STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 1999
v	No. 208939 Oakland Circuit Court
JAMES E. GLEASON, Defendant-Appellant.	LC No. 97-150297 FC

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for delivery of more than fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant was sentenced, as a second drug offender, to a term of natural life without the possibility of parole, MCL 333.7413(1); MSA 14.15(7413)(1). We affirm.

I

Defendant was arrested following a controlled buy in which he sold a confidential informant and an undercover officer over 127 grams of cocaine. On appeal, defendant argues that the court erred in denying his affirmative defense of entrapment. We disagree.

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 Jones*, 203 Mich App 384, 386; 513 NW2d 175 (1994). We review the trial court's findings regarding entrapment under the "clearly erroneous" standard. *People v Connolly*, 232 Mich App 425, 428; 591 NW2d 340 (1998). A finding is clearly erroneous if, after a review of the record, we are left with a firm conviction that a mistake has been made. *Id.* at 429.

Entrapment exists if either of the following exists:

> (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. [*People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997).]

After a careful review of the record, we find that defendant has not established that he was entrapped under either prong of this test.

With regard to the first prong, we consider the willingness of the accused to commit the act weighed against how a normally law-abiding person would react under similar circumstances. *People v Juillet*, 439 Mich 34, 54; 475 NW2d 786 (1991) (Brickley, J). Relevant factors include appeals to friendship, inducements that would be particularly enticing to a hypothetical law-abiding citizen, government pressure and acts by the government to increase the criminal culpability of the defendant, and any targeting of the investigation. *People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992). However, the mere furnishing of an opportunity for the defendant to commit a crime is not entrapment. *Ealy, supra* at 510.

Defendant has failed to demonstrate that the police conduct in this case caused him to commit a crime that an otherwise law-abiding citizen in similar circumstances would not have. To the contrary, evidence at the hearing showed that defendant was merely afforded an opportunity to commit the crime. Defendant was not initially a target of this investigation, and he initiated contact with the informant by saying that he "had something" for the informant. Defendant demonstrated his willingness to engage in criminal activity absent any alleged prodding by the informant.

Turning to the second prong of the test, we find that neither the conduct of the police nor that of the informant[1] extended beyond a tolerable level so as to be considered reprehensible. Defendant testified that the informant was persistent and threatened not to repay a previous loan in order to get defendant to sell the cocaine to him. In contrast, the informant expressly denied begging, appealing to their friendship, or threatening not to pay back a loan. Questions of credibility are best left to the court presiding over the hearing. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998); *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993). Moreover, the trial court stated that even if defendant's testimony were believed, it would demonstrate only that defendant sold the cocaine for profit, not unlike any other drug dealer. We agree with the trial court's assessment, and are not left with a firm conviction that a mistake has been made. Accordingly, we affirm the trial court's determination that defendant was not entrapped.

II

Defendant next argues that he was denied a fair trial when two different judges presided over the entrapment hearing and the trial. Because defendant failed to raise this issue in the trial court,[2] this issue has not been preserved for our review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Although review may be granted when a criminal defendant claims he was deprived of a fundamental constitutional right, our failure to consider the issue would not result in manifest injustice.

III

Defendant argues that the trial court abused its discretion in denying his motion for a mistrial. We disagree.

The grant or denial of a motion for mistrial rests within the sound discretion of the trial court. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1998). The test for determining whether a mistrial is appropriate is not whether there was some irregularity, but whether the defendant received a fair and impartial trial. *People v Lumsden*, 168 Mich App 286, 298; 423 NW2d 645 (1988).

At issue here is the non-responsive testimony of the confidential informant that defendant had spent time in jail on a previous drug-related offense.[3] Without question this testimony was prejudicial. However, the trial court determined that the testimony was inadvertent, not elicited by the prosecutor, and not so prejudicial as to deprive defendant of a fair trial. *People v Coles*, 417 Mich 523, 554-555; 339 NW2d 440 (1983). In addition, the evidence in this case was overwhelming. See *People v Holly*, 129 Mich App 405, 416; 341 NW2d 823 (1983). After a careful review of the record, we find no abuse of discretion in the trial court's denial of defendant's motion for mistrial.

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

[1] As an agent for the police officers, the informant's conduct was imputed to the officers. *People v Jones*, 165 Mich App 670, 674; 419 NW2d 47 (1998).

[2] In fact, defendant specifically requested that another judge preside over the entrapment hearing, but not the trial itself.

[3] Defense counsel refused the trial court's offer of a curative instruction.