Circuit Court for Montgomery County
Case No. 128772C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1051

September Term, 2022

DANIEL READ

v.

STATE OF MARYLAND

Kehoe,
Shaw,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Shaw, J.

Filed: July 18, 2023

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant, Daniel Read, was convicted of solicitation of a minor following a bench trial in the Circuit Court for Montgomery County. He was sentenced to ten years' imprisonment, all suspended, with five years of supervised probation. Appellant presents one question for our review:

1. Did the trial court err by finding no entrapment given that the State failed to prove beyond a reasonable doubt that Mr. Read was predisposed to commit the crime of solicitation of a minor?

BACKGROUND

On January 21, 2016, Appellant was indicted on one count of sexual solicitation of a minor in the Circuit Court for Montgomery County. Following the indictment, Appellant elected to have a bench trial. During opening statements, Appellant's counsel raised the defense of entrapment.

In its case in chief, the State called one witness, Detective Nicholas German. Detective German testified that between October 31, 2015, and December 3, 2015, he participated in an undercover sting operation exchanging dating app (Grindr[1]) messages, text messages, and oral communications over the phone with Appellant. The communications began on October 31, when Appellant contacted Detective German's Grindr profile, where he posed as an eighteen-year-old named "John."

[1] Grindr is a location-based social networking and online dating application targeted towards members of the gay, bisexual, transgender, and queer community. *See* Grindr About, **http://www.grindr.com** (last visited June 14, 2023).

Between November 2 and November 12, Appellant and John spoke about a wide array of topics. According to the detective, his objective during these communications was to get Appellant to "like" John. On November 6, John informed Appellant that he was seventeen and not eighteen. Appellant responded by saying, "It's cool though. 16 is legal in Maryland." On November 12, John told Appellant "I really like you. I mean I REALLY like you, but I haven't been truthful about my age, because I didn't want to scare you. I'm 15." Appellant replied, "Okay. Well, we just can't have sex then LOL."

Thereafter, the two continued to have contact and Detective German continued to bring up the topic of sex with Appellant. On November 14, John said, "Look, we can have sex, and I'll never tell anybody." Appellant responded, "It doesn't matter, it's still a crime." On November 25, John wished Appellant a happy Thanksgiving and afterwards, the conversations between Appellant and John became less frequent.

On December 1, Detective German signed back into his Grindr profile and Appellant texted him. This was the first time John had been active on the dating app since November 2. Appellant asked John why he was back on the app and John explained that he was looking for someone else to have sex with, stating, "You may be Mr. Right, but I also need Mr. Right now." Four hours later, Appellant texted the words "Let's f*ck" to John and agreed to meet him on December 3, 2015, at a McDonald's restaurant at 8:00 AM. Appellant was arrested at the designated McDonald's restaurant on December 3 at 8:00 AM.

On cross examination, Detective German admitted that the purpose of his choice in creating John was to manipulate Appellant. He acknowledged that he sent sexually explicit

photos to Appellant. He also acknowledged that he had no evidence of sexual contacts between Appellant and any persons under sixteen.

During redirect, Detective German was permitted to read, into the record, messages between Appellant and unknown user accounts. Defense counsel objected on multiple grounds including lack of foundation, failure to authenticate the messages, hearsay, and confrontation issues arising from the absence of testimony from the third parties involved in the conversations. According to the State, the messages were relevant to whether Appellant was predisposed to commit the crime of solicitation. Appellant's objections were overruled.

At the conclusion of the State's case, defense counsel moved for judgment of acquittal, and his motion was denied. Appellant was ultimately found guilty of solicitation of a minor. Appellant timely appealed.

DISCUSSION

Standard of Review

Maryland Rule 8-131(c) states:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

As we articulated in *Sparks*, when entrapment by law is taken on appeal:

> [T]he defendant will be claiming on appeal that the affirmative establishment of entrapment, as a matter of law, entitled him to an acquittal-not at the hands of the jury[,] but at the hands of the judge. If he was convicted in a court trial, the claim will be that the verdict of the judge was clearly erroneous. If he

> was convicted in a jury trial, the claim will be that the judge was legally in error in submitting the case to the jury.

Sparks v. State, 91 Md. App. 35, 57 (1992). "Under the 'clearly erroneous' standard, 'if there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.'" *Johnson v. State*, 440 Md. 559, 568 (2014) (quoting *Solomon v. Solomon*, 383 Md. 176, 202 (2004)).

I. The court did not err in finding that Appellant was not entrapped.

Appellant argues that he established entrapment as a matter of law and the court erred in ruling that the State had proven beyond a reasonable doubt that he was predisposed to commit the offense of solicitation of a minor. Appellant asserts that although the court found that he had generated an entrapment defense, and met his burden of showing inducement, the court, nevertheless, found him guilty of solicitation. Appellant argues that Detective German weaponized knowledge of his life to emotionally manipulate him and used jealousy to overcome his unwillingness to commit the crime. Appellant contends that the Grindr messages did not constitute evidence of predisposition. Appellant cites *Jacobson v. United States* to support his argument.

The State argues the court's decision was not error and Appellant has no support for his claim that his entrapment defense was improperly rejected. The State contends that while the court found that Appellant had met his burden of showing inducement, it was not required to find him not guilty of the crime of solicitation. The State cites *Kamara v. State* to support its argument.

Entrapment is an affirmative criminal defense and is defined as "[a] law-enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to later bring a criminal prosecution against that person." *Sparks*, 91 Md. App. at 82; *Entrapment*, BLACK'S LAW DICTIONARY 573 (8th ed. 2004). The entrapment defense requires two inquiries: "(1) whether there was an inducement on the part of the government officials (or their agents) and if so (2) whether the defendant showed any predisposition to commit the offense." *Bowser v. State*, 50 Md. App. 363, 369 (1981).

"On the first question the accused has the burden; on the second the prosecution has it." *Sparks v. State*, 91 Md. App.at 65. As we explained in *Sparks*:

> An inducement, by its very nature, contemplates more than a request and an affirmative response. It embraces, as well, the indispensable notion of an effective catalytic agent. It is more than a solicitation. It is more even than a successful solicitation. It also requires something by way of the unresisted bait or the effective precipitating agent that actually seduced an otherwise virtuous person from the paths of righteousness into the ways of the ungodly. It involves that sort of "grave threat," "fraud," or "extraordinary promise[.]" It requires, in a word, a catalyst."

Sparks, 91 Md. App. at 87 (internal citations omitted). "Predisposition is the 'willingness to commit a crime' and 'may be shown by evidence, direct or circumstantial, that the defendant was ready and willing to commit the crime charged prior to the time that the law enforcement officers made initial contact.'" *Kamara v. State*, 184 Md. App. 59, 77 (2009); Maryland Criminal Pattern Jury Instruction ("MPJI–CR") 5:04 (2007 Suppl.).

In *Bowser*, this Court held that the appellant had not established entrapment as a matter of law and that the case was properly submitted to the jury for its determination.

Bowser v. State, 50 Md. App. 363, 369 (1981). We examined the predisposition prong and found that an officer's testimony regarding suspicion, rumor, secondhand reputation evidence and other unreliable hearsay was not admissible to rebut an entrapment defense and to establish predisposition. *Id.* at 375.

Bowser was convicted on two counts of distribution of marijuana and lesser included offenses, arising from sales to a police informant. *Id.* at 364. The informant approached Andrews, a third party, and asked to purchase marijuana. *Id.* at 365. Andrews refused to sell to the informant directly and told him he could purchase it through Bowser. *Id.* The informant approached Bowser and asked if he could purchase some marijuana from Andrews. *Id.* Bowser informed him that he would check. *Id.* Later that day, the informant asked Bowser again, but was told that he had not contacted Andrews yet. *Id.* The informant asked Bowser a third time and they made arrangements for the purchase to be completed that evening. *Id.* For the next two weeks, the informant had multiple contacts with Bowser to inquire about further purchases. *Id.* Subsequently, Andrews was arrested, and Bowser gave a full confession as to his part in the sales. *Id.*

At trial, Bowser argued entrapment. *Id.* at 366. During its case, the State called a deputy sheriff who had previously worked with the informant. *Id.* The deputy implied that the information he testified to was obtained from one or more informants that he would not reveal. *Id.* at 366-67. Bowser testified that he agreed to the informant's solicitation out of friendship and a desire to "get him off [his] back." *Id.* at 367. The court instructed the jury on entrapment and Bowser was convicted. *Id.* On appeal, Bowser argued that the court

erred because he established entrapment as a matter of law and that the deputy's testimony should not have been admitted. *Id.* at 368.

We held that inducement was not established because "[a]lthough [the informant] might have been persistent, there was not the degree of harassment, pressure, persuasion, coercion or the irresistible appeals that would be sufficient to establish an inducement as a matter of law." *Id.* at 370. We noted that even if an inducement was "established as a matter of law, the entrapment defense would not be conclusively established and would still be submitted to the [factfinder] if there was sufficient evidence from which the [factfinder] could find beyond a reasonable doubt that the criminal conduct resulted not from the inducement but from the defendant's own readiness or predisposition to commit the offense." *Id.* "By electing to raise the defense of entrapment, a defendant 'cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing (on his claim of innocence).'" *Id.* at 371-72 (quoting *Sorrells v. United States*, 287 U.S. 435, 451 (1932)). "[A] defendant's ready acquiescence to a police officer's solicitation may itself indicate predisposition, as might the ready access to contraband, the possession of paraphernalia generally associated with criminal activity, or any statements made in the course of the transaction, including displays of expert knowledge and boasts about previous similar criminal activity." *Id.* at 372. While rumor, suspicion and other unreliable hearsay is barred, "other probative evidence of state of mind are admissible to assist the trier of fact in determining whether the police ensnared in their net an innocent lamb lured astray, or a predatory wolf pursuing the bait." *Id.* at 375.

We stated that Bowser's "predisposition might be inferred from the fact that [] Andrews referred [the informant] to [Bowser] to act as a middleman in any sale." *Id.* at 370. Furthermore, Bowser's ability and access to get the marijuana on the same day as the inquiries from the informant, "coupled with the fact that [Bowser] participated in two separate sales to [the informant] could all be considered evidence of [his] predisposition." *Id.* at 370-71. Based on these reasons, we held that the issue was properly submitted to the factfinder. *Id.* at 371.

In *Jacobson*, the petitioner was indicted for violating the Child Protection Act of 1984, "which criminalizes the knowing receipt through the mails of a 'visual depiction [that] involves the use of a minor engaging in sexually explicit conduct.'" *Jacobson v. United States*, 503 U.S. 540, 542 (1992). Jacobson purchased two magazines from a California adult bookstore that depicted photographs of nude preteen and teenage boys. *Id.* at 542-43. The boys in the magazine were not engaged in sexually explicit conduct and the purchase of the magazines was legal in both Jacobson's home state and federally. *Id.* at 543. Three months later, the federal law changed and receipt of sexually explicit material of children through the mail became illegal. *Id.* at 543. Thereafter, the Government began repeated efforts "to explore petitioner's willingness to break the new law by ordering sexually explicit photographs of children through the mail." *Id.* at 543. Jacobson subsequently purchased several magazines with explicit photos, and he was charged. *Id.* at 547. At trial, Jacobson raised an entrapment defense alleging that the government "entrapped him into committing the crime through a series of communications from undercover agents that spanned the 26 months preceding his arrest." *Id.* at 542. Jacobson

was ultimately found guilty, and the Eighth Circuit affirmed his conviction concluding that, as a matter of law, he was not entrapped. *Id.* at 548.

The Supreme Court reversed the conviction, finding that "[b]y the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations." *Id.* at 550. As the Court explained, when the defense of entrapment is at issue: "[T]he prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Id.* at 549. The Court held the "Government did not prove that this predisposition was independent" but rather it was the product of the Government's solicitations. *Id.* at 550. The Court explained, "[l]aw enforcement officials go too far when they 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'" *Id.* at 553. The Court also explained that, "where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition." *Id.* at 550. In *Jacobson*, the investigation lasted more than two years and involved substantial pressure exerted by law enforcement. *See id.* at 543. It is distinguishable from the investigation in the instant case which lasted approximately two months and did not entail extensive efforts by law enforcement.

In *Kamara*, we addressed a conviction to solicit murder where the appellant contracted another person to kill his girlfriend, Kanu. *Kamara*, 184 Md. App. at 64. At trial, Kanu testified that Kamara continued to contact her after the relationship ended, and

it made her "nervous and scared." *Id.* Maurice Proctor, one of the appellant's former coworkers, testified that Kamara initiated conversations with him about killing Kanu. *Id.* at 64-65. He agreed to kill Kanu in exchange for money but testified that he never intended to commit the crime. *Id.* at 65. Instead, he wanted to get Kamara's money. *Id.* Proctor was arrested on an unrelated drug offense and informed the police of his conversations with Kamara, in hope of favorable treatment regarding the drug charge. *Id.*

Police began working with him and meetings between Proctor and Kamara were recorded and videotaped. *Id.* At a meeting on April 8, 2006, Kamara gave Proctor $100, with the promise that he would give him more and told him to wait until December to kill Kanu because he did not want to be identified as the primary suspect if the murder was committed sooner. *Id.* at 66. Kamara was subsequently interviewed by the police and he admitted that he initially wanted Proctor to kill Kanu but that he subsequently told him not to commit the crime. *Id.* Appellant's written statement was admitted into evidence. *Id.*

At the conclusion of the State's case, Kamara's counsel made a motion for judgment of acquittal. *Id.* at 68. He argued the evidence was insufficient to convict him, and that he was entrapped because the solicitation was "initiated by the police and the individual who was arrested." *Id.* The motion was denied, however, the jury was instructed on entrapment, as requested. *Id.* at 69. Kamara was convicted. *Id.* at 70.

On appeal, Kamara argued that he was "entrapped as a matter of law." *Id.* at 75. He asserted that if the evidence properly supported a finding by the judge that inducement occurred, then no rational jury could find beyond a reasonable doubt that inducement did not occur. *Id.* at 75-76. Likewise, no jury could have concluded beyond reasonable doubt

that he was not induced or that he was predisposed to solicit Proctor to murder before he was induced. *Id.* at 76.

We disagreed and held that the court did not err in denying Kamara's motions for judgment of acquittal. *Id.* We held the evidence did not establish entrapment as a matter of law. *Id.* That evidence included Proctor's testimony, recorded calls and meetings and the money that the appellant paid Proctor. *Id.* at 79. We noted that the evidence, if believed, was not so clear and decisive that reasonable minds, applying the correct law could not differ in finding that the defendant was not induced by the police to commit the offense or that he was not predisposed to solicit Proctor. *Id.* at 76. Viewing the evidence in the light most favorable to the State, we found that the evidence was sufficient to convince a rational trier of fact beyond a reasonable doubt that Kamara was not induced and/or was predisposed to commit the offense. *Id.* at 79.

In the present case, both parties agree that the court properly found that Appellant had proven inducement. The court stated:

> Reading all of the text messages exchanged between the police and the defendant, the [c]ourt finds that the defendant met his burden to show that he was induced or persuaded by the police to commit the crime. The police officer was the one who repeatedly brought up the issue of sex.

As for the second inquiry, Appellant contends that the court erred in finding predisposition based on the Grindr messages, which only contained expressions of interest and fantasy. The State counters that the determination was a fact-based one for the trial judge. We agree.

The following messages, predating the investigation, were admitted at trial to establish Appellant's predisposition to have sex with minors:

> The defendant mentioned that he likes them, meaning boys, ranging in age from 13 to 30. He mentions in there that he likes their hairless bodies or hairless nipples, I believe is what the exact quote was, their hairless c*cks, and hairless pinholes to quote him.
>
> Saying 'Let's get you over here' to a profile identifying as 15-years-old, after asking if he had 'ever been with a man.'
>
> Read said he had a 'second cousin who's about 12' that he though [sic] was gay and said, 'Gonna take him camping.'
>
> When told another person 'had his nephew with him' Read said 'I can suck his d*ck while you f*ck me.' When told the nephew was 11, Read responded, 'So, LOL . . . I sucked d*ck early, LOL.'
>
> When told someone else had a three way with a 15-year-old and a 14-year-old, Read said, 'Nice. Would love to join.'
>
> He told another user that he 'Wish[ed] he could find' someone who was '13 or 14.'
>
> When talking to someone who said he was 15, he said 'I'm [sic] bet I'm [sic] make you come quick. How big are you?'

In finding that the State had proven predisposition, the court stated:

> [T]he second element requires proof that the defendant was not predisposed to commit the crime of having sex with a minor. The Court finds that the state established beyond a reasonable doubt that defendant was predisposed to have sex with a minor. On cross-examination Detective German testified that there was a subpoena issued to Grindr, and transcripts of defendant's communications with others show that transcripts of defendant's communications with others show that he had discussed having sex with minors. These conversations occurred prior to the time that the defendant and John began communicating, and there're evidence of defendant's predisposition to have sex with person's [sic] younger than 16. Accordingly, the Court finds that entrapment did not occur in this case, and defendant is guilty of sexual solicitation of a minor.

As *Bowser* instructs, when an accused relies on the defense of entrapment, the State is entitled to rebut the defense with evidence of predisposition to commit the crime.

Bowser, 50 Md. App. at 372. By electing to raise the defense, "a defendant cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells,* 287 U.S. at 451.

Quoting from *Fisher v. State*, the *Bowser* court stated:

> The initial test of the evidence, within the framework of the substantive law of entrapment is always a matter of law for the court. The question to be decided depends upon how the question is raised. A motion for judgment of acquittal based upon that defense requires the court to decide whether there is undisputed evidence, so clear and decisive that reasonable minds, applying the correct law, could not differ in finding that the defendant was induced by the police to commit the offense, and that his criminal conduct was due to the persuasion of the police and not his own readiness or predisposition to commit the offense. Only when such is the state of the evidence is there entrapment as a matter of law.

Bowser, 50 Md. App at 369 (quoting *Fisher v. State,* 28 Md. App. 243, 249-50 (1975)).

Appellant argues that the nature of the inducements, including emotional manipulation, demonstrate a lack of predisposition and that the Grindr messages expressed mere fantasy and interest. Appellant contends the State failed to present any evidence of prior unrelated offenses or convictions or contraband. Quoting from *Jacobson*, Appellant states, "a person's inclinations and fantasies . . . are his own and beyond the reach of government . . . ." 503 U.S. at 551-52. Appellant cites *Mayfield* to further his argument that "predisposition requires more than a mere desire, urge or inclination to engage in particular conduct . . . ." *United States v. Mayfield*, 771 F.3d 417, 428 (7th Cir. 2014).

Our review, as noted by this court in *Fisher*, is, "whether there is undisputed evidence, so clear and decisive that reasonable minds, applying the correct law, could not differ in finding that the defendant was induced and that his criminal conduct was due to

the persuasion of the police and not his own readiness or predisposition to commit the offense." *Fisher,* 28 Md. App. at 250.

As we see it, a reasonable fact finder could determine that the Grindr messages contained explicit expressions about sexual activity and contact, specifically with minors. Appellant contends that the messages did not suggest "actually intended" acts. However, during the trial, there was no testimony or evidence presented in support of Appellant's argument that the statements were mere fantasy. The messages do not delineate that they were mere interests, they do not use the terms fantasy, imaginings or notions that engender non-real-life experiences. Thus, it was within the court's province to accept or not accept the proposition that the communications were of interests and not expressions of action. After its review of the evidence, the court held that the messages were evidence of Appellant's willingness and disposition to have sex with persons younger than sixteen.

In our examination, we find that the evidence presented was not "so clear and decisive that reasonable minds, applying the correct law, could not differ in finding that the defendant was induced and that his criminal conduct was due to the persuasion of the police and not his own readiness or predisposition to commit the offense." *Fisher,* 28 Md. App. at 250. On the record before us, the court did not err.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1051s22cn.pdf