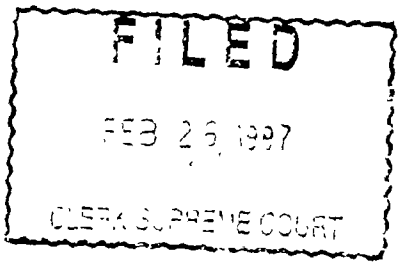
IN THE COURT OF APPEALS OF IOWA

No. 6-760 / 95-1654

000500



STATE OF IOWA,

Appellee,

vs.

LEONARD WALLACE,

Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendant appeals from the judgment and sentence entered upon his conviction for sexual exploitation of a minor. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

Heard by Cady, P.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

000501

CADY, P.J.

The primary question we face in this appeal is whether a sting operation by a law enforcement task force entrapped defendant into committing a crime as a matter of law. We conclude entrapment did not occur as a matter of law and affirm the conviction.

The Iowa Child Exploitation Child Pornography Task Force was formed in 1991 to investigate cases of child sexual exploitation in Iowa. It is comprised of several law enforcement officials from various levels of state and federal government.

On June 2, 1994, the task force placed an advertisement in an adult magazine called the "Midwestern Connection." The ad read:

> Divorced white female with children. Society does not understand my needs, looking for a man who does. Please be discreet.

The ad also included a fictitious name "Barbara" and a mailing address to a Des Moines post office box.

Numerous individuals responded to the ad, including Leonard Wallace. On July 1, 1994, the task force received a letter from Wallace indicating his desire to enter into a relationship with "Barbara." This letter was followed by an exchange of numerous letters and telephone calls over a period of two months.

The task force responded to the inaugural letter from Wallace by indicating "Barbara" was not as interested in a relationship for herself as she was in finding someone to help with her children's "special education." Wallace was informed

further communications should be discontinued in the event they were not "thinking along the same lines."

Wallace promptly responded he understood "Barbara's" needs. He also indicated he would be able to instruct the children on a variety of sexual matters, including foreplay and intercourse. In a postscript to one letter, Wallace offered to send a nude picture of himself to "Barbara."

The three children were described to Wallace as ranging from ages seven to thirteen. Wallace responded by describing in detail what he could teach the children, including the pleasures of orgasm. Wallace also suggested their meeting involve a variety of sex toys, such as "vibrators, beads, ben-wa balls and the like."

In a letter to Wallace dated August 10, 1994, the task force suggested Wallace bring a camera to take "some family photographs." Wallace responded he would be able to bring a camera. Subsequent conversations confirmed Wallace would be responsible for photographing their meeting. Wallace also discussed his familiarity with taking photographs of children, as well as places that would develop film of children. Wallace mentioned videotaping the children's "first intercourse."

Wallace and "Barbara" arranged to meet, together with the children, in a West Des Moines hotel. An undercover agent played the role of "Barbara." Wallace arrived with a bag containing a camera, film, oriental love beads, tubes of surgical lubricant, vibrators, an electric vibrating ball and two ben-wa balls. A hidden camera

captured the meeting. Before Wallace was arrested, he told the undercover agent he would take nude photographs of the children.

Wallace was charged by trial information on October 14, 1994, with sexual exploitation of a minor in violation of Iowa Code section 728.12(1). Wallace timely filed notice of entrapment defense. He also filed a motion to dismiss the trial information on March 10, 1995, asserting he could not be found guilty of causing a minor to engage in prohibited sex acts as a matter of law because the minor children involved in the sting operation were fictitious. In response, the State moved to amend the trial information to charge Wallace with promoting child pornography in violation of 728.12(2). The district court granted the amendment following a hearing. Counsel for Wallace offered no objection to the motion.

Wallace was found guilty, following a trial, of promoting child pornography in violation of section 728.12(2). His motion for judgment of acquittal at trial based on entrapment was denied by the district court. His post-trial motions for new trial and arrest of judgment were also denied.

Wallace claims on appeal he was entrapped as a matter of law. He also argues there was insufficient evidence to support his conviction because the crime of promoting child pornography requires an intent to place the pornographic material into the stream of commerce. Finally, he claims his trial counsel was ineffective for failing to resist the amendment to the trial information.

000504

I. Entrapment

The entrapment defense is available to respond to abusive tactics by law enforcement officials in enforcement of our criminal laws. *State v. Mullen*, 216 N.W.2d 375, 381 (Iowa 1974). Entrapment occurs when a law enforcement agent induces the commission of a crime, using persuasion or other means likely to cause a law-abiding person to commit the crime. *Id.* at 382. As a matter of public policy, any prosecution under such circumstances must be dismissed. *See id.* at 381.

It has long been recognized that government may use artifice and strategem to catch those engaged in criminal activity. *State v. Williams*, 315 N.W.2d 45, 54 (Iowa 1982). Thus, a "sting" operation is not an improper inducement if it merely affords a person an opportunity to commit a crime. *See United States v. Joost*, 92 F.3d 7, 12 (1st Cir. 1996); *Mullen*, 216 N.W.2d at 382 (conduct which merely gives a person an opportunity to commit a crime does not constitute entrapment). *See also Jacobson v. United States*, 503 U.S. 540, 548-49, 112 S. Ct. 1535, 1540, 118 L. Ed. 2d 174, 184 (1992) (government may use undercover agents to enforce the law). When the undercover operation, however, includes conduct likely to induce a law-abiding citizen to commit a crime, the line between proper and improper law enforcement is violated.

The defendant has the initial burden of producing sufficient evidence which would permit the jury to reasonably infer the conduct by police would cause a normally law-abiding person to commit the crime. *State v. Cooper*, 248 N.W.2d 908,

910. (Iowa 1976). When this is done, the burden shifts to the state to disprove entrapment beyond a reasonable doubt. *Id.* Generally, entrapment is a jury question. *See United States v. Pfeffer*, 901 F.2d 654, 656 (8th Cir. 1990). The trial court, however, may grant a judgment of acquittal when entrapment is established as a matter of law. *Id.* It is a question of law when there is no dispute in the facts and inferences to be drawn from the facts. *Mullen*, 216 N.W.2d at 382. Otherwise, a jury question is presented. *Id.*

Our primary focus when determining whether entrapment has occurred is the conduct of law enforcement. *Id.* We direct our inquiry at the conduct of law enforcement to determine if it would likely overcome the will of a law-abiding person to obey the law. Law enforcement conduct involving excessive incitement, urging, persuasion, or temptation constitutes entrapment. *State v. Babers*, 514 N.W.2d 79, 83 (Iowa 1994). Depending on the circumstances, it could involve such activities as extreme pleas of desperate illness, appeals based primarily sympathy, pity, or close personal friendship, and offers of large sums of money. *Cooper*, 248 N.W.2d at 910.

Although the objective test is used as the measuring stick for entrapment, we do not necessarily close our eyes to the defendant's participatory actions in the criminal offense. *State v. Agent*, 443 N.W.2d 701, 703 (Iowa 1989). We consider the defendant's response to the communications and conduct by undercover agents to help determine the effect the government conduct would have on a normally law-abiding person. *Id.*

Wallace asserts his initial responses to the solicitation in the magazine and his initial letters expressed only an interest to enter into a relationship with the fictitious person called "Barbara." He argues there was no indication or inference he intended to sexually exploit minors. Additionally, Wallace points out the undercover agent initiated the idea of entering into a sexual relationship with children, as well as taking photographs of children. He further points out the state repeatedly continued to lure him into committing the crime in the subsequent communications. Wallace claims these actions show the state systematically entrapped him as a matter of law.

We agree Wallace expressed no initial intent to exploit children. Yet, we do not address the predisposition of the defendant to commit the crime. We also acknowledge the state raised the idea of involving children. Notwithstanding, entrapment does not occur as a matter of law merely because police initiate the relationship which culminates in the commission of a crime. *Illinois v. Day*, 665 N.E.2d 867, 871 (Ill. App. 1996). Moreover, even repeated requests by government agents for the defendant to engage in criminal conduct do not usually establish inducement if not coupled with persuasive overtures. *See United States v. McKinley*, 70 F.3d. 1307, 1312 (D.C. Cir. 1995). We must examine all of the conduct of law enforcement and consider objectively the likelihood it would entrap a law-abiding citizen.

Our review of the communication between the State and Wallace reveals the State provided Wallace with the opportunity to commit the criminal act, but did not

excessively incite or persuade him to do so. When the undercover agent suggested the relationship involve children, Wallace was clearly given an opportunity to withdraw. He did not. *See Pennsylvania v. Johnson*, 670 A.2d 666, 671 (Pa. Super 1996). When photographs were suggested, Wallace showed no reluctance. With each communication from the State, Wallace responded with a progressive willingness to be involved, together with a sharp familiarity with the suggested activity.

Considering all of the circumstances, we agree with the district court the conduct of the law enforcement did not establish entrapment as a matter of law. The issue was properly submitted to the jury.

II. Sufficiency of Evidence

Wallace argues there was insufficient evidence to support the conviction because the particular sexual exploitation of a child statute he was charged with violating does not apply to photographing children engaged in sexual acts for personal pleasure. We disagree.

Iowa Code section 728.12(2) (1995) provides:

> A person commits a class "D" felony when the person knowingly *promotes* any material visually depicting a live performance of a minor engaging in a prohibited sexual act.... (emphasis added).

The term "promote" is defined in section 728.1(7) as:

> to *procure, manufacture,* issue, sell, give, prove, lend, mail, deliver, transfer, transmute, transmit, publish, distribute, circulate, disseminate,

present, exhibit, or advertise, *or to offer or agree to do any of the these acts*. (emphasis added).

We find no language in the statutory definition of "promote" to limit the scope of the crime as claimed by Wallace. The term "promote" is not only aimed at the distribution of the prohibited material, but also the creation of it. Moreover, we do not read the word "manufacture" to exclude material manufactured for personal purposes. There was sufficient evidence to support the conviction.

III. Effective Assistance of Counsel

To establish a claim of ineffective assistance of counsel, defendant must prove counsel failed to perform an essential duty and prejudice resulted. *State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987). The state acknowledges a pretrial amendment was an improper method to charge Wallace with promoting child pornography as defined under section 728.12(2). It alleges, however, no prejudice resulted because Wallace could have properly been charged with promoting child pornography by requesting a dismissal of the trial information under Iowa Rule of Criminal procedure 27(1) and filing a new trial information charging violation of section 728.12(2). *See* Iowa R. Crim. P. 27(1).

Rule 27(1) permits the dismissal of a prosecution in the "furtherance of justice." Iowa R. Crim. P. 27(1). Clearly justice is furthered when a charge is dismissed based on lack of evidence. *See State v. Lundeen*, 297 N.W.2d 232, 236 (Iowa App. 1980) (relevant considerations in determining to dismiss include weight

of evidence). Furthermore, the State is not prohibited from filing a new charge following a dismissal of a different charge if the charges were not filed in bad faith. *See State v. Henderson*, 537 N.W.2d 763, 767 (Iowa 1995).

We have no record before us to determine if the sexual exploitation charge originally brought against Wallace was filed in bad faith. Wallace claims it was the result of zealous overcharging. We preserve the issue to permit Wallace to develop a record.

In conclusion, we affirm the conviction, but preserve the claim of ineffective assistance of counsel for possible postconviction proceedings.

AFFIRMED.