

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARIC SCOTT ANDERSON,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 181744
LC No. 93-009995

Before: Saad, P.J., and Holbrook and G. S. Buth,* JJ.

PER CURIAM.

The jury convicted defendant of delivery of marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), and the court sentenced defendant to two years' probation. Defendant appeals; we affirm.

In February, 1993, the Downriver Narcotics Unit (DRANO) assigned Roberta Stevenson, a private undercover investigator, to investigate drug trafficking in an automotive plant. During the investigation, Stevenson purchased marijuana from defendant. Claiming entrapment, defendant moved to dismiss the charge. After an evidentiary hearing, the judge found that defendant was not entrapped and he was tried with codefendant Quentin Smith.

I.

On appeal, defendant claims that the trial judge's bias deprived him of a fair entrapment hearing. When reviewing a claim of judicial bias, we consider whether the trial court's comments or conduct were of such nature as to unduly influence the jury and thereby deprive the defendant of his right to a fair and impartial trial. *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989).

We agree with defendant that the trial judge was discourteous and unprofessional in addressing defense counsel during the entrapment hearing. However, this conduct did not deprive defendant of a fair and impartial hearing. It is apparent from the record that defense counsel had no evidence of

* Circuit judge, sitting on the Court of Appeals by assignment.

entrapment, but was merely hoping to uncover such evidence. Under these circumstances, the trial judge's conduct did not deprive defendant of a fair hearing.

Defendant's other specific allegations also fail to demonstrate that he was deprived of a fair hearing. Defendant claims that the trial court prevented him from pursuing a pertinent line of questioning which could have supported his entrapment claim. In *People v Fabiano*, 192 Mich App 523; 482 NW2d 467 (1992), this Court held that a finding of entrapment is warranted if "(1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the Court." *Id.*, 526. The defendant carries the burden of proving by a preponderance of the evidence that he was entrapped. *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991). It appears that defendant was attempting to elicit testimony that Stevenson did not comply with DRANO guidelines. This testimony, by itself, would not warrant a finding that the investigator's conduct would have induced a similarly situated, law-abiding person to engage in criminal conduct, or that her conduct was intolerably improper. The trial court was correct in finding that evidence of the investigator's misconduct, in the absence of any evidence that this misconduct influenced defendant's actions, was irrelevant.

Defendant also asserts that the trial judge made a ruling before hearing all the evidence. This claim is based on a misrepresentation of the record. The trial judge did not make a ruling until defense counsel stated that he had no more witnesses.

Defendant next contends that the trial judge misstated the law by stating that entrapment applies only to conduct of government officials, and not to that of private citizens. In fact, private citizens acting with official encouragement or assistance are treated as government agents for purposes of the entrapment defense. *People v LaClear*, 196 Mich App 537, 539; 494 NW2d 11 (1992), rev'd on other grounds 442 Mich 867 (1993). However, here, even if the trial judge were mistaken in his statement of law, the error would have been harmless because both parties acknowledged that Stevenson was acting as a government agent.

II.

Defendant further alleges that the trial judge's treatment of defense counsel (and of his codefendant's counsel) denied him a fair trial. Canon 3(A)(3) of the Code of Judicial Conduct states that a judge "should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." The trial judge's conduct toward codefendant's counsel during examination of Eunice Smith fell far short of this standard. However, this incident took place out of the jury's presence, and defense counsel had no interest in the examination of this witness. Therefore, the judge's conduct did not deprive defendant of a fair trial.

At least three times during the trial, the trial judge either disallowed a question before the prosecutor objected, or evinced impatience with defense attorneys. The Code of Judicial Conduct

provides that a trial judge should studiously “avoid controversies that are apt to obscure the merits of the dispute between litigants” and “should avoid a controversial manner or tone” when addressing counsel. Code of Judicial Conduct, Canon 3(A)(8). “[E]xcessive interference in the examination of witnesses, repeated rebukes and disparaging remarks directed at defendant’s counsel, and marked impatience in the presence of the jury” can result in the denial of a fair trial. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). Although we find no legal error in the trial judge’s evidentiary rulings, he was overly hasty in his interruptions. However, this conduct was not so egregious as to obscure the merits of the dispute.

Defendant argues that he was prejudiced by the trial court’s rulings which prohibited him from questioning the undercover investigator about her relationship with a Robert Gallagher. However, because the record does not reveal who Gallagher is, or why this questioning may be relevant, we are precluded from reviewing this issue. Defendant also claims he was prejudiced by the trial court’s refusal to allow him to question Lee Struder regarding security procedures at the plant. Defendant does not explain in his brief how he was prejudiced by the trial court’s decision on this issue. A party’s failure to argue an issue in its appellate brief constitutes abandonment of the issue. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994).

We also conclude that defendant was not prejudiced when the trial judge interposed during his closing argument. Some judicial assistance was required at that point in order to explain to the jury the limited purpose of portions of Robert Grant’s testimony. The intervention was appropriate.

III.

Although defendant is not entitled to a new trial, this decision should not be construed as approval of the trial judge’s conduct. His abusive and insulting remarks to codefendant’s counsel were grossly inappropriate. Although these and other undignified and unnecessary comments did not deprive defendant of a fair trial, they were unseemly and inconsistent with the decorum of a judicial proceeding.

Affirmed.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ George S. Buth