ARKANSAS COURT OF APPEALS

NOT DESIGNATED FOR PUBLICATION
DIVISION I

CACR05-277

March 22, 2006

JOHNIFER ROSTON APPELLANT	APPEAL FROM THE CHICOT COUNTY CIRCUIT COURT [CR-03-120-5]
V.	HON. JERRY E. MAZZANTI, CIRCUIT JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Judge

Appellant Johnifer Roston was convicted by a Chicot County jury of delivery of cocaine and misdemeanor possession of marijuana and sentenced to thirty years in the Arkansas Department of Correction on the cocaine charge and a fine of $250 on the marijuana charge. He argues on appeal that the trial court erred in denying his motion to suppress two ounces of marijuana and a .38 caliber gun[1] found during a search of his home and that the trial court erred in not including a jury instruction on entrapment. We affirm.

Prior to trial, Roston filed a motion to suppress evidence discovered during a consensual search of his home, alleging that the consent was not voluntary. During the suppression hearing, Officers George Philley and Charles Watson testified about the events

[1]The jury acquitted Roston of the charge of simultaneous possession of drugs and a firearm.

that occurred on September 9, 2003, the day of the arrest. Following a controlled buy of crack cocaine and powder cocaine involving Roston, the officers arrested him in front of his place of business. The entire controlled buy was captured on videotape.

The officers then transported Roston back to the police station and held him in an office while they executed a search warrant on his business.[2] This search uncovered two cigars filled with marijuana lying on a pool table. When the officers returned, they uncuffed Roston and asked if he would voluntarily consent to a search of his home. Initially he refused, stating that he did not have any drugs in his home. Officer Philley then inquired if Roston was on probation, to which Roston replied that he was. Officer Philley then advised one of his colleagues to telephone Roston's probation officer. At this point, Roston told the officers that he did, in fact, have some marijuana at his home. Officer Philley told Roston that based on this admission, they now had probable cause and could obtain a search warrant. According to Officer Philley, he gave Roston a choice, saying "you don't have to give me consent," and "you can consent or not." Roston then agreed to consent to a search and signed a standard consent form, which stated "No promise, threat or coercion of any kind has been made against me." Roston then accompanied the officers to his home and led them to his bedroom, opened his closet, and directed them to the marijuana. The officers continued to search and discovered another bag of marijuana in a dresser drawer, along with $500. The officers also found a lockbox containing a loaded .38 caliber handgun.

Roston's account differed from the accounts of both Officer Watson and Officer Philley. He testified that the consent was not so easily obtained. He maintained that the officers told him that everyone in the house would go to jail if the officers had to obtain a search warrant. He stated that the officers also threatened to call DHS, who could revoke

[2]Roston does not challenge the propriety of the search of his business.

Roston's wife's daycare license and take custody of the parties' small child. He said that it was because of the threat to his wife's livelihood that he agreed—under duress—to the search.

At trial, Officer Philley acknowledged that he had been contacted by a woman named Melissa Walker, prior to Roston's arrest, who informed him that she had been in contact with Roston about purchasing cocaine. The task force allowed her to set up a buy and gave her $200, which was photocopied prior to the buy. The task force also placed an audio and video recorder on Walker. She testified that she had bought cocaine and marijuana from Roston before September 9, 2003. She stated that on the day in question she purchased both crack cocaine and powder cocaine from Roston with the money given to her by the task force. According to Philley, when she returned from the buy she handed him two plastic baggies that contained substances that he "believed to be" crack cocaine and powder cocaine. The officers then retrieved and viewed the videotape. The officers positively identified Roston as the person on the videotape purporting to sell Ms. Walker crack and powder cocaine.[3] When Officer Philley went to Rolston's home and informed him that he was under arrest for two counts of delivery of a controlled substance, Roston had $375 on his person, $200 of which matched the photocopied money.

After the conclusion of the State's evidence, Roston (who was proceeding pro se but with an assisting attorney) made a motion for a directed verdict arguing that the conduct of the task force was entrapment. The trial court denied the motion and advised Roston that entrapment was a defense that he had to prove. After presenting his case, Roston renewed his motion. The judge again denied the motion, explaining that Roston had not put on any

[3]The videotape was played in open court; however, the videotape is not part of the appellate record.

evidence to prove entrapment.[4] Thereafter, during the court's consideration of jury instructions, the following colloquy took place:

> COURT: The only thing that's not in there that could potentially be given, I don't know, and I doubt if there's evidence to support it, would be an entrapment instruction. I can give that as a defense, but, really, I'm not sure there's evidence to support it.
> DEFENDANT: Yes sir, there is. If the woman wouldn't have made a phone call and called me, then...she induced me. I wasn't even thinking about it.
> COURT: But the problem ... is that the entrapment defense, I'll just read it to you out of the book. It's 607. It says that "a law enforcement officer or somebody acting in cooperation with him, induced the commission of the offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute the entrapment." Now, just one telephone call to somebody asking them, or two, ask if you view the evidence...
> DEFENDANT: It's the way she was asking. See, she didn't state that. I understand they wanted to do everything they could. They probably been instructed by Mr. Porch how to abide by the law and work the law, but no doubt that's what happened. This woman called me several times and acting like she needed it so bad and all this and that and I told her I didn't mess with it. But, this woman called with two hundred dollars and she want this here and you ain't got to do nothing but put stuff in the bag.
> COURT: You haven't testified though. And, I told you earlier, I thought you were going to have to testify to establish and entrapment defense. Now, the question becomes whether based upon the testimony of the informant alone I can give this instruction.

The court then considered the case law regarding entrapment and found that Roston had presented no proof of conduct by the officers, other than providing the informant an opportunity to request and purchase the drugs from Roston, to support an entrapment defense.

For his first point on appeal, Roston argues that his voluntary consent allowing officers to search his home was based on coercion by law enforcement officers and thus, all items recovered during the search of his home should have been suppressed. In reviewing the denial of a motion to suppress, we make an independent determination based on the totality of the

[4] Although he testified at the suppression hearing, Roston chose not to testify in his own defense at trial.

circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause that a crime has been committed, while giving due weight to inferences drawn by the trial court. *See Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). We do not reverse the trial court's decision unless it was clearly erroneous. *Benevidez v. State*, 352 Ark. 374, 101 S.W.3d 242 (2003). We defer to the credibility determinations made by the trial judge when weighing and resolving facts and circumstances. *Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004).

We are satisfied that the trial court did not err in denying the motion to suppress. Both officers testified that Roston consented to the search of his home voluntarily. Although Roston disagreed with the officers' account, the trial court clearly considered the officers' testimony to be more credible than Roston's. Further, the fact that the interview took place in an office rather than an interrogation room, that Roston was released from handcuffs, that the officers informed him that he was free to refuse consent, and that he signed a consent form all factor well into the conclusion that his consent was not coerced. Although the officers acknowledged their ability to obtain a warrant, Roston had admitted that he had marijuana in his home, which established probable cause to obtain a warrant. Thus, the officers were not bluffing in an attempt to secure Roston's consent. Additionally, a quantity of marijuana sufficient to support the possession charge was also found during the search of Roston's business—a search which he does not contest. Therefore, if there was any error, it was harmless.

Roston contends in his second point on appeal that the trial court should have allowed a jury instruction on entrapment. Our supreme court has held that an appellant who seeks reversal based on the failure to instruct the jury as requested by the appellant must present a record showing a proffer of the requested instruction. *Watson v. State*, 329 Ark. 511, 951

S.W.2d 304 (1997). From our review of the record, it is unclear that Roston ever proffered an instruction. Although the court itself read the model jury instruction on entrapment, Roston himself never proffered it, or for that matter, any entrapment instruction. Failure to proffer an entrapment instruction is tantamount to failing to preserve this issue for appeal.

However, we can affirm on this point even if we reach the merits. Entrapment occurs when a law-enforcement officer or any person acting in cooperation with him induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording the person an opportunity to commit an offense does not constitute entrapment. Ark. Code Ann. § 5-2-209 (Repl. 2006). Our case law has held that, if a defendant denies committing an offense, he cannot assert that he was entrapped into committing the offense. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996). If there is no evidence to support an instruction, it is not error to refuse it. *Id*. at 847, 936 S.W.2d at 504.

Roston pled not guilty to the charges and never testified to any involvement. Therefore, based on *Heritage*, he could not assert the entrapment defense because he never admitted the act. The only evidence presented was by the State, and that evidence showed that Roston was given an opportunity to commit a crime by the informant. Roston failed to present any evidence to suggest that he was induced into selling the cocaine by Walker or the officers.

Affirmed.

HART and ROAF, JJ., agree.