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STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
BORRELLO, P.J., and MURRAY and LETICA, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAYNEEL JADE,

Defendant-Appellant.

Supreme Court No. 167920

Court of Appeals No. 365951

Circuit Court No. 22-023839 FH

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

Most of the prosecution's arguments were addressed in the defense's opening brief. A few points warrant this reply.

I. A trial court's application of the law to the facts is reviewed de novo, not for clear error.

The prosecution's attempt to synthesize a coherent standard-of-review scheme is admirable but ultimately overwrought. The prosecution posits that a trial court's application of the law to the facts is reviewed de novo but its "ultimate ruling on entrapment" is reviewed for clear error. (Pros Br, p 19). But no meaningful daylight exists between those two concepts. Instead, a trial court's ultimate ruling is part and parcel of its application of the law to the facts. To that point, in the suppression-hearing setting—which this Court has analogized to the entrapment-hearing setting, *People v D'Angelo*, 401 Mich 167, 177-178 (1977)—this Court has referred to "application of the law to the facts" and "ultimate ruling" interchangeably. *People v Williams*, 472 Mich 308, 313 (2005); *People v Slaughter*, 489 Mich 302, 310 (2011). And the defense is aware of no other legal doctrine where these two concepts are divorced. Rather, a court's ultimate ruling is simply the endpoint of its law-to-facts analysis.

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The prosecution's hypothetical about a court that wrongly applies the subjective test (Pros Br, p 21-22) exposes the flaws with its standard-of-review scheme. The prosecution agrees that the law-to-facts analysis would be reviewed de novo and necessarily be found to be erroneous. But then the trial court's "ultimate ruling"—the last step of the law-to-facts analysis—would receive highly deferential clear-error review despite being infected by a blatant error of law. Simply put, this makes no sense. Again, no other issue in our jurisprudence is reviewed this way, and there is no good reason why entrapment should be subject to this anomalous and irrational mode of appellate review.

II. Entrapment does not require a defendant's will to be overcome.

The prosecution's repeated allusions to overcoming a defendant's will (Pros Br, p 4 n 5, 31, 32) underscore what the prosecution gets wrong about entrapment. Entrapment is not a duress defense, nor does it require coercion. Instead, entrapment as conceived under the objective test is an equitable doctrine designed to preserve the sanctity of the courts from police tactics that manufacture crime. The defendant's subjective "will" is beside the point.

People v Duis, 81 Mich App 698 (1978), which has been cited favorably by this Court, *People v Juillet*, 439 Mich 34,

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57, 63, 66 (1991), is an apt example of these principles. In *Duis*, a "police undercover agent" was in jail awaiting trial on a felony charge. *Duis*, 81 Mich App at 699. The agent reached an agreement with police by which the agent "was released from jail on personal recognizance in order to arrange drug arrests for the police." *Id*. In exchange, police told the agent that they would help get his charge reduced and that he would receive probation in lieu of prison. *Id*. at 699-700. The agent targeted the defendant, a friend and former coworker. *Id*. at 700. The defendant was a drug user but had never sold drugs to the agent or anyone else. *Id*. at 701.

The agent went to the defendant's house and "inquired about buying some hallucinogens." *Id*. at 700. The defendant said "that there were some around but that he had none for sale." *Id*. The agent asked if the defendant could get him some, but the defendant was "noncommittal." *Id*. The agent returned a few hours later and again asked for help procuring drugs, and the defendant said no. *Id*. "After a third visit and two telephone calls, defendant finally agreed to procure mescaline for [the agent] as a favor." *Id*.

The Court of Appeals held that the defendant had been entrapped. The court found that several factors rendered the police's conduct reprehensible, including the exploitation of the agent, the untargeted nature of the investigation, the pressure exerted on the defendant by the agent, and the agent's exploitation of the defendant's friendship.

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Id. at 702-703. Accordingly, the Court held as a matter of law that police had behaved reprehensibly and that the defendant had been entrapped. *Id*. at 703-704.

But was the defendant's will overcome? The defense thinks not. Three home visits and two phone calls would not overbear a reasonable person's freedom of choice. *Duis* shows, then, that this is not touchstone of an entrapment claim. Instead, *Duis* fits neatly within the defense's formulation of the entrapment inquiry—were police detecting (rather than creating) crimes, and would the defendant have committed the charged crime without police involvement? The answer to both those questions being no, a finding of entrapment is the correct result.[1]

The prosecution spends a good deal of time going through the 12 "factors" identified in prior caselaw. (Pros Br, p 40-45). But the prosecution's discussion is problematic. At several points, the prosecution says that the absence of a certain factor weighs "against" a finding of entrapment. But no prior cases have applied the factors in

[1] *Duis* also shows why, as the defense previously argued, the induce-an-otherwise-law-abiding-person formulation of entrapment is imprecise at best. (Def Br, p 42-44). Three home visits and two phone calls would not induce an otherwise law-abiding person to procure illicit drugs. And yet the result in *Duis* is correct both as a matter of law and intuition. This is because the police in *Duis* were undeniably manufacturing a theretofore nonexistent crime.

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this way. The factors are not a balancing test where the party that accumulates the most factors wins. So, once more, the prosecution misconceives the correct analysis for entrapment.[2]

For the first time, the prosecution attempts to use statistics to establish Skip the Games as a hub of child sex trafficking. (Pros Br, p 1-2). But none of the statistics the prosecution cites support the premise of the sting operation in this case—that people who use Skip the Games to solicit sex with adults routinely encounter underage prostitutes posing as adults.[3] Yet the prosecution also points to a

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[2] As the defense previously argued, the "factors" are, for the most part, better thought of us examples of scenarios where entrapment has been found. (Def Br, p 36). But as the prosecution's myopic focus on the factors also shows, they hold the potential to distract from the bigger-picture question that entrapment is supposed to get at—were the police creating crimes that otherwise would not have occurred? This Court should reestablish this question as the lodestar of the entrapment inquiry rather than any list of factors, which may lead lower courts to miss the forest for the trees.

[3] The prosecution claims that Detective Frattura testified that Skip the Games is "commonly used for CSAA and CSAM." (Pros Br, p 35). But that's inaccurate. When asked "how often do you receive minors positing [sic] things on these types of Snap Chat, Facebook, Skip The Games, whatever it is, whatever application it is?" he answered, "More than I would like to." (95a-96a). But when asked specifically about cases involving Skip the Games, Detective

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handful of reported cases where Skip the Games was used to traffic minors. (Pros Br, p 35-37). But in nearly every case cited by the prosecution, images of the minor were used to traffic them. This is an important fact because it shows that any prospective johns knew or at least should have known that they were soliciting sex with a child. Here, by contrast, police used a photograph of an adult woman, and the listing stated that she was a 20-year-old woman. So all the prospective johns were seeking sex with an adult, not a minor.

That said, the defense does not disagree that child traffic sex trafficking is a pernicious crime that deserves police resources and attention. Likewise, the defense does not dispute that sting operations may be the most effective way for investigating these crimes. But the targets of such sting operations should be *people looking to have sex with children*. That's not what happened in this case. Rather than investigating known or suspected child sex trafficking activity, the police concocted a bait-and-switch scheme designed to arrest targets who had initially set out to have sex with an adult. In other words, police were not detecting child sex trafficking crimes, they were creating them. This is the essence of entrapment.

Frattura testified only about a single case involving a prostitute who had robbed a john. (91a-92a). Nothing about underage prostitutes.

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RELIEF REQUESTED

The defense again asks this Court to vacate Mr. Jade's conviction and dismiss this case.

Respectfully submitted,

/s/ Scott A. Grabel
/s/ Timothy A. Doman

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