.E.2d 330 (2019) (declining to review unpreserved argument that entrapment was established as a matter of law in online solicitation of minor case, but noting the jury was

instructed on the defense). Thus, when mounting an entrapment defense, defense counsel should argue during the motion to dismiss at the close of State's evidence that entrapment was established as a matter of law such that the case should not make it to the jury, along with any sufficiency of the evidence arguments. If denied, defense counsel can still then argue for the jury instruction at the charge conference. For more about the requirements for an entrapment defense, see John Rubin's book The Entrapment Defense in North Carolina (2001).

If you have thoughts about *Keller* or other tips about entrapment to share, feel free to leave a comment below.