

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD RAY HALE,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 248706

Jackson Circuit Court

LC No. 02-006501-FH

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of two counts of delivery of a controlled substance, MCL 333.7401(2)(a)(iv), (six pills of pain medication, three containing morphine, an opiate, and three containing oxycodone, an opium derivative). The trial court sentenced defendant as a second felony offender, MCL 769.10, to 21 to 360 months' imprisonment. Defendant raises two issues on appeal: 1) that the trial court reversibly erred by denying his motion to dismiss based on entrapment, and 2) that prosecutorial misconduct denied him a fair trial. We affirm.

I

Defendant asserts that his conviction must be vacated because he was entrapped by being induced to provide medication to a police informant, by the informant's appeal to his sympathy and his long-time friendship with the informant's good friend, Jack Carter.

This Court reviews a trial court's finding of entrapment for clear error. *People v Johnson*, 466 Mich 491, 497; 647 NW2d 480 (2002). A defendant has the burden of establishing entrapment by a preponderance of the evidence. *Id.* at 498. "A defendant is considered entrapped if either 1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or 2) the police engaged in conduct so reprehensible that it cannot be tolerated." *Id.*, at 498, citing *People v Juillet*, 439 Mich 34, 54; 475 NW2d 786 (1991). "[W]here law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist." *Johnson, supra* at 498.

When examining whether governmental activity would impermissibly induce criminal conduct, several factors are considered: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had

been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted. [*Johnson, supra* at 498-499.]

Defendant asserts that the police engaged in impermissible conduct (first entrapment prong) in that: 1) J-NET and its informant, Deborah Ray, induced defendant to give Ray pain medication by preying on defendant's sympathy and friendship with Jack Carter, a long-time friend of defendant's, 2) J-NET and Ray continually pressured defendant, and 3) J-NET failed to properly supervise Ray's activities. We disagree.

After hearing extensive testimony and closing arguments, the trial court stated its findings and its conclusion that defendant had not established entrapment by a preponderance of the evidence. The court concluded defendant had not established reprehensible police conduct (2d prong), and defendant does not argue to the contrary on appeal. Regarding the impermissible police conduct entrapment prong, the trial court concluded:

Quite frankly, I don't – even if – I think if they hadn't offered a witness at all, and they just rested and I just had to decide it based on the Defendant's witnesses, I don't think they met that.

The, uh—accepting Mr. Hale's testimony, there was some sympathy as to the friend, but I thought that was relatively minor. I didn't see any particular inducements or excessive considerations or guarantees this wasn't illegal or pressure or sexual favors or threats of arrest.

* * *

When I take everything, I'm not as impressed with the friendship of, uh, or the sympathy from Jack Carter. I think—I'm sure they knew each other, but I'm not really impressed that it was like your best friend asking you to do a favor for someone, uh, that would any convince a law-abiding person to do this. I mean, there may be some circumstances where someone could deliver some pills. If it was the middle of the night and someone said, "Listen, I've hurt my foot. I know you've got some pain medication. Would you lend me some pain medication until tomorrow?" I think that's different than, "Could I buy six pills for \$120?" at seven o'clock in the evening when the pharmacies are open, when places are open to provide medical care. If it was an appeal to friendship, you think it would be to, uh, give it, not buy it for \$120.

This just doesn't—the conduct that was involved here, I don't see any way that it would induce a law-abiding person to, uh, deliver six or seven pills or whatever it was for \$120. I don't see the causation test is even close to being met, and for those reasons, I'm denying the motion. I find there is no entrapment.

Defendant has not shown that the trial court's factual findings were clearly erroneous. Assuming that defendant knew well and had been close with Jack Carter for several decades since they were teenagers, according to defendant's own testimony, the relationship between the men had cooled considerably over the ten years or so preceding the August 14, 2002, incident. Further, there was no testimony other than defendant's to support that Carter had been present when "Debbie" called defendant asking for drugs on August 14, 2002, or to support that defendant had conferred with Carter regarding providing Debbie drugs. Similarly, there was no testimony other than defendant's that the money exchanged that evening was a loan from Carter, rather than payment for the pills defendant provided. The trial court's finding that defendant's friendship with Carter played a minor part in the transaction was thus not clearly erroneous.

Defendant's claim that J-NET and Ray continually pressured him to make the transaction was also not supported. By all accounts, it took Debbie only one phone call to get defendant to provide her the pain medication. The record is clear that the phone calls to defendant from "Lisa" and "James" occurred after the August 14, 2002, buy, so they could not have played a part in pressuring defendant to sell on that date.

Defendant's claim that the police did not adequately supervise Debbie Ray is not supported. The police were present when Ray called defendant on August 14, 2002, were present during the buy itself, and videotaped the buy.

The trial court's finding that defendant was not entrapped was not clearly erroneous.

II

Defendant asserts that his conviction must be reversed because the cumulative effect of prosecutorial misconduct denied him a fair trial when, on rebuttal, the prosecutor personally disparaged both defense counsel and defendant. Defendant contends that the prosecutorial misconduct went beyond the bounds of propriety, and harmed him by prejudicing the jury's deliberations. Defendant maintains that the trial court erred when it allowed the disparaging comments to stand uncorrected, as the comments were intended to play on society's disdain for drug traffickers as well as on the jury's civic duty to punish drug dealers.

This Court reviews claims of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant maintains that the prosecutor suggested to the jury that defense counsel attempted to mislead them when he said: "Mr. Adams wants you to believe, well gee, the cops are tricky." Defense counsel objected immediately thereafter, stating: "That's a disparaging comment on the Defense, 'Mr. Adams wants you to think . . .' That's not permitted, Judge." The court overruled the objection. Defendant's claim is without merit. The prosecutor's remark

was not an attempt to mislead the jury, as defendant clearly urged the jury in closing to believe that the police *were* tricky. In both opening statement and closing argument, defense counsel urged that the prosecution of defendant was “based on fraud and deception and betrayal.” In closing argument, defense counsel argued as well that:

When the government gives you misinformation, when the government lies to you, you have to think to yourself whether or not this is something you want to be a part of. And, uh, if you find that Mr. Hale acted on misinformation given to him by the government, that seems to me like a reasonable doubt in your mind as to his guilt or innocence of this charge, and you should be able to say, “I find the Defendant not guilty.”

We conclude that the prosecutor’s comments on rebuttal were responsive to defendant’s closing argument and thus permissible.

Defendant also asserts that the prosecutor improperly appealed to the jury’s fears by injecting his personal opinion of defendant’s guilt and using denigrating terms to describe defendant as a drug dealer. Defendant cites only the following portion of the prosecutor’s rebuttal closing argument in support:

We here in the courthouse deal with facts and we deal with evidence. The facts and the evidence support the conviction of Mr. Hale. You may not like how the police do their job. I’m glad they’re here. They have a difficult job, they do it well. *They busted a drug dealer. Walks like one, talks like one, money for drugs.*

The prosecutor was free to argue the evidence and all reasonable inferences arising therefrom, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and was not obligated to state the inferences in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Although the reference to defendant as a “drug dealer” may have been less than prudent, defendant’s argument focused on the question whether defendant willingly sold drugs, or whether he was misled into doing so by the police, and the prosecutor’s argument was intended to respond.¹

Affirmed.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly

¹ It is unclear whether this remark was intended to refer to defendant’s conduct in actually selling the pills and in stating he could obtain additional drugs, or whether it was a reference to defendant’s gait and speech pattern. To the extent that it was the latter, the argument was improper. Nevertheless, we are satisfied that the outcome of the trial was not affected.