STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2001
v	No. 220909 Oakland Circuit Court
TIMOTHY MARK GILDERS, Defendant-Appellant.	LC No. 98-164037-FH

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver fifty or more but less than 225 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Because defendant had a prior conviction for possession with intent to deliver less than fifty grams of cocaine, he was sentenced pursuant to MCL 333.7413(2); MSA 14.15(7413(2) to an enhanced prison term of fifteen to forty years. He appeals as of right. We affirm.

Defendant first argues that the trial court erred when it found that he was not entrapped into committing the crime at issue. This Court reviews a trial court's finding concerning entrapment under the clearly erroneous standard. *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998). In *People v Hampton,* 237 Mich App 143, 156; 603 NW2d 270 (1999), this Court stated:

> Michigan courts use the objective test of entrapment. The objective test focuses on the propriety of the government's conduct that resulted in the charges against the defendant rather than on the defendant's predisposition to commit the crime. The question is whether the actions of the police were so reprehensible under the circumstances that the court should refuse, as a matter of public policy, to permit the conviction to stand. Entrapment occurs when (1) the police engage in impermissible conduct that would induce a person situated similarly to the defendant and otherwise law abiding to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. (Citations omitted.)

Here, defendant concedes that he cannot establish a case of entrapment under the first prong of the test. He relies on the second prong.

> Under the second prong of the test, entrapment exists where "the police conduct is so reprehensible that we cannot tolerate the conduct and will bar prosecution on the basis of that conduct alone." Entrapment could also occur under the second prong of the entrapment test if the furnishing of the opportunity for a target to commit an offense "requires the police to commit certain criminal, dangerous, or immoral acts." [*Connolly, supra* at 430 (citation omitted).]

Defendant argued that he was entrapped by a confidential informant's reprehensible conduct. He claimed that the informant harassed and pressured him into committing the crime. The trial court found that defendant was not credible in this regard. "Special deference is given to a trial court's finding that defendant was not a credible witness." *People v Sherman-Huffman,* 241 Mich App 264, 267; 615 NW2d 776 (2000), lv pending. The testimony from the entrapment hearing supports the trial court's conclusion that there was no credible evidence that the informant's conduct was so reprehensible that it constituted entrapment.

Defendant also argued that the undercover officer's conduct was so reprehensible that it cannot be tolerated by the courts. He argued that he only wanted to purchase one ounce of cocaine and that the officer's conduct in refusing to deal in any amount less than two ounces was sentencing entrapment. As a basic premise, undercover drug sales conducted by the police do not constitute entrapment per se. *Connolly, supra* at 430. "[A] law enforcement officer may distribute controlled substances to another person as a means of detecting criminal activity. *Id. at* 431." In *People v Ealy,* 222 Mich App 508; 564 NW2d 168 (1997), this Court examined a situation where the defendant alleged that the police conduct was reprehensible because the police induced him to participate in offenses dealing with greater amounts of drugs in order to trap him into a higher sentence for his criminal conduct. This Court found that sentencing entrapment takes place when a defendant, "although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment." *Id.* at 510. This Court specifically indicated, however, that "[e]ntrapment will not be found where the police do nothing more than present the defendant with the opportunity to commit the crime of which he was convicted." *Id.*

In this case, the trial court's finding that the undercover officer did nothing but offer defendant the opportunity to commit the crime was not clearly erroneous. The officer "put the word out" on the street that he had cocaine for sale but would not sell less than two ounces. Defendant contacted the officer on numerous occasions to make a deal. The officer never initiated contact with defendant. Although aware that the officer would only deal in two or more ounces of cocaine, defendant persisted in trying to make a deal. His problem was not that he did not want two ounces but that he could not afford two ounces at once. Towards this end, the issue of using property was discussed. According to the officer, whose testimony the trial court found persuasive, defendant offered his jet ski and $600 for two ounces. However, no property was ever traded. After a first failed attempt at a transaction involving drugs for the property and cash, defendant did not hesitate to contact the officer after obtaining sufficient cash to complete a two-ounce transaction. The conduct of the police was not so outrageous that it overcame the will of

defendant. The officer did nothing more than present defendant with the opportunity to purchase two ounces of cocaine. Moreover, the evidence did not indicate that the use of a two-ounce minimum was intended as a means to enhance possible sentences. Rather, the officer testified that he only dealt with two or more ounces because he wanted to distinguish between drug users and people buying for resale. There was nothing to rebut this testimony or demonstrate that the true purpose of the two-ounce minimum was to trap defendant into committing a greater crime. We find no error in the trial court's determination that defendant was not entrapped.

Defendant also argues that the prosecutor committed misconduct in making his closing argument. This Court reviews preserved claims of prosecutorial misconduct by evaluating the prosecutor's allegedly improper comments in the context that they were made to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). Appellate review of unpreserved claims of prosecutorial misconduct is precluded unless the prejudicial effect could not have been cured by a cautionary instruction or if the failure to consider the issue would result in the miscarriage of justice. *People v Nimeth*, 236 Mich App 616, 626; 601 NW2d 393 (1999).

Generally, prosecutors are accorded great latitude regarding their arguments and conduct, and are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In addition, a prosecutor is not required to state inferences or conclusions in the blandest terms possible. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Prosecutors may use "hard language" when it is supported by the evidence and are not required to phrase arguments in the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Emotional language may be used during closing argument and is "an important weapon in counsel's forensic arsenal." *Id.*

Defendant asserts that the prosecutor made an argument that was not supported by the evidence when he made the following statement to which defendant did not object:

> What's important to remember is from that time until the 24th, Officer [] did not call the defendant but on the 24th the defendant called Officer [] eleven times. He had customers out there waiting, he needed to get his product, that's the bottom line.

We find defendant's argument unpersuasive. Although there was no direct evidence that defendant had customers and needed to get cocaine, the argument was reasonably inferred from the evidence presented at trial. Defendant told the officer that he was going to cut the cocaine for resale. Defendant also indicated that he was going to make money on the cocaine. Further, on October 24, 1998, the date of the transaction at issue, defendant paged the officer eleven times, indicating that he was ready to conduct the transaction. Defendant was anxious. When arrested, defendant had a "cutting" agent with him. A reasonable inference can be drawn that defendant had people willing to buy and needed the cocaine. Thus, the prosecutor's comment was not improper.

Defendant also complains that the prosecutor unlawfully vouched for defendant's guilt when he stated that defendant "has absolutely no defense in this case, and nothing has been stated

that would give him one. His testimony is incredible and ridiculous and my burden is not beyond a ridiculous doubt." While a prosecutor may not vouch for the credibility of a witness or suggest that the government has special knowledge about truthfulness, a prosecutor may argue from the facts that the defendant is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor indicated that defendant's story was ridiculous and did not make sense. While the language used was emotional and "hard," a prosecutor is not required to use bland terms. *Launsburry, supra*. Contrary to defendant's argument, the prosecutor did not attempt to urge a guilty verdict based on the prestige of his office or his own personal beliefs. The prosecutor's comment did not deprive defendant of a fair trial or due process.

Finally, defendant argues that the following rebuttal argument to which defendant did not object was an improper civic duty argument:

> The bottom line is the officer received information, that's their job, and based on that information they act. And one way to think about it is to take Officer [], consider him just Dave, he's not an undercover officer and what would have happened that day. Two ounces of cocaine would have been sold for $1,700, and then it would have been cut up and sold on the street. That's what would have happened.

Arguments must be considered in their proper context. *Truong, supra*. Moreover, rebuttal arguments must be considered in light of previous defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). In this case, defendant's counsel argued that defendant was not a dealer and that the evidence showed only that he wanted one ounce of cocaine. Defendant argued that he was forced to engage in a transaction greater than what he wanted to do. The prosecutor's rebuttal argument addressed defendant's claims that he was forced to buy more than one ounce and the implication that the police entrapped defendant into doing so. The prosecutor observed that defendant's argument was basically a smoke screen and pointed out that if the officer was not an undercover officer, defendant would still have used his $1,700 to purchase two ounces of cocaine for distribution on the street. The officer's status as a police officer had nothing to do with the commission of the crime.

Further, the challenged argument did not constitute an improper "civic-duty" argument. In *Truong, supra* at 340, this Court indicated that a "civic-duty" argument necessarily injects issues broader than the defendant's guilt or innocence or encourages the jurors to suspend their powers of judgment. The argument at issue did neither. It simply highlighted that defendant was guilty of the drug transaction based on the facts and regardless of whether the "dealer" was a police officer. The prosecutor's argument was not an attempt to have defendant convicted based on something other than the facts of the case.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey