

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUENTIN LEANDER SMITH,

Defendant-Appellant.

UNPUBLISHED
February 11, 1997

No. 181731
Recorders Court
LC No. 93-010264
93-010265

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of delivery of marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). He was sentenced to two years of probation on each count. We affirm.

I

Defendant's employer hired a private company, Professional Law Enforcement, Inc., to investigate activity that may be illegal or violate company policies. The company assigned a private investigator to pose as a consultant in the plant. During the course of this assignment, the private investigator engaged in transactions involving the sale of marijuana with defendant and reported this information to police, which led to defendant's arrest and conviction in this matter.

The private investigator testified at trial that she first discussed the subject of marijuana with defendant in early 1993. Defendant allegedly told her that he had quit marijuana because it got him in trouble, but advised her that he knew where she could get "good marijuana." The private investigator asked defendant to provide her with a quarter ounce of marijuana for the weekend, and defendant agreed. The next day, defendant sold her a quarter ounce of marijuana after speaking with his

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

“connection.” Four months later, the private investigator asked defendant to supply her with a half ounce of marijuana, and paid him in advance. Defendant later told her that he could only supply her with a quarter ounce. The private investigator accepted the quarter ounce, defendant refunded her half the money, and then defendant introduced her to his “connection,” codefendant Aric Anderson.

After each transaction, the private investigator contacted Detective Robert Grant of the Michigan State Police to report the events surrounding the transaction and deliver the contraband to him. Over a month after the second transaction, defendant and Anderson were arrested and charged with delivery of marijuana based on the information obtained from the private investigator.

II

Defendant first argues that he was denied the effective assistance of counsel when his attorney did not pursue an entrapment defense. Defendant preserved this claim by moving for a new trial and evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). This Court will not reverse a court’s ruling on a motion for new trial absent an abuse of discretion. *People v Legrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994). Alternatively, defendant argues that the trial court’s finding that no entrapment occurred was erroneous, and hence, the court abused its discretion when denying his motion for a new trial and concluding that defendant’s counsel was not ineffective. We reject both arguments.

A

To establish a claim of ineffective assistance of counsel, a defendant must show that under prevailing professional norms, his counsel’s performance fell below an objective standard of reasonableness and that the deficiency prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant concedes that after numerous discussions with his attorney, he agreed to follow his attorney’s recommendation to forego the defense of entrapment. Nonetheless, defendant maintains that, despite this agreement, his attorney should have proceeded with this defense. Although several options are available to defend a client, the role of defense counsel is to choose the best defense for his client under the circumstances. *Pickens, supra*, 446 Mich 324-325. In this case, defense counsel was faced with proceeding with a defense which denied any criminal involvement or pursuing the defense of entrapment which may have involved a tacit admission to criminal activity.¹ Indeed, a claim of entrapment would be wholly inconsistent with defendant’s contention that he never spoke with the private investigator about marijuana nor ever sold her marijuana.

Still, defendant argues that an entrapment hearing was a “risk-free” option. Defendant maintains that entrapment could have been established at a hearing solely by examining the private investigator. Defendant reasons that since he would not have had to testify, he could not have been impeached at trial. We disagree. A defendant has the burden of proving entrapment by a preponderance of the evidence. *Jamieson, supra*, 436 Mich 80. Accordingly, we will not presume

that the absence of defendant's testimony in this case would have satisfied his burden of proof. Hence, we conclude that defense counsel's decision to forego this defense was sound as an entrapment defense was inconsistent with defendant's claim that he participated in no criminal acts. *Pickens, supra*.

B

Nevertheless, defendant insists that entrapment exists as a matter of law in this case and the trial court clearly erred when finding otherwise. At the *Ginther* hearing, the trial court stated that the private investigator could not be considered a government agent because she was hired by the employer not the police. The trial court compared the private investigator to a block club member who reports illegal activity to the police. Alternatively, the trial court found that if she was a government agent, there was no entrapment under these facts. The trial court based these findings on the arguments at the *Ginther* hearing and the evidence adduced at trial.

Whether entrapment has occurred must be determined on the facts of each case and is a question of law for the court to decide. *People v Patrick*, 178 Mich App 152, 154; 443 NW2d 499 (1989). This court reviews a trial court's findings regarding a claim of entrapment for clear error. *People v Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992).

The purpose of the entrapment defense is to deter the corruptive use of government authority to instigate or manufacture crime, and as such, a finding of entrapment justifies acquittal for the accused irrespective of his guilt or innocence. *People v Juillet*, 439 Mich 34, 52; 475 NW2d 786 (1991)(Brickley, J.); *People v D'Angelo*, 401 Mich 167, 174, 179; 257 NW2d 655 (1977). Entrapment occurs when the police either "engage in impermissible conduct that would induce a law-abiding person situated similarly to the defendant to commit the crime or engage in conduct so reprehensible that it cannot be tolerated by civilized society." *Williams, supra*, 196 Mich App 661. The entrapment defense applies in cases where the conduct of the police or its agents, when objectively considered, was likely to induce or instigate the commission of a crime by a person not ready and willing to commit it. *People v Jamieson*, 436 Mich 61, 82; 461 NW2d 884 (1990)(Brickley, J.).

In this case, defendant contends that the conduct of *both* the private investigator and the police were reprehensible. Yet, the private investigator's conduct could not be attributed to the police unless she was acting with official encouragement or assistance. *People v Jones*, 165 Mich App 670, 674; 419 NW2d 47 (1988); *People v Stanley*, 68 Mich App 559, 564; 243 NW2d 684 (1976). There is no bright line measure to determine what degree of "encouragement or assistance" warrants a finding of government agency. *Jones, supra*. Still, Michigan courts have tended to reject agency under facts in which the informant, rather than the police, has sole control over his or her interaction with the accused and then simply reports the criminal transaction to police. See, e.g., *People v Owczarzak*, 144 Mich App 65; 372 NW2d 683 (1985)(aspiring police informant arranged the sale of marijuana prior to any police involvement).

In this case, the underlying investigation of activities at the plant was prompted by the employer. At trial, Sergeant Tyrone Mitchell of the Michigan State Police testified that the employer's security official requested assistance from the Michigan State Police to conduct undercover investigations of illegal activities at the plant. Because he could not spare police personnel for the plant, Sergeant Mitchell recommended Professional Law Enforcement, Inc. The employer ultimately hired this company, and the private investigator was assigned to the plant. Before commencing her assignment at the plant, the employer arranged a consultation with the state police in which they informed the private investigator regarding police procedures and supplied her prerecorded funds that could be used as evidence in potential narcotics cases. Using this information, the private investigator properly reported her interaction with defendant and preserved evidence for the criminal investigation in this case. For example, after securing the contraband, the private investigator would arrange a meeting with Detective Grant to deliver the contraband and to report what occurred after each transaction. Detective Grant's involvement in this investigation was limited to receiving the contraband and filing police reports. Consequently, as these activities were instigated by defendant's employer with only minimal instruction and assistance from the state police, we reject defendant's contention that the investigator acted with official police encouragement or assistance.

Nevertheless, at the *Ginther* hearing, defendant argued that the private investigator was acting with encouragement and assistance from law-enforcement officials and urged that lack of police control over the private investigator requires a finding of entrapment. We disagree. The lack of control exercised by law enforcement is simply one factor in determining whether the informant acted as an agent of the police or whether entrapment had occurred. *People v LaClear*, 196 Mich App 537, 543; 494 NW2d 11 (1992)(Taylor, J., dissenting) reversed for reasons stated in dissent 442 Mich 867 (1993). As discussed, the private investigator's activities were directed by defendant's employer, not the police. Accordingly, the trial court did not clearly err in finding that the private investigator was not a government agent.

Even, assuming *arguendo* that the private investigator acted as a police agent, defendant could not establish entrapment. Defendant contends that despite his repeated attempts to ward off the private investigator's requests for marijuana, she persisted until he complied with her requests. Also, defendant claims that he ultimately conceded because the private investigator appealed to their "friendship." While this Court has found entrapment under circumstances involving an appeal to sympathy or friendship,² defendant's contentions are inconsistent with the evidence adduced at trial. The private investigator testified that defendant offered to give her information about where to obtain marijuana. Moreover, defendant testified at trial that he and the private investigator had a casual, amicable relationship. There is no indication that defendant was reluctant to participate in these transactions or that his participation resulted from the investigator's persistent urging or appeals to friendship. Viewed objectively, the investigator's conduct would not induce a person, who was not "ready and willing," to commit a crime. *Jamieson, supra*, 439 Mich 82.

Accordingly, we reject defendant's contention that the trial court abused its discretion when denying defendant's motion for a new trial on the basis that it found that defendant was not entrapped.

III

Defendant also alleges that his counsel's admission of his own personal drug use during his closing argument also rendered him ineffective. Although defense counsel's personal admission to drug use during closing argument was an extreme measure, defendant has failed to establish that this statement deprived him of a fair trial. *Pickens, supra*, 446 Mich 338. Moreover, after defense counsel's closing argument, the trial judge admonished the jury that defendant was on trial, not defense counsel, and the actions of counsel should not be attributed to defendant.

IV

Defendant next argues that the trial court's limitation on defendant's examination and presentation of witnesses deprived him of an opportunity to fully present his defense at trial. We disagree. A trial court has broad discretion to control the manner in which a trial is conducted, including the mode of admitting proofs and the examination of witnesses. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

A

First, defendant claims that the trial court erred when limiting his counsel's cross-examination of the private investigator. Defense counsel attempted to question the private investigator as to whether anyone bribed her to target defendant, whether she was interested in a career in law enforcement, and whether apprehension and conviction of criminals in her work affected her opportunities for promotion within her company. The trial court found the questions irrelevant, immaterial and confusing, and sustained the prosecution's objections to them. Defendant contends that this ruling prevented him from showing the jury the investigator's motive and bias against defendant. We disagree.

The right of cross-examination does not include the right to cross-examine on irrelevant issues. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). A trial judge has wide latitude to impose reasonable limits on cross-examination to address concerns about harassment, prejudice, confusions of the issues, witness safety, and repetitive or irrelevant interrogation. *Id.* We find that the questions were irrelevant and unrelated to the issues at trial. Defendant has presented no facts which would establish a rational basis for exploring conspiracy theories or the investigator's career aspirations. On appeal, defendant also suggests that the questioning was relevant to determine the propriety using a private investigator as an informant. Again, such questions bear no relation to the investigation of this case. Thus, we find no error in the trial court's ruling.

B

Defendant also contends that the trial court deprived him of presenting his defense. We disagree. When defense counsel began questioning defendant's mother about defendant's brother's death, the judge stopped the examination, excused the jury, and asked defendant to explain the relevance of his questions. Defense counsel explained that he was attempting to impeach the

investigator's testimony regarding the events surrounding the second alleged transaction. Defense counsel argued that the investigator should have known about the death because defendant informed all his coworkers that his brother died that night, and her lack of knowledge proves that she did not interact with defendant on that date.

The trial court stated that defense counsel had failed to ask the investigator any questions concerning this issue, and hence, failed to establish any basis for impeachment. Nonetheless, the trial court instructed that defendant call witnesses outside the presence of the jury to determine the relevancy of their testimony before he could present the testimony to the jury. The trial court then allowed defendant to testify regarding the death of his brother, limiting the purpose of the testimony to prove that defendant learned of his brother's death on that date and that he communicated this information to others while at work. The court also disqualified one witness because her testimony would have been cumulative. The trial court explained that it did not want questioning on unrelated issues that were simply designed to elicit sympathy.

We find the trial court did not abuse its discretion when requiring defendant to make an offer of proof and then limiting the purpose of the testimony. Although a defendant's right to present a defense is an essential element of a fair trial, only relevant evidence is admissible at trial. MRE 401. Moreover, a judge may, within its discretion, exclude relevant evidence which is cumulative. MRE 403. Because the judge's rulings were designed to insure that relevant competent evidence was introduced at trial, any error in limiting defendant's presentation of his defense was harmless. MRE 611; *Paquette, supra*, 214 Mich App 340.

V

Defendant next argues that he was denied his right to a fair trial when the court communicated its bias against defendant and his counsel to the jury. A trial court's conduct pierces the veil of judicial impartiality where such conduct unduly influences the jury as to deprive defendant of a fair trial. *Paquette, supra*, 214 Mich App 340. With the exception of one instance, defendant failed to object to the alleged instances of judicial misconduct. Absent an objection, appellate review is foreclosed unless manifest injustice would result from a failure to review. *Id.* Many of defendant's allegations of misconduct involve statements made by the court when making adverse evidentiary rulings against defendant. As the challenged rulings have been affirmed by this panel, no manifest injustice would result from a failure to review the unpreserved allegations of misconduct.

Defendant preserved review of one statement when he moved for a mistrial after the judge said, "Yeah, right. She could have picked you, me, or anyone according to that theory." The judge made this statement in response to defense counsel's argument that he wanted to determine whether the investigator was bribed to accuse defendant of selling marijuana while concealing the perpetrator's true identity. We find the court's surprised, albeit sarcastic, reaction was not inappropriate. In response to defendant's request for a mistrial, the court explained that it made the remark because there was no

evidence whatsoever that the investigator received a bribe from anybody, and concluded that the questions were irrelevant to the issues being tried.

Having reviewed the record as a whole, we conclude that the court's conduct did not unduly influence the jury as to deprive defendant of a fair trial. *Paquette, supra*.

VI

Defendant lastly argues that the prosecutor's failure to produce the informant's daily logs violated the court's discovery order and deprived him of a fair trial. We disagree.

Defendant preserved this issue for appellate review by making a timely motion for dismissal. *People v Johnson*, 206 Mich App 122, 126; 520 NW2d 672 (1994). This Court reviews a trial court's decision whether to grant a defendant's motion for dismissal, based upon a prosecutor's failure to comply with a discovery order, for an abuse of discretion. *Id.*

The record indicates that defendant was provided with copies of the informant's reports which were in the police and prosecutor's possession pursuant to the court's order. When cross-examining the investigator, defense counsel learned that the investigator prepared daily written logs. Defense counsel requested a dismissal claiming the logs were discoverable pursuant to the court's order, and failure to provide defendant with copies of these logs violated the court's order. Upon questioning the witness, the court learned that the witness only forwarded these logs to her company, not the police. Since the prosecution never received copies of these logs, there was no violation of the discovery order and the court denied defendant's motion for dismissal. We find no abuse of discretion and uphold the court's ruling. *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987).

VII

Finally, defendant argues that the trial court abused its discretion in denying his motion to sever his trial from his codefendant, claiming that he and his codefendant had antagonistic defenses. We disagree.

The decision to sever or join defendants lies within the discretion of the trial court. MCL 768.5; MSA 28.1028, and MCR 6.121(D). Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994). The tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other. *Id.* Severance is mandated under MCR 6.121(C) only when a defendant provides the court with proof that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *Id.*, 345.

Defendant claims that his and codefendant's defenses were antagonistic because his defense was that the alleged delivery of marijuana never took place, while his codefendant's theory was that the

delivery took place, but that codefendant did not know that the substance was marijuana. Yet, defendant made his motion to sever after Anderson's defense counsel questioned potential jurors during voir dire. In fact, codefendant Anderson's defense at trial was that he was absent from work when any transaction took place. Consequently, the defenses were consistent, not mutually antagonistic, and defendant cannot establish that he was prejudiced by the court's denial of his motion to sever. We find no abuse of discretion.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Maura D. Corrigan

/s/ Michael J. Callahan

¹ "The defense of entrapment is not interjected to establish the absence of an essential element of the crime but to present facts collateral or incidental to the criminal act which justify acquittal on the ground of an overriding public policy to deter instigation of crime by enforcement officers in order to get a conviction." *People v D'Angelo*, 401 Mich 167, 179; 257 NW2d 655 (1977).

² See, e.g., *People v Graczyk*, 156 Mich App 632, 634; 402 NW2d 60 (1986); *People v Letts*, 122 Mich App 135, 140-141; 332 NW2d 438 (1982); *People v Duis*, 81 Mich App 698, 702-703; 265 NW2d 794 (1978).