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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>MICHAEL ANTHONY HERNANDEZ,<br><br>Appellant. | ) | 2 CA-CR 2012-0055<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20104283001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

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Thomas C. Horne, Arizona Attorney General
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V Á S Q U E Z, Presiding Judge.

**¶1** After a jury trial, appellant Michael Hernandez was convicted of three counts of sale of a narcotic drug, possession of a deadly weapon during the commission of a drug offense, and possession of drug paraphernalia. He pled guilty to two severed counts of possession of a deadly weapon by a prohibited possessor. On appeal he contends the trial court abused its discretion by refusing to give the jury his requested entrapment instruction. We affirm for the reasons stated below.

**¶2** The evidence, viewed in the light most favorable to sustaining the convictions, *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), established the following. On August 17, 2010, Tucson Police Officer Gabriel Lopez was working undercover and telephoned Hernandez, whom he had known for a number of months, asking to buy crack cocaine. Hernandez responded that he did not have crack but had powder cocaine he could sell to Lopez. The two men met and Hernandez sold Lopez some cocaine. Lopez asked if Hernandez had any firearms to sell or knew where Lopez could buy some. Hernandez said to contact him the next day and he would have "an assortment of firearms."

**¶3** On September 14, 2010, Lopez contacted Hernandez and again asked for cocaine. The two met and while they waited for Hernandez's supplier, Lopez asked him if he knew anyone who did home invasions. Hernandez said he could do it with some people he knew and told Lopez he would be getting various firearms and to contact him later. The supplier then arrived, and Lopez purchased crack cocaine. On November 30, 2010, Lopez again contacted Hernandez and asked to buy more crack.

In a text message, Hernandez said he had a .38 automatic weapon for sale. Lopez picked up Hernandez and they drove to another location, a Tucson hotel, where Hernandez said they would get the gun. During the drive to the hotel, Hernandez showed Lopez his own gun, which was in his pants and under his shirt. After going inside a room at the hotel for awhile, Hernandez came out, walked over to Lopez's car and showed him the automatic handgun; another man then came out of the room and joined them. He discussed the handgun with Lopez and the two agreed on a price. Hernandez went back to the apartment and returned with the magazine for the handgun and some ammunition. Lopez then drove Hernandez to another part of town where Hernandez purchased cocaine, a portion of which he sold to Lopez.

**¶4** On that same day, Hernandez had told Lopez he was interested in purchasing a MAC 10 or MAC 11 machine pistol. On December 7, Lopez used his cellular telephone to send Hernandez pictures of two guns, both MAC 11 style. Hernandez agreed to pay $200 for one of them. The next day, Lopez picked up Hernandez and they drove to a parking lot, where Lopez said they would meet his cousin; the "cousin" was actually undercover officer Miguel Verdugo. Hernandez again showed Lopez his own gun but said he wanted the MAC 11 to do a home invasion to take twenty pounds of methamphetamine and a half million dollars in cash. The two met Verdugo at the parking lot and walked over to Verdugo's car, where Hernandez purchased the gun. Soon thereafter, other officers arrested Hernandez.

**¶5** Before and during trial, Hernandez requested a jury instruction on the defense of entrapment. On the second day of trial, Hernandez asked the trial court to decide whether it would give the instruction before Hernandez had to decide whether to testify. Hernandez argued, "the idea of committing the offenses in every situation on all four of these occasions . . . started with the police." He asserted the law enforcement officers had "induc[ed]" and "urg[ed]" him to commit the offenses, asking him "to take the gun and check the slide." Additionally, he argued, the state had "not shown predisposition in the sense at all really." The court deferred making a decision until all of the evidence had been presented.

**¶6** Hernandez testified he had never been a "drug seller," but was a "drug user"; he had been using crack cocaine for about ten years; and he "get[s] addicted" to it, relapsing and "mak[ing] mistakes." He stated that before August 17, 2010, he had used drugs with Officers Lopez and Verdugo and that he had known Lopez since May or June. He said the two men kept asking him for drugs, he had told them he did not deal drugs, and Lopez had contacted him on all three occasions that he had purchased crack cocaine or cocaine from him. But, he admitted it was to his advantage to procure the drugs for Lopez. He stated, "I would . . . purchase the crack. I would get more than what I would give them. I didn't ever really have my own money. I had my own money sometimes. I did it and of course, I would continuously feed my addiction." He further stated that before August 17, Lopez and Verdugo had contacted him and asked if he knew where they could get guns and he had "told them, of course, just leading

them on," explaining this was nothing more than a "ploy based on my own personal experience of hustling in the streets and, you know, continuing using crack that I was . . . trying to get them to come back and spend more money with me."

**¶7** Hernandez also testified he had agreed to sell Lopez drugs after Lopez called him on August 17 because Lopez and "his cousin," Verdugo, were supposed to be friends, "good people," and because he did not feel like using drugs that day, he sold it to them. He stated he agreed to procure drugs for Lopez because he had fallen on "hard times," and he supposed, too, it was "necessary" to "support [his] habit." When asked what, other than financial hardship, had made him do it on August 17, he answered he was not using drugs that day and he "guess[ed]" he would rather have the $20 than the $20 worth of cocaine. Although he said, "I guess you could say I was pressured," he explained "I wanted to keep them around. . . . I figured, you know, with them being friends." When asked why he decided to sell Lopez drugs on September 14, he responded, "Because he called me, and he seemed like he needed it, so I figured I'd go ahead and do that. And at the same time, I figured, you know, I'll make something for myself too, so I could be getting high, because I think that day that he called I was already lit. I was high as a kite." He explained, too, that he had an arrangement with his drug supplier that if he brought the man "money," presumably meaning other customers, the supplier would give him extra to use himself.

**¶8** Hernandez also testified that although Lopez had asked if he knew of anyone who did home invasions and suggested Hernandez get some friends who could

help him, Hernandez simply "went along" with Lopez and never intended to participate. He further stated Lopez had called him again on November 30 looking for crack and discussed the sale of a gun; Hernandez told him he had crack and Lopez could have some, since he had been using it and was "high." He added, "It was the officer's idea. I mean, I may have probably later that night found somebody else to hustle, you know what I mean, and went to where I go to, and continuously feed my crack habit, but you know, like I said, I was at where I was at just chilling, high."

**¶9** Hernandez admitted one of his prior felony convictions was for attempted possession of cocaine for sale. And he agreed on cross-examination he had the power to say no to any of these drug deals. When he was asked on redirect examination whether he felt pressure to sell drugs to the officers, he responded, "Just pressure as if pressure would be that of friends." He wanted to "look out for [Lopez]" as a friend and was also concerned that if he did not get drugs for Lopez, he might go elsewhere to buy it and he would lose the opportunity to get drugs for himself. Based on a juror's question, the trial court asked Hernandez whether he had felt pressure from or had been intimidated by the officers to supply them with cocaine. Hernandez responded, "Pressure or intimidated to supply them cocaine? Pressured in a sense but, like I said, it was friendship, you know what I mean, if you had any friends and they pressured you to do anything." "Peer pressure?" the court asked. "Yeah, peer pressure. And that would be about it. Not threatened."

**¶10** After Hernandez testified, the trial court directed the parties to research the issue of whether mere peer pressure constituted the kind of conduct that was intended to constitute urging or inducing a defendant to commit an offense under the entrapment-defense statute, A.R.S. § 13-206. The court observed, "Hernandez has basically said . . . he did this because he felt comfortable with them. . . . It was peer pressure to sell. I was afraid they wouldn't call me again if I didn't sell. He talks about running hustles on the side. . . . I don't know that that's inducing and urging someone to commit a crime. I think that's afraid you're going to lose your business if you don't sell."

**¶11** The following day, after the parties argued their respective positions, the court refused to give the instruction, reasoning:

> And I just simply don't think that the instruction is supported by the evidence. I mean, all we really have even with, you know, considering Mr. Hernandez's testimony in its most favorable light, is police provided him an opportunity. They asked but there was no pushing going on. In fact, in his own testimony on redirect it was like, No, I agreed, because they were my friends, and it was peer pressure. But that's not entrapment. I mean, he didn't want to lose a friend, and he didn't want to lose business, and business necessarily is the drug business so that he can continue to whatever his reasons for selling were. But he didn't want to lose the business. He said that on redirect. He said that again in response to a jury question. I just don't find that there's any evidence to support the giving of an entrapment instruction. So I'll show that no entrapment instruction will be given.

**¶12** Section 13-206(B) provides that to prove the affirmative defense of entrapment, the defendant must establish the following by clear and convincing evidence:

> 1. The idea of committing the offense started with law enforcement officers or their agents rather than with the person.
>
> 2. The law enforcement officers or their agents urged and induced the person to commit the offense.
>
> 3. The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.

Section 13-206(C) provides, however, that the defense is not available when the defendant "was predisposed to commit the offense and the law enforcement officers or their agents merely provided the person with an opportunity to commit the offense."

**¶13** "[I]n order to be a valid claim of entrapment, there has to exist activity by the State in the nature of an inducement to commit a crime which the accused would not have otherwise committed, although providing the mere opportunity to commit the offense is not sufficient." *State v. Martin*, 106 Ariz. 227, 229, 474 P.2d 818, 820 (1970). The defense may be available when law enforcement officers induce an "otherwise innocent person" to commit a crime. *State v. Rocha-Rocha*, 188 Ariz. 292, 295-96, 935 P.2d 870, 873-74 (App. 1996). "Entrapment occurs when law enforcement officers induce a defendant to commit a crime he had not contemplated and would not otherwise have committed." *State v. Ross*, 25 Ariz. App. 23, 25, 540 P.2d 754, 756

(1975). Coercion by law enforcement officers is not an element of the statute. *Francis v. Sanders*, 222 Ariz. 423, n.2, 215 P.3d 397, 400 n.2 (App. 2009).

**¶14** We review for a clear abuse of discretion a trial court's refusal to instruct the jury on the defense of entrapment. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995); *State v. Hernandez*, 200 Ariz. 530, ¶ 8, 29 P.3d 877, 878 (App. 2001). A defendant is entitled to a jury instruction on any defense that is "reasonably supported by the evidence." *State v. Strayhand*, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995). "While a Defendant must show more than a mere scintilla of evidence, an instruction must be given if there is evidence upon which the jury could rationally sustain the defense." *Id.* at 587-88, 911 P.2d at 593-94.

**¶15** On appeal, Hernandez asserts he admitted the elements of the offenses and argues the undisputed evidence showed the idea of committing the crimes began with law enforcement officers because each time Lopez purchased cocaine or crack cocaine he had called Hernandez. And Lopez offered to sell Hernandez the MAC 11 gun. Hernandez contends the trial court abused its discretion when it found he had not presented sufficient evidence he had been induced by law enforcement officers to commit the offenses, arguing the court made factual findings that should have been left for the jury to make and "ignor[ed] the fact that coercion is not an element of the entrapment defense." He also contends that despite evidence of his prior conviction for attempted sale of a narcotic drug, it was for the jury to determine whether he was predisposed to commit the charged offenses.

**¶16** Hernandez is correct that, generally, it is for the jury to decide whether a defendant has met his burden of establishing the elements of this affirmative defense. *State v. Soule*, 164 Ariz. 165, 167, 791 P.2d 1048, 1050 (App. 1989). But a trial court does not abuse its discretion in refusing an entrapment instruction when there is "no evidence to support the defense." *Id*. at 168, 791 P.2d at 1051; *see also State v. Reyes*, 99 Ariz. 257, 261-62, 408 P.2d 400, 403 (1965). Given Hernandez's testimony, which provided the best evidence of entrapment and which the court correctly viewed in the light most favorable to justifying the instruction, we cannot say the court abused its discretion in refusing to give it. Although there was an abundance of evidence that Lopez had initiated the communications that resulted in the drug sales and the sale of one gun to Lopez and one to Hernandez, Hernandez's own testimony established he had acted out of a desire to maintain friendship, to obtain cocaine or crack cocaine for his own use, and to keep Lopez and Verdugo as future customers.

**¶17** We agree with the trial court that this did not constitute the kind of urging or inducement contemplated by the statute. But even if it did, based on Hernandez's own testimony about his prior conviction for attempted sale of a narcotic drug, his drug habit, his motivations for providing Lopez with the drugs, his arrangement with his drug supplier if he were to bring the supplier other customers, and the fact that he admitted with respect to one of the three drug transaction he "may have probably later that night found somebody else to hustle," there was not a scintilla of evidence he "was not predisposed to commit the type of offense charged before the law enforcement

officers or their agents urged and induced [him] to commit the offense." § 13-206(B)(3); *see also Strayhand*, 184 Ariz. at 587-88, 911 P.2d at 593-94 ("[d]efendant must show more than a mere scintilla of evidence," to be entitled to requested instruction). Accordingly, because there was insufficient evidence that an "otherwise innocent person" was induced to commit a crime, the instruction was not warranted. *Rocha-Rocha*, 188 Ariz. at 295-96, 935 P.2d at 873-74.

**¶18** Because we conclude the trial court did not abuse its discretion, we affirm the convictions and the sentences imposed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge