STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0342

State of Minnesota,
Respondent,

vs.

Jeffrey Christopher Gusciora,
Appellant.

Filed February 6, 2023
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Isanti County District Court
File No. 30-CR-18-709

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Jeffrey R. Edblad, Isanti County Attorney, Joel Whitlock, Assistant County Attorney, Cambridge, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Reyes, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from the judgment of conviction of prostitution involving a minor and electronic solicitation of a child, appellant argues that: (1) the district court erred by determining that the state proved beyond a reasonable doubt his predisposition to commit

solicitation and prostitution, and he was therefore not entrapped; (2) the district court erred by not obtaining appellant's waiver of his right to a jury trial on the entrapment defense; and (3) he cannot receive a separate sentence on the solicitation conviction because it was part of the same behavioral incident as the prostitution conviction. We affirm in part, reverse in part, and remand.

FACTS

On September 5, 2018, a sting operation involving several law-enforcement entities and officers began and lasted two days. The sting operation consisted of an undercover police officer acting as a fifteen-year-old minor posting an online advertisement for sexual acts on a sex-advertisement website.

Appellant Jeffrey Christopher Gusciora went on the website that evening and found the undercover officer's online advertisement. At approximately 6:24 p.m., the conversation started with appellant asking the undercover officer her pricing and availability. The undercover officer responded with $250/hour for both women who were advertised and $200/hour for one woman. Based on the undercover officer's messages to appellant, it appeared there was another woman next to her who she referred to as "friend" telling her what to say to appellant because she was new to this. During their communication, the undercover officer made a comment about having to do her homework. In response, appellant inquired about her age and the following communication took place:

The undercover officer:	she says I sh[ou]ldn't say that
The undercover officer:	but can I trust [yo]u won[t] say somet[h]ing
Appellant:	when I come tell me
Appellant:	unless you want to tell me now

The undercover officer: I'll be 16 next week

Despite the undercover officer disclosing her age, appellant continued to exchange messages with her. But, in their communication, appellant seemed concerned that he would end up in jail and asked the undercover officer for a picture. The undercover officer responded with "you won't end up there." and sent a picture to appellant. Following that, she asked appellant to send a picture of himself as well, and he complied. Appellant asked the undercover officer to prove the transaction was legitimate. At that point, the undercover officer started to pull away and told appellant that she would be chatting with someone else. Appellant responded, "No I'll come now." At around 7:30 p.m., the undercover officer told appellant to hurry because her friend's mother would be home at 9:00 p.m. Appellant could not make that time work, so they agreed to meet the next day.

The next day, the undercover officer sent appellant a message to see if they were still seeing each other that day. They agreed to meet at the same location from the day before. They continued communicating throughout the day and sent photos to each other. During their communication, appellant asked whether the undercover officer had had many sexual partners. *Id*. She responded with "no haaah I'm 15 so only like 2 . . . well soon 3."

Upon appellant's arrival, the undercover officer opened the door, appellant entered the residence, and officers placed him under arrest. Appellant had two condoms, a cell phone, and $200 cash on him. Respondent State of Minnesota charged appellant with two felony counts: (1) hiring, offering, or agreeing to hire an individual believed to be between the ages of 13 to 16 to engage in prostitution involving sexual penetration or contact, in violation of Minn. Stat § 609.324 subd. (1)(b)(3) (2018), and (2) soliciting a child or

someone reasonably believed to be a child through electronic communication to engage in sexual conduct, in violation of Minn. Stat § 609.352, subd. 2a(1) (2018).

Appellant moved to dismiss the charges based on a due-process-rights violation and entrapment defense. After a contested omnibus hearing, the district court denied appellant's motion, determining that appellant's due-process rights were not violated and that appellant's entrapment defense failed because he was predisposed to commit the crime. Following trial, a jury found appellant guilty of both charges. The district court convicted appellant of both charges. It sentenced appellant to 23 months in prison, with a 10-year stay of execution, for the prostitution conviction and 15 months in prison, with a 3-year stay of execution, for the solicitation conviction. This appeal follows.

DECISION

I. The district court did not err by determining that appellant's entrapment defense fails because the state proved beyond a reasonable doubt that appellant was predisposed to commit the charged crimes.

Appellant argues that the district court erroneously determined that law enforcement did not entrap him. We are not persuaded.

We review a district court's legal conclusions de novo and its factual findings for clear error on its omnibus-hearing decision. *State v. Garcia*, 927 N.W.2d 338, 339 (Minn. App. 2019). "Minnesota follows the so-called subjective test of entrapment." *State v. Vaughn*, 361 N.W.2d 54, 57 (Minn. 1985). Establishing an entrapment defense involves a two-step process. *Id*. First, "the defendant must raise the entrapment defense by showing by a fair preponderance of the evidence . . . that the government induced the commission of the crime." *Id.* The burden then shifts to the state; "to obtain a conviction[,] the state

must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *Id*.

While appellant agrees with the district court's determination that there was government inducement, the state strongly argues to the contrary. Regardless, because the predisposition prong is dispositive, we need not address the first prong. "Predisposition may be established by: (1) the defendant's active solicitation to commit the crime; (2) defendant's prior criminal convictions; (3) defendant's prior criminal activity not resulting in a conviction; (4) defendant's criminal reputation; or (5) any other adequate means." *State v. Johnson*, 511 N.W.2d 753, 755 (Minn. App. 1994), *rev denied* (Minn. Apr. 19, 1994).

Here, the record supports that appellant had a predisposition based on his active solicitation to commit the crimes. Appellant voluntarily went on the sex-advertisement website where he sought sex for sale. He came across the undercover officer's advertisement for sex and initiated contact. Appellant asked for pricing and availability, which the officer provided. During their communications, the officer disclosed that she was 15 years old. After learning of her age, appellant could have terminated their communications, but he still communicated with her and offered to meet with her. He chose to drive 45 minutes to the agreed-upon residence and had two condoms and $200 cash on him. We conclude that the district court did not err by determining that the state met its burden of proving beyond a reasonable doubt that appellant was predisposed to commit the charged crimes.

II. The district court did not err by accepting appellant's counsel's request to submit the entrapment defense to the court and not the jury, and any alleged error was harmless beyond a reasonable doubt.

Appellant argues that the district court erred by failing to obtain a proper waiver from him of his right to have a jury consider his entrapment defense. We disagree.

Every defendant must be provided the opportunity "to present a complete defense." *State v. Smith*, 876 N.W.2d 310, 331 (Minn. 2016) (citations omitted). On appeal, we first determine whether the district court erred by "denying the defendant the right to present a defense." *Id.* If there is error, we then review whether it was harmless beyond a reasonable doubt.[1] *Id.* "Under this standard, we 'must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict.'" *Id.* (quotation omitted).

A defendant can present an entrapment defense either "to a jury as a factual issue or to the district court as a matter of law." *State v. Balduc*, 514 N.W.2d 607, 611 (Minn. App. 1994) (citation omitted). "[The defendant] shall give notice of such election to the court and prosecution, setting forth the basis for the claim of entrapment defense in reasonable detail." *State v. Grilli*, 230 N.W.2d 445, 455 (Minn. 1975). "If the defendant elects to have the [district] court consider a claim of entrapment, they must waive a jury trial on that

[1] While neither party raises the plain-error standard of review, we note that appellant never objected at any stage before the district court. As a result, the plain-error standard can also apply here. However, because we conclude that the district court did not err, his claims fail under the plain-error standard as well. *See State v. Griller*, 583 N.W.2d 736, 748 (Minn.1998) (under plain-error standard, appellant must show (1) error, (2) that is plain, and (3) that affects appellant's substantial rights).

issue either in open court or in writing." *Id.* But when a "defendant was present when his counsel made the waiver of jury trial on entrapment issue, defendant may well be said to have ratified the waiver and made it his personal act." *See State v. Ford*, 276 N.W.2d 178, 183 (Minn. 1979). The *Ford* court further stated that "*Grilli* does not permit the defense to have it both ways." *Id.* In other words, the appellant must either elect to have the court decide the issue or the jury.

Here, appellant, through his counsel, elected to submit the entrapment defense to the district court, not to the jury. Appellant first gave notice of his election to submit the entrapment issue to the district court when his counsel filed a motion to dismiss on the entrapment defense which stated, "*[Appellant] elects to submit this entrapment defense to the [c]ourt.*" (emphasis added). More importantly, at the contested omnibus hearing, appellant was present when his counsel stated in open court that "[appellant] elected to submit the entrapment defense to the [district] court." Therefore, appellant through his counsel "ratified the waiver and made it his personal act." *Ford*, 276 N.W.2d at 183.

Appellant's counsel also informed the district court that both parties agreed to argue the entrapment issue to the district court by submitting written memoranda and having the other party respond. The district court would then review both briefs and issue a decision. In fact, appellant's counsel had already submitted his memorandum, and the state agreed to file a responsive memorandum. The district court determined that appellant met his burden of showing that he was induced but that the state also met its burden to prove that he was predisposed. Once the district court issued its determination, appellant did not have the right to present the defense to the jury. *See Grilli,* 230 N.W.2d at 455. We therefore

conclude that the district court did not err by accepting counsel's waiver of appellant's right to a jury trial on the entrapment defense.

But even if we were to assume error, it was harmless.[2] Even though appellant was barred from presenting the entrapment defense, he still had an opportunity to present his case to the jury. The jury heard and considered the testimony and evidence he presented and ultimately found him guilty of both felony counts. Based on our careful review of the record, we conclude that any alleged error by the district court was harmless beyond a reasonable doubt.

III. The district court erred by imposing a sentence on the electronic-solicitation-of-a-child conviction because it was part of the same behavioral incident as the prostitution-of-a-minor conviction.

Appellant argues, and the state agrees, that the district court erred by imposing sentences on both offenses because they arose from a single behavioral incident. We agree.

Courts may not impose "multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted); Minn. Stat. § 609.035 (2018). Rather, "a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident . . . ." *Id.* (quotation omitted). "Whether an offense is subject to multiple sentences under [section] 609.035 is a question of law, which we review

[2] This case is analogous to *State v. Juhl*, in which appellant Juhl did not provide a jury-trial waiver on the entrapment issue. *State v. Juhl*, A18-0395, 2018 WL 6165496, at *2 (Minn. App. Nov. 26, 2018). This court held that, while the district court erred by failing to obtain a waiver, its error was harmless beyond a reasonable doubt. While *Juhl* is nonprecedential, it is persuasive.

de novo." *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012). The state bears the burden of proving "by a preponderance of the evidence that the conduct did not occur as part of a single behavioral incident." *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000). "Whether a defendant's multiple offenses occurred during a single course of conduct depends on the facts and circumstances of the case. Offenses are part of a single course of conduct if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) (citations omitted).

Here, appellant's actions were motivated by a single criminal objective of hiring the minor female to have sex with him. Both offenses occurred at substantially the same time and place as well. The record shows that appellant and the officer communicated online during the span of two days through the sex-advertisement website and then agreed to meet up at a location with the intent to have sexual intercourse. As a result, the record supports that appellant's offenses arose from a single course of conduct. We therefore reverse appellant's sentences and remand to the district court to vacate appellant's multiple sentences and to sentence appellant only for one offense. *See Kebaso*, 713 N.W.2d at 322.

Affirmed in part, reversed in part, and remanded.