DIVISION ONE
FILED: 12/28/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0607
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
THOMAS ALAN VIERRA,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. CR2008-0959

The Honorable Rick A. Williams, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Adriana M. Rosenblum, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant, Thomas Alan Vierra ("Vierra"), appeals his conviction and requests a new trial. For the following reasons, we affirm.

FACTUAL BACKGROUND

¶2 After an introduction by a confidential informant ("CI"), Vierra sold three ounces of methamphetamine to an undercover Department of Public Safety ("DPS") officer in Lake Havasu on January 12, 2006. Two weeks later the officer called and met Vierra in La Paz County, and Vierra sold him an ounce of methamphetamine. Subsequently, Vierra was charged with possession of dangerous drugs for sale, a class two felony for the January 12, 2006 offense.[1]

¶3 During trial, Vierra claimed that he had been entrapped by DPS. Specifically, he claimed that he was willing to sell drugs to maintain a friendship with the C.I., a former major league baseball player.

¶4 Although Vierra objected, the trial court determined that the testimony about the La Paz County incident was admissible pursuant to Ariz. R. Evid. 404(b). Vierra was subsequently convicted as charged and sentenced.

¶5 Vierra filed an appeal, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010)[2] and -4033(A)(4) (2010).

---

[1] Vierra was not charged in the La Paz County incident.
[2] We cite the current version of a statute unless there has been a material revision.

DISCUSSION

¶6 Vierra argues that the trial court abused its discretion when it allowed testimony about the La Paz County incident to be presented to the jury. He contends that the La Paz County evidence was inadmissible to show his predisposition to commit the earlier crime and caused unfair prejudice. We disagree.

¶7 We review the trial court's decision to admit other act evidence for abuse of discretion. *State v. Villalobos*, 225 Ariz. 74, __, ¶ 18, 235 P.3d 227, 233 (2010) (citing *State v. Andriano*, 215 Ariz. 497, 502, ¶ 17, 161 P.3d 540, 545 (2007)). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). Such evidence may, however, be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

¶8 Other act evidence is admissible if the trial court finds that the evidence has a proper purpose under Rule 404, is relevant, and that its probative value is not substantially outweighed by potential for unfair prejudice. *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Evidence relevant for any purpose other than showing a propensity to act in a certain way is admissible. *State v. Connor*, 215 Ariz. 553,

563, ¶ 32, 161 P.3d 596, 606 (App. 2007) (citing *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983)).

¶9 The entrapment defense required Vierra to prove by clear and convincing evidence the following elements:

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.

A.R.S. § 13-206(B) (2010).

¶10 Stated differently, "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).

¶11 Once the defense of entrapment is raised, a defendant's "predisposition and criminal intent [become an] issue." *State v. Lacey*, 143 Ariz. 507, 512, 694 P.2d 795, 800 (App. 1984). "[T]he state may properly introduce evidence of similar conduct for the purpose of showing predisposition." *State v. Korte*, 115 Ariz. 517, 520, 566 P.2d 318, 321 (App. 1977). In fact, our supreme court has held that other act "evidence [is] admissible not only to show scheme, plan, intent, and knowledge, but also to show defendant's state of mind in

entering the transaction, as rebuttal of his defense of entrapment." *State v. Turner*, 104 Ariz. 469, 471, 455 P.2d 443 (1969). The evidence is admissible because:

> [I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense.

Sorrells v. United States, 287 U.S. 435, 451-52 (1932).

¶12 Although our case law has not addressed whether subsequent acts are admissible, other courts have allowed subsequent other act evidence to rebut an entrapment defense. *See generally* Daniel E. Feld, Annotation, *Admissibility of Evidence of Other Offenses in Rebuttal of Defense of Entrapment*, 61 A.L.R. 3d 293 (1975 & Supp. 2009). For example, in *United States v. Rodriguez,* 474 F.2d 587, 590 (5th Cir. 1973), the circuit court affirmed the admission of evidence about a drug sale to government agents twenty days after the charged crime to rebut the entrapment defense. The court found that "evidence of a similar offense, committed in close proximity of time, may be corroborative of a prior or subsequent offense" and "may be introduced to establish that a defendant possessed a requisite knowledge or that there is a consistent pattern, scheme of operations, or similarity of method." *Id*.

¶13 Similarly, in *People v. Calvano*, 282 N.E.2d 322, 326 (N.Y. 1972) the New York court of appeals found that the testimony about a subsequent sale of heroin to police officers was admissible to prove predisposition. Finally, in *Berlin v. State*, 277 A.2d 468, 474-75 (Md. Ct. Spec. App. 1971), the appellate court found that a pharmacist's subsequent drug sales to a state trooper were admissible to rebut the entrapment defense.

¶14 Vierra, however, cites to *Hill v. State ("Hill II")*, where a divided Georgia supreme court found that defendant's motion for directed verdict should have been granted. 405 S.E.2d 258, 260 (Ga. 1991). In *Hill v. State ("Hill I")*, the court of appeals found that the record indicated that the informant repeatedly called Hill, and, even though he initially refused, persuaded him to find a cocaine source. 398 S.E.2d 226, 227-28 (Ga. Ct. App. 1990), *rev'd* 405 S.E.2d 258 (Ga. 1991). After Hill found a source, the informant called Hill at the request of the undercover agent, and Hill provided a sample to the informant. *Id.* Four days later, the informant and two undercover agents met Hill at a restaurant to consummate the transaction. *Id.* at 228. After the agents did some role playing about who they were and what they wanted, *id.*, which the supreme court would call "creative activity," *Hill II*, 405

S.E.2d at 259, the agents met him at his car, and Hill sold them cocaine. *Hill I*, 398 S.E.2d at 228.

¶15 Although the Georgia court of appeals found that there was sufficient evidence to go to the jury, *Hill I*, 398 S.E.2d at 229, the supreme court found that law enforcement's "creative activity" four days after Hill secured cocaine at the informant's behest did not create "independent [criminal] acts subsequent to the inducement but part of a course of conduct which was the product of the inducement" and could not be used to show predisposition. *Hill II*, 405 S.E.2d at 259 (internal quotation marks omitted).

¶16 Here, there was no continuing course of conduct or creative activity. Although Vierra drove to Lake Havasu and sold cocaine to the undercover DPS officer to, as he testified, maintain his friendship with the CI, there is no evidence that Vierra was unable to procure or unwilling to sell the drugs. Then, two weeks later, the undercover agent called and Vierra drove to La Paz County to make another drug sale. Consequently, the trial court in this case did not err when it allowed testimony about the La Paz County incident to show Vierra's predisposition in order to rebut the entrapment defense.

¶17 Vierra next argues that the trial court erred because the prejudicial effect of the evidence from the La Paz County incident outweighed its probative value. We disagree.

¶18 The trial court "must determine if the probative value is substantially outweighed by the danger of unfair prejudice." *Connor*, 215 Ariz. at 563, ¶ 32, 161 P.3d at 606 (quoting *State v. Dickens*, 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996)) (internal quotation marks omitted). We will affirm the trial court's decision absent a clear abuse of discretion so long as the decision to admit the other act evidence is supported by the facts. *Id.*

¶19 Evidence is unfairly prejudicial only when it has a tendency to evoke a decision on an improper basis, such as emotion, sympathy, or horror. *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995). "The trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice." *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998).

¶20 Here, the State proffered testimony about the La Paz County incident to show that Vierra was predisposed to sell methamphetamine, thus negating the entrapment defense. The trial court determined that the La Paz County incident was

sufficiently similar to the charged crime and allowed the testimony.[3]

¶21 Moreover, and to avoid misuse of the La Paz County incident, the trial court gave a limiting instruction on the proper use of the La Paz County other act evidence. The court instructed the jury that:

> Evidence of other acts has been presented. You may consider this act only if you find the State has proved by clear and convincing evidence that the defendant committed this act. You may only consider this act to establish the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. You must not consider this act to determine the defendant's character or character trait or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense.

¶22 Because the instructions were properly given, and we assume followed, *see State v. Newell*, 212 Ariz. 389, 404, ¶ 69, 132 P.3d 833, 847 (2006), the trial court did not abuse its discretion when it determined the probative value of the other act evidence outweighed any unfair prejudice.[4]

---

[3] During the January, 12, 2006 incident, Vierra secreted methamphetamine in a "Gunk" spray can in his car trunk. In the La Paz County incident, Vierra secreted the methamphetamine in a WD-40 canister in his car trunk.

[4] The trial court precluded the State from introducing evidence that Vierra had been convicted in Maricopa County of conspiracy to sell dangerous drugs.

CONCLUSION

¶23 For the forgoing reasons, we affirm the trial court's decision.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Judge

/s/
_____
PATRICIA A. OROZCO, Judge