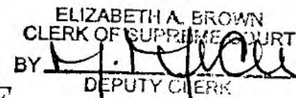
IN THE SUPREME COURT OF THE STATE OF NEVADA

TYLER JOSEPH ATENCIO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87045

FILED

DEC 05 2024



ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted abuse or neglect of a child involving sexual exploitation and soliciting a child for prostitution. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Appellant Tyler Atencio was arrested in a reverse sex sting operation in Reno. He used an adult escort website to seek commercial sex and unknowingly interacted with decoy model profiles created and monitored by law enforcement officials. In chatting with one of these profiles, Atencio was led to believe that the model was 16 years old. Thereafter, he offered money to that model for sex acts and drove to an address provided by the detective pretending to be the model. Law enforcement arrested Atencio after he drove past the house and made a U-turn, apparently because he had changed his mind.

Atencio moved to dismiss the information due to outrageous governmental conduct and entrapment. The district court denied the motion, and the case proceeded to trial. A jury found him guilty of attempted abuse or neglect of a child involving sexual exploitation and soliciting a child for prostitution. On appeal, Atencio argues that reversal is warranted due to improper jury instruction, outrageous government

24-46345

conduct in conducting the sting, and insufficient evidence. Atencio also contends that the State improperly charged him with attempted abuse or neglect of a child involving sexual exploitation. We are not persuaded by these arguments and affirm the judgment of conviction.

Jury instructions

Atencio challenges a jury instruction that provided in part, "Initial contact is generally the most crucial point for an analysis of entrapment." He claims that this sentence "is nowhere mentioned in the major entrapment cases of more recent years" and vitiated his entrapment defense. Atencio maintains that the more correct statement of the law is that entrapment turns on predisposition and not necessarily initial contact.

District courts generally have "broad discretion" in settling jury instructions. *Kassa v. State*, 137 Nev. 150, 156, 485 P.3d 750, 757 (2021) (internal quotation marks omitted). This court, however, reviews the law underlying a given jury instruction de novo. *Id.* If the instruction reveals legal error, "reversal is not required unless a different result would be likely, absent the contested instruction." *Id.*

Entrapment is a burden-shifting defense. The defendant first bears the burden of proving "governmental instigation" or "an opportunity to commit a crime [was] presented by the state." *Foster v. State*, 116 Nev. 1088, 1091, 13 P.3d 61, 63 (2000); *Miller v. State*, 121 Nev. 92, 95, 110 P.3d 53, 56 (2005). If proven, the burden shifts to the State to prove "that the defendant was predisposed to commit the crime." *Foster*, 116 Nev. at 1091, 13 P.3d at 63.

We recently decided in *Martinez v. State*, a case involving the same sting operation, that the identical initial contact instruction from *Adams* was given in error because Nevada's "subjective approach" to entrapment centers on predisposition rather than initial contact. 140 Nev.,

Adv. Op. 70, 558 P.3d 346, 353 (2024) (internal quotation marks omitted); *Adams v. State*, 81 Nev. 524, 524, 407 P.2d 169, 171 (1965) (observing that "initial contact" is generally "the most crucial point for an analysis of entrapment"). We observed that initial contact may inform whether entrapment occurred, but it is not dispositive. *Martinez*, 140 Nev., Adv. Op. 70, 558 P.3d at 352-53. Instead, "facts tending to show the defendant's predisposition . . . are the more important part of the entrapment analysis." *Id.* at 352. Despite the *Adams* instruction, we concluded that Martinez did not demonstrate any prejudice from the district court's inclusion of the instruction, such that reversal would be justified. *Id.* at 353. So too here. Given the evidence adduced at trial that Atencio used a disguised phone number to ask a decoy model, that he was told minutes before was 16 years old, for various sex acts, it is not apparent that "a different result would be likely" had the district court omitted this instruction. *Kassa*, 137 Nev. at 156, 485 P.3d at 757. This is especially true where, as here, the district court gave several other instructions that correctly stated the law on entrapment. Therefore, we conclude that Atencio is not entitled to relief on this claim.

Outrageous government conduct

Atencio argues that the facts demonstrate "outrageous governmental conduct" violative of his due process rights. Like the appellant in *Martinez*, he argues the district court erred in denying his motion to dismiss the information and seeks the reversal of his conviction.

Typically, this court reviews the district court's decision to dismiss an information for an abuse of discretion. *Cf. Guerrina v. State*, 134 Nev. 338, 347, 419 P.3d 705, 713 (2018) (stating that the denial of a motion to dismiss an indictment is reviewed for an abuse of discretion). When the

motion asserts outrageous governmental conduct, however, courts review the district court's decision de novo. *Martinez*, 140 Nev., Adv. Op. 70, 558 P.3d at 354-55; *United States v. Pedrin*, 797 F.3d 792, 795 (9th Cir. 2015).

In *Martinez*, we adopted the six-factor test from *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013), to determine whether the government acted so outrageously as to justify dismissal of the charges. *Martinez*, 140 Nev., Adv. Op. 70, 558 P.3d at 355. The nonexhaustive six-factor test looks to

> (1) known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendants to commit the offense conduct; (5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.

Black, 733 F.3d at 303.

Addressing the same reverse sting operation, we concluded that law enforcement's actions in that case did not constitute outrageous governmental conduct. *Martinez*, 140 Nev., Adv. Op. 70, 558 P.3d at 355-56. Because each individual's interaction with law enforcement will be different, even within the same sting operation, each factual scenario therefore requires independent analysis. However, applying the *Black* factors here demands the same result we reached in *Martinez*. While it is true that the first and second factors mostly favor Atencio because law enforcement did not have firsthand knowledge of Atencio or any criminal propensities before launching the sting, the remaining *Black* factors favor the government. Ultimately, the evidence establishes that Atencio willingly sought to engage in commercial sex with a model that he believed was 16.

Though he expressed momentary reservations after hearing her "true" age, he only sought reassurance that he would not get caught—not reassurance that the sex worker was not a minor. After he got that reassurance, he proceeded to request specific sex acts from the minor decoy model and drove to the address given to him by the law enforcement agent to carry out those acts. Like *Martinez*, this case does not showcase conduct "so outrageous" or "grossly shocking" to warrant dismissal. *United States v. Russell*, 411 U.S. 423, 431-32 (1973); *United States v. Stinson*, 647 F.3d 1196, 1209 (2011).[1] For this reason, any error by the district court in importing concepts relevant to entrapment's predisposition prong when the central focus in outrageous governmental conduct is the government's actions, is harmless.

Sufficiency of the evidence

Atencio argues that the State failed to present sufficient evidence to sustain the conviction for soliciting a child for prostitution because any solicitation was already complete by the time he was told the model was 16. Evidence supports a criminal conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" when the evidence is viewed in a light most favorable to the prosecution. *Belcher v. State*, 136 Nev. 261, 275, 464 P.3d 1013, 1029 (2020) (internal quotation marks omitted).

We conclude the evidence here is sufficient to sustain the conviction for soliciting a minor for prostitution. *Glegola v. State*, 110 Nev. 344, 347-48, 871 P.2d 950, 952 (1994) (defining solicitation); NRS

---

[1]We also reject Atencio's argument that *United States v. Lofstead*, 574 F. Supp. 3d 831 (D. Nev. 2021), "should be declared preclusive" under the "anti-silver platter" doctrine discussed in *Mapp v. Ohio*, 367 U.S. 643 (1961). There is no search or seizure problem under these facts or in *Lofstead*, so the "anti-silver platter" doctrine does not apply here.

201.354(2)(a), (c) (2019) (providing that solicitation of a minor for prostitution includes soliciting a peace offer posing as a child); 2019 Nev. Stat., ch. 545, § 5, at 3365. It is true that Atencio generally offered money in exchange for sex before being told that the model was under 18. But after hearing she was 16, he requested specific sex acts from the officer posing as a minor, negotiated prices for those acts, and arranged to meet with the model. Therefore, Atencio offered, agreed, or arranged sexual conduct for a fee with a peace officer posing as a child.[2]

The charge of attempted abuse or neglect of a child involving sexual exploitation

Atencio argues that NRS 200.508 cannot apply to his conduct. Whether a statute covers certain conduct is a legal question subject to de novo review. *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010).

NRS 200.508(1) provides that a person is guilty of abuse, neglect, or endangerment of a child if they "willfully cause[ ] a child who is less than 18 years of age" either (1) "to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect," or (2) "to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect." The definition of abuse or neglect includes sexual exploitation of a child under the age of 18 years "under circumstances which indicate that the child's health or welfare is harmed or threatened

[2]Atencio raises the same constitutional arguments we rejected in *Martinez* regarding law enforcement's use of an adult woman's photos in the advertisement without disclosing that woman's biographical information. We reject them again here—there is neither a Due Process Clause nor Confrontation Clause violation under these facts—and conclude that the district court did not err by denying Atencio's motion to compel the identity of the person depicted in the photos.

with harm." NRS 200.508(4)(a), (d); NRS 432B.020. NRS 432B.110(1), which the information cited, defines sexual exploitation in part as "forcing, allowing or encouraging a child . . . [t]o solicit for or engage in prostitution."

As we explained in *Martinez*, NRS 200.508 applies when someone attempts to force, allow, or encourage someone who is not actually a child, but is posing as one, to solicit for or engage in prostitution as defined in NRS 432B.110(1). 140 Nev., Adv. Op. 70, 558 P.3d at 357. Applicable here, the government properly charged Atencio with attempted abuse or neglect of a child involving sexual exploitation under NRS 200.508 because there was sufficient evidence showing he "believed the person with whom he was corresponding was a child, even if the purported child was not an actual child." *Johnson v. State*, 123 Nev. 139, 142, 159 P.3d 1096, 1097 (2007). Therefore, we conclude that Atencio's argument is without merit and the district court did not err by denying his motion to dismiss.

Based on the foregoing, we

ORDER the judgment of conviction AFFIRMED.[3]

_______________________, J.
Herndon

_______________________, J.
Lee

_______________________, J.
Bell

[3]Atencio claims that the district court violated his right to present a defense by precluding the admission of law enforcement's operational plan. We conclude that the district court did not abuse its discretion because the plan was not a record "of acts, events, conditions, opinions or diagnoses." NRS 51.135. Nor was it "made at or near the time" of the law enforcement sting. *Id.*

cc: Hon. Scott N. Freeman, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk