MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David R. Oberly,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

June 23, 2022

Court of Appeals Case No. 21A-CR-1638

Appeal from the Marshall Superior Court

The Honorable Dean A. Colvin, Judge

Trial Court Cause No. 50D02-1906-CM-554

Pyle, Judge.

Statement of the Case

[1] David R. Oberly ("Oberly") appeals, following a bench trial, his conviction for Class A misdemeanor dealing in a schedule IV controlled substance.[1] Oberly argues that there is insufficient evidence to overcome his entrapment defense. Concluding that there is sufficient evidence to support Oberly's conviction, we affirm the trial court's judgment.

[2] We affirm.

Issue

Whether there is sufficient evidence to overcome Oberly's entrapment defense.

Facts

[3] The facts most favorable to the judgment are as follows. In 2017, Serena Clemons Lowe ("Serena") began a relationship with Oberly. In 2018, Serena married Jeremy Lowe. However, her relationship with Oberly continued. In early 2019, Serena agreed to work with the Marshall County Drug Task Force ("the DTF"). Serena and Jeremy Lowe provided Oberly's name as a potential target for the DTF. Additionally, the DTF had received other tips about Oberly from individuals outside of the DTF program. The DTF used confidential informants because they are "in contact with known drug dealers. They'll set up; they'll make contact with those people, and then they contact us, and then

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[1] IND. CODE § 35-48-4-3.

we conduct a controlled buy on the suspect." (Tr. Vol. 2 at 7). In March 2019, Serena, acting as a confidential informant, asked Oberly if she could "get some pain pills off of [Oberly][.]" (Tr. Vol. 2 at 31). Oberly agreed to meet with Serena.

[4] Soon after, the DTF set up a controlled buy. Plymouth Police Department Officer Derek Workman ("Officer Workman") was the handler for Serena. Officer Workman picked Serena up and took her to Oberly's workshop. Serena was fitted with a covert cellphone that recorded her exchange with Oberly. Serena entered Oberly's shop and asked for four Xanax pills. Oberly initially refused. Serena then said, "Come on, my head is killing me. How about three?" (State's Ex. 1). While handing Serena the pills, Oberly asked Serena, "Now, they told you you're supposed to have that, right?" (State's Ex. 1). Serena responded, "yeah they did," and Oberly replied, "bullshit." (State's Ex. 1). While handing Serena $60, Oberly said "You're not going to buy drugs with this, right?" (State's Ex. 1). Serena responded that she was going to buy makeup with it. After receiving the money and Xanax, Serena left Oberly's shop and handed the three Xanax pills to Officer Workman. Officer Workman allowed Serena to keep the $60 that Oberly had given her.

[5] In June 2019, the State charged Oberly with Class A misdemeanor dealing in a schedule IV controlled substance. In May 2021, Oberly filed with the trial court an amended notice of intent to raise defenses. This notice included the possibility of Oberly raising an entrapment defense at trial. In June 2021, the trial court held a bench trial. The trial court heard the facts as set forth above.

Additionally, Serena testified that she had known Oberly for more than five years. Serena also testified that she had continued a romantic relationship with Oberly after her 2018 marriage. Additionally, Serena testified that she was unable to find anybody to get drugs from, so she decided to message Oberly. Serena further testified that she was addicted to drugs, took pills every day, and would get "dope sick" if she was unable to find a supply. (Tr. Vol. 2 at 30). Serena further testified that she had also regularly stolen pills from Oberly.

[6] Bremen Police Department Officer Nicholas Spaid ("Officer Spaid") testified that Serena had told the DTF that she could get pills from Oberly because she used to "stay[] with him in exchange for those items." (Tr. Vol. 2 at 44). During direct examination, Officer Spaid also testified that Oberly had approached him a few months after the controlled buy while Officer Spaid was investigating an unrelated incident near Oberly's property. Officer Spaid testified that Oberly had told him, "I'm not arguing the fact that I gave [Serena] the pills, I'm just not a drug dealer." (Tr. Vol. 2 at 48).

[7] At the conclusion of the State's case-in-chief, the State asked the trial court if Serena could be recalled to the stand in order to address Oberly's entrapment defense. Specifically, the State sought to question Serena about the frequency in which Oberly had provided Serena with pills in the past. Oberly objected to the State's request. The trial court allowed Serena to be recalled over Oberly's objection.

[8] Serena further testified that Oberly had "helped [Serena] out a few times" when she had "asked [Oberly] if [she] could have a couple pain pills, [Oberly] would help [her]." (Tr. Vol. 2 at 71). In regard to the frequency in which Oberly would provide Serena with pills, Serena testified that "[i]f [she] asked, sometimes [Oberly] g[a]ve them to [her] but not all the time[.]" (Tr. Vol. 2 at 71). Serena also testified that she had frequently stolen pills from Oberly.

[9] At the conclusion of the bench trial, the trial court found Oberly guilty as charged. The trial court stated, "the Court was not persuaded in this particular case that entrapment was at issue[.]" (Tr. Vol. 2 at 83). At sentencing, the trial court ordered Oberly to serve one (1) year at the Marshall County Jail with two hundred and seventy-five (275) days suspended.

[10] Oberly now appeals.

Decision

[11] Oberly argues that there is insufficient evidence to overcome his entrapment defense. "We review a claim of entrapment using the same standard that applies to other challenges to the sufficiency of evidence." *Dockery v. State*, 644 N.E.2d 573, 578 (Ind. 1994). We neither reweigh the evidence nor reassess the credibility of witnesses. *Id.* Instead, we look to the probative evidence supporting the verdict and the reasonable inferences drawn from that evidence. *Id.* If we find a reasonable trier of fact could infer guilt beyond a reasonable doubt, we will affirm the conviction. *Id.*

[12] INDIANA CODE § 35-41-3-9 provides a definition of entrapment:

> (a) It is a defense that:
>
> > (1) the prohibited conduct of the person was a product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
> >
> > (2) the person was not predisposed to commit the offense.
>
> (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

A defendant does not need to formally plead the entrapment defense; rather, it is raised, often on cross-examination of the State's witnesses, by affirmatively showing the police were involved in the criminal activity and expressing an intent to rely on the defense. *Wallace v. State*, 498 N.E.2d 961, 964 (Ind. 1986). The State then has the opportunity for rebuttal, its burden being to disprove one of the statutory elements beyond a reasonable doubt. *Riley v. State*, 711 N.E.2d 489, 494 (Ind. 1999). There is no entrapment if the State shows either: (1) there was no police inducement; or (2) the defendant was predisposed to commit the crime. *Id.*

[13] Whether a defendant is predisposed to commit the crime charged is a question for the trier of fact. *Dockery*, 644 N.E.2d at 577. The defense of entrapment turns upon the defendant's state of mind, or whether the criminal intent originated with the defendant. *Ferge v.* State, 764 N.E.2d 268, 271 (Ind. Ct. App. 2002) (internal quotation marks and citations omitted). "In other words, the question is whether criminal intent was deliberately implanted in the mind

of an innocent person." *Id.* (internal quotation marks and citations omitted). "When the Government's quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene." *Jacobson v. U.S.*, 503 U.S. 540, 553-54 (1992).

[14] Here, the trial court properly concluded that the State had overcome Oberly's entrapment defense. Our review of the record reveals that Oberly was predisposed to commit the crime. Specifically, Serena testified that Oberly had sometimes given her pills in the past. Thus, on the specific occasion in this case, criminal intent was not deliberately planted in Oberly's innocent mind. Instead, the record supports the conclusion that Oberly was predisposed to giving Serena pills when she had requested them. Thus, Oberly's entrapment defense fails. *See McGowan v. State*, 674 N.E.2d 174, 175 (Ind. 1996) (holding that the State can overcome an entrapment defense by negating either element), *reh'g denied*.[2]

[15] Affirmed.

May, J., and Brown, J., concur.

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[2] Oberly also argues that the trial court erred when it allowed the State to recall Serena to the stand in order to rebut his entrapment defense. Specifically, Oberly argues that "the fruit of [Serena's] testimony was overly prejudicial to Oberly's entrapment defense." (Oberly's Br. 7). However, Oberly provides no cogent argument pointing to any cases or authorities that support this claim. Thus, he has waived the argument on appeal. *See* Ind. Appellate Rule 46(A)(8).