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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LISA ALEXIS REED, Appellant.	2 CA-CR 2012-0122 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20104215001

Honorable Paul E. Tang, Judge

AFFIRMED

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M I L L E R, Judge.

¶1 After a jury trial, Lisa Reed was convicted of four counts of selling methamphetamine and one count of possession of drug paraphernalia and sentenced to

concurrent, presumptive prison terms, the longest of which was ten years. On appeal, she argues the trial court erred when it sustained objections limiting the cross-examination of the arresting officer, the prosecutor misstated the law during closing arguments, and the trial judge misinterpreted the sentencing scheme. We affirm the convictions and sentences.

Factual and Procedural Background

¶2 In summer 2010, Tucson Police Officer Ward Beattie received a tip that local telephone chat lines were being used to arrange drug purchases. In September, he created a profile that said he liked to "party, stay up late, and possibly go fast." He received a message from Lisa Reed asking "what [he] partied with," and Reed and Beattie started a conversation through text messages. Beattie eventually referred to methamphetamine and asked if he could "get a T, referring to a teener of methamphetamine," to which Reed replied she "could get anything at any time." Beattie met Reed and drove her to another location to meet the seller, but the sale did not occur for reasons unrelated to the case.

¶3 A few days later, Beattie texted Reed to see if they could meet up "with her boy," a different seller. Reed set up a meeting and Beattie picked her up to take her to a hotel, where she bought methamphetamine with Beattie's money. Over a period of two months, Reed assisted Beattie with a total of four drug purchases, for which Reed usually received cash from Beattie. After the last purchase, Tucson Police arrested Reed and found a methamphetamine pipe in her purse. The four purchases totaled more than thirteen grams of methamphetamine. Reed was convicted, sentenced, and filed a timely appeal.

Discussion

Evidentiary Objection

¶4 Reed first contends the trial court erred when it sustained two of the state's objections during cross-examination of Beattie because the objections were procedurally improper and the expected testimony was relevant.

¶5 We will reverse a trial court's decisions to exclude evidence only when they constitute a clear, prejudicial abuse of discretion. *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994). When a trial court sustains an objection to the introduction of evidence, the party seeking to introduce evidence ordinarily must make an offer of proof to assert error on appeal. *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996). Where there is no offer of proof, we will review if the substance is apparent from the context. *See State v. Kaiser*, 109 Ariz. 244, 246, 508 P.2d 74, 76 (1973); Ariz. R. Evid. 103(a)(2).

¶6 During cross-examination of Beattie, the following exchange occurred:

> [Defense Counsel]: Isn't it true that after you ask[ed] about getting the T ball and Lisa said yes, isn't it true that at that moment you had grounds to arrest and charge her with conspiracy?
>
> [Prosecutor]: Objection, Your Honor.
>
> [Court]: Sustained.
>
> [Defense Counsel]: The text exchange that we're talking about eventually le[]d to this encounter with the guy named Mando; correct?
>
> [Beattie]: Yes, sir.

> [Defense Counsel]: And you've already told the jury about that contact. Isn't it true that as a result of that contact you could have arrested and charged Lisa with attempted sale?
>
> [Prosecutor]: Objection, Your Honor.
>
> [Court]: Sustained.

After the objections were sustained, Reed did not make an offer of proof to the trial judge pursuant to Rule 103(a)(2), Ariz. R. Evid. We find, however, that the substance of the "yes" or "no" questions was apparent in the context.

¶7 Reed first argues that the court should have required a "specific ground" pursuant to Rule 103(a)(1) to sustain the objection. Rule 103(a)(1)(B) provides that it is not necessary to state a ground if "it was apparent from the context." Although Reed contends that the grounds were not obvious, her argument is directly contradicted by her rationale for failing to make an offer of proof: the substance was apparent from the testimony. Just as the substance of the officer's testimony about probable cause was apparent, so too the basis for the objection was clear. The dispositive issue is whether the testimony was relevant to Reed's defense of entrapment.

¶8 Reed argues the testimony was relevant to whether Reed met her burden of proof on the entrapment defense,[1] Beattie's credibility, and whether the state met its burden of proof on the sale offenses and the threshold amount of sales.

[1]Reed also argues that it was relevant to establishing her state of mind. Because her predisposition to commit the offense is an element of the entrapment defense, we will not address it separately.

¶9 Evidence is relevant if it tends to make the existence of a fact in issue more or less probable. *State v. Fulminante*, 193 Ariz. 485, ¶ 57, 975 P.2d 75, 92 (1999); *see* Ariz. R. Evid. 401(a). To prove entrapment, Reed was required to prove by clear and convincing evidence that: (1) the idea of committing the offense started with Beattie, (2) Beattie urged and induced her to commit the offense, and (3) she was not predisposed to commit the offense before Beattie induced her to commit the offense. *See* A.R.S. § 13-206(B). Further, "[a] person does not establish entrapment if the person was predisposed to commit the offense and the law enforcement officers . . . merely provided the person with an opportunity to commit the offense." A.R.S. § 13-206(C). Nor is it entrapment for law enforcement officers to "use a ruse or conceal their identities." *Id*.

¶10 Reed argues correctly that evidence of an officer's *conduct* is statutorily relevant to her entrapment defense. *See id*. What Reed's question actually sought, however, is evidence of Beattie's state of mind—whether he thought he had grounds to arrest Reed earlier. The law enforcement officer's state of mind is not relevant to the entrapment calculus. *United States v. McClain*, 531 F.2d 431, 435 (9th Cir. 1976) ("[I]t is not the state of mind of the government agent that is important . . . it is the 'predisposition of the defendant' to commit the offense."), *quoting United States v. Russell*, 411 U.S. 423, 427 (1972).[2]

[2] Federal courts use a subjective inquiry into whether the government agent implanted the criminal plans in the defendant's mind. *See, e.g., United States v. Williams, 547 F.3d 1187, 1197 (9th Cir. 2008)*. This court has held that Arizona's statutory entrapment defense also follows the subjective approach. *State v. Gessler, 142 Ariz. 379, 384-85, 690 P.2d 98, 103-04 (App. 1984)*.

¶11 Reed also contends that the testimony was relevant for the jury to determine Beattie's credibility. However, Beattie was "permitted to exercise [his] own judgment in determining at what point in [the] investigation enough evidence [had] been obtained." *State v. Monaco*, 207 Ariz. 75, ¶ 17, 83 P.3d 553, 558 (App. 2004), *quoting United States v. Baker*, 63 F.3d 1478, 1500 (9th Cir. 1995). Reed had no individual right to be arrested earlier than she was. *Monaco*, 207 Ariz. 75, ¶ 17, 83 P.3d at 558 (defendant who sold cocaine five times to undercover officer had no individual right to be arrested after first sale). Beattie's choice to delay the arrest is not relevant to his credibility.

¶12 Regarding Reed's other listed reasons the testimony is relevant, Reed did not develop her argument that it was relevant to the state's proof of the elements of the offense and the threshold amounts of drugs. Failure to develop those claims constitutes waiver of those issues on appeal. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). Additionally, Reed admitted to the substantive elements of the offenses as required by the entrapment statute, A.R.S. § 13-206(A), and Beattie's thoughts of arresting Reed earlier have no relevance to the elements of those offenses.

¶13 Finally, Reed argues that the trial judge's preclusion of her cross-examination questions denied Reed "her Sixth and Fourteenth Amendment rights to confrontation, cross-examination, and a fair trial." Because Reed did not object below she therefore must show any error was fundamental and prejudicial. *See State v. Womble*, 225 Ariz. 91, ¶ 10, 235 P.3d 244, 249 (2010); *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. When cross-examination has been denied, the test under the confrontation clause is whether that denial prevented the defendant from presenting information relevant to the

issues in the case or the credibility of the witness. *See State v. McElyea*, 130 Ariz. 185, 187, 635 P.2d 170, 172 (1981). Because we determine that the testimony was not relevant to the issues in the case or Beattie's credibility, Reed cannot show fundamental error or prejudice.

Improper Rebuttal

¶14 Reed next argues that the prosecutor misstated the elements of Reed's entrapment defense during rebuttal argument by repeatedly emphasizing that no one "forced" Reed to buy drugs, implying that Reed was arguing the defense of duress. But because she raises no objection on these grounds, we review only for fundamental error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Reed must prove fundamental error occurred and "that the error in his case caused [her] prejudice." *Id*. ¶ 20.

¶15 The state admits the misstatement, but argues that it did not rise to the level of fundamental error and that Reed was not prejudiced. The state focuses its argument on prosecutorial misconduct, while Reed asserts that she is not arguing prosecutorial misconduct; rather, even if offered in good faith, the statements were in error and deprived Reed of a fair trial. Because we conclude that Reed cannot meet her burden of showing prejudice, we need not determine whether the misstatement is characterized as prosecutorial misconduct or some other species of error.

¶16 During rebuttal, the prosecutor made seven references to "force," implying that it was part of the definition of "entrapment."[3] Although the definition includes the

[3]For example, the prosecutor stated, "There's absolutely no evidence that officers in this case forced Miss Reed to do anything, and that's essentially what entrapment is.

terms "urge[] and induce[]," to the extent that the prosecutor's statements added the element of "force" to the definition of entrapment, was a misstatement of the law. A.R.S. § 13-206(B).

¶17 Assuming without deciding that the error was fundamental, Reed cannot meet her burden of proving that this misstatement caused her prejudice. During Reed's closing arguments, counsel spent considerable time applying the proper elements of the entrapment jury instruction to the facts of the case. Although the state used the word "force" in its rebuttal, the context did not otherwise imply any sort of requirement of physical danger, as it is used in the duress defense statute, A.R.S. § 13-412; rather, it was an overstatement of the correct terms "urged" and "induced." More important, the jury instructions contained the proper definition of entrapment, tracking the language in the statute, and before closing arguments, the trial judge instructed the jury, "You must follow these jury instructions. They are the rules you should use to decide this case." He also instructed them, "In their opening statements and closing arguments the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence." Jurors are presumed to follow the court's instructions, *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006), and in light of the jury instructions, Reed cannot show prejudice. *See State v. Means*, 115 Ariz. 502, 504-05, 566 P.2d 303, 305-06 (1977) (no abuse of discretion in failure to grant new trial due to prosecutor's misstatement of law, where judge made corrective remark despite

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Entrapment is the idea that somebody forces you to do something. Somebody takes that choice away from you."

noting argument was "permissible," and proper jury instructions given); *see also People v. Lozada*, 570 N.E.2d 737, 740-41 (Ill. App. 1991) (misstatement of entrapment defense harmless error where proper instruction detailed in closing arguments and provided to jury).

¶18 Reed's reliance on *Francis v. Sanders*, 222 Ariz. 423, 215 P.3d 397 (App. 2009), is unavailing. In *Francis*, the misstatement of the law by the prosecutor took place in front of the grand jury, where a prosecutor must impartially present the evidence. *Id.* ¶¶ 7, 12; *see Maretick v. Jarrett*, 204 Ariz. 194, ¶ 10, 62 P.3d 120, 123 (2003) ("Prosecutors bear a 'particularly weighty duty not to influence the jury because the defendant has no representative to watch out for his interests . . . .'"), *quoting State v. Hocker*, 113 Ariz. 450, 454, 556 P.2d 784, 788 (1976), *overruled on other grounds by State v. Jarzab*, 123 Ariz. 308, 599 P.2d 761 (1979). Unlike the grand jury in *Francis*, the trial jury was correctly instructed on the law by the trial court. *Francis* is inapposite.

Sentencing Error

¶19 Reed's final argument on appeal is that the trial court abused its discretion when it imposed presumptive, concurrent sentences of ten years, because the court indicated that it felt bound to impose consecutive sentences if it opted to impose minimum terms.

¶20 The trial court has broad discretion to impose sentences, and "we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). At the time of Reed's offenses, the minimum prison term for certain

methamphetamine-related offenses was five years, with a presumptive term of ten years and a maximum of fifteen years. 2008 Ariz. Sess. Laws, ch. 301, § 34. During sentencing, the trial court initially stated that it was "inclined just to give the presumptive as to all of [the four sales counts] concurrently anyway," and then let the parties speak. At the end of sentencing, the court stated to Reed,

> [Y]our counsel had eloquently requested that I impose essentially a minimum term of five years for all the counts with a probation tail, and the problem with that suggestion to me is as follows is that they're different counts. And essentially it would be my inclination, if I were to give the minimum term, then I would be stacking them. So you would be looking at 20 years. So that's not what I'm going to do. Instead, I'm going to go ahead and impose the presumptive term of 10 years as to each count, but I'll run them all concurrently, that's as to Counts One through Four, because there is no aggravating factors in this case. And essentially what that's going to amount to is two and a half years per count, is what it's going to turn into.

¶21 Essentially, Reed speculates that the trial court must have concluded that it was legally required to impose consecutive sentences if it imposed the minimum terms. We disagree. The transcript shows that the court rejected defense counsel's argument that the court should impose concurrent, minimum terms. Instead, it was weighing consecutive minimum against concurrent presumptive, both of which were permissible.

¶22 There is nothing in the record to indicate that the trial court felt bound to impose the sentences due to some error of law. *Cf. State v. Garza*, 192 Ariz. 171, ¶ 7, 962 P.2d 898, 900 (1998) (finding error where trial court imposed consecutive sentences not requested by state and trial court stated "all of [these] factors together indicate to me that this sentence is clearly excessive. But I am bound by the law to do it in the fashion that I

am doing it"); *State v. Fillmore*, 187 Ariz. 174, 185, 927 P.2d 1303, 1314 (App. 1996) (finding error where trial court imposed 289.75-year sentence after prosecutor recommended 15.75 years, where court stated "mass of convictions" had resulted in "a total sentence which was not [the court's] goal"). Instead, the trial court simply stated that it was inclined to impose consecutive sentences if it chose the minimum sentence. The resulting sentence was well within the limits of five to sixty years in prison, and we see no clear abuse of discretion. *See Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d at 357.

Disposition

¶23 For the foregoing reasons, Reed's convictions and sentences are affirmed.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge