NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
DEC -1 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CLAY NELSON HULL, Appellant.	2 CA-CR 2009-0022 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20081035

Honorable Richard S. Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

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Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Clay Hull was convicted of sale or transfer of a narcotic drug. He argues the trial court erred in admitting evidence of a previous encounter with the officer involved in this case and refusing his request for a jury instruction on the lesser included offense of possession of a narcotic drug. For the reasons stated below, we affirm.

Facts and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In March 2008, an undercover police officer asked Hull about purchasing some crack cocaine. Hull took money from the officer and purchased crack cocaine at a nearby residence. He returned to the vehicle and handed the cocaine to the officer. During an ensuing conversation with the officer, Hull sold the officer another rock of crack cocaine. At trial, the jury heard a recording and testimony regarding an encounter a few months before the March events that gave rise to the charges in this case, in which Hull had introduced the same undercover officer to a prostitute. Regarding the current charges stemming from the March drug sale, Hull was charged with, and later convicted of, sale and/or transfer of a narcotic drug, a class two felony. The trial court sentenced Hull to 9.25 years in prison, and this appeal followed.

Discussion

¶3 Hull first argues the trial court erred in admitting evidence of his conduct during the previous pandering encounter with the undercover officer in this case because the evidence constituted impermissible character evidence. We review the admission of

prior act evidence for an abuse of discretion. *State v. Burciaga*, 146 Ariz. 333, 336, 705 P.2d 1384, 1387 (App. 1985). Generally, evidence of prior conduct may be used to impeach the credibility of a witness under Rule 608, Ariz. R. Evid., or for purposes specified in Rule 404(b), Ariz. R. Evid., such as to prove motive, intent, or opportunity, but such evidence is "not admissible to show predisposition" to commit a crime. *Burciaga*, 146 Ariz. at 335, 705 P.2d at 1386. However, a limited exception applies when a defendant raises the defense of entrapment, as Hull did in this case. *Id*.

¶4 Section 13-206, A.R.S., regulates the defense of entrapment:

> B. A person who asserts an entrapment defense has the burden of proving the following by clear and convincing evidence:
>
> 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.
>
> C. A person does not establish entrapment if the person was predisposed to commit the offense and the law enforcement officers or their agents merely provided the person with an opportunity to commit the offense.

Thus, "[e]ntrapment 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). When a defendant raises the

defense of entrapment, "the state may properly introduce evidence of similar *conduct* for the purpose of showing predisposition." *Burciaga*, 146 Ariz. at 335, 705 P.2d at 1386. "Predisposition is material in an entrapment case only to the extent it bears on the defendant's intent to commit the crime with which he is charged . . . ." *Ross*, 25 Ariz. App. at 26, 540 P.2d at 756. Further, to be admissible, "the past conduct must be of a *sufficiently similar nature* to the crime charged to show a predisposition to commit that crime." *Burciaga*, 146 Ariz. at 335-36, 705 P.2d at 1386-87.

¶5 Here, Hull contends his prior conduct leading to a misdemeanor conviction for pandering was "*not sufficiently similar* in nature to the crime of Sale and/or Transfer of a Narcotic Drug . . . [and] had no bearing on his intent or predisposition to commit a drug offense." He contends the trial court's denial of his pre-trial request to suppress the evidence constitutes reversible error and was a violation of his federal due process rights.

¶6 In the prior pandering encounter between Hull and the undercover officer, Hull approached the officer's parked car and asked for money for beer. The officer told Hull that he was "looking for girls" and had only $20. Hull testified he had not been interested in a cut of the money, but had wanted some of the beer in the officer's car. Eventually Hull got in the car and showed the officer to a location where the officer met a woman, and Hull was arrested.

¶7 In the incident that led to the current case, the undercover officer approached Hull and told him he was looking to purchase a "dub" of about $20 worth of crack cocaine. Hull got into the officer's car and directed him to park at a residence. Hull took the officer's money, left and returned to the car with crack cocaine. After

giving the officer the drugs, Hull asked for a few dollars, yet still had a piece of crack cocaine in his hand, which he eventually sold to the officer for another $20.

¶8 In response to Hull's request at trial to exclude evidence of the pandering incident, the state responded that the evidence was admissible because "[t]he point is, he'll do anything for money, so he's predisposed." It did not introduce any evidence of a connection between pandering and sale of drugs. The trial court agreed with the state: "if he's out there looking for money, agreeing to broker deals, that shows a predisposition to commit crime," and viewed both incidents as reflecting "a propensity to act as a broker on the street level." The court determined that because entrapment was the defense, the probative value of the evidence was raised, the unfair prejudicial effect was lessened effectively, and the prior incident showed intent and a predisposition to act as a street level broker.

¶9 In *Burciaga*, 146 Ariz. at 336, 705 P.2d at 1387, this court concluded that the trial court had properly excluded a prior theft conviction because theft was not sufficiently similar to be probative of predisposition toward trafficking in stolen property. We have likewise determined evidence that the defendant previously had purchased heroin was inadmissible because it was not pursuasive evidence of a predisposition to sell heroin. *Ross*, 25 Ariz. App. at 25, 540 P.2d at 756. *See also United States v. Mendoza-Prado*, 314 F.3d 1099, 1104 (9th Cir. 2002) (theft, extortion, and aiding a prison escape, "although obviously serious crimes, bear little relationship to the drug-trafficking crimes"); *De Jong v. United States*, 381 F.2d 725, 726 (9th Cir. 1967) (prior offenses of burglary and drunkenness dissimilar to charge of drug distribution).

¶10 Pandering and the sale of drugs are more distinct from one another than the conduct in *Burciaga* and *Ross*. The record does not establish any connection between the two. The evidence offered must show the defendant has a predisposition to commit the particular crime charged, not simply criminal acts in general. *Burciaga*, 146 Ariz. at 336, 705 P.2d at 1387. Accordingly, the trial court erred in admitting evidence concerning Hull's pandering.

¶11 Because the trial court improperly admitted evidence of Hull's prior acts, we must determine whether that error entitles Hull to a new trial. When "an issue is properly presented to the trial court and erroneously ruled on, we review for harmless error." *State v. Coghill*, 216 Ariz. 578, ¶ 28, 169 P.3d 942, 949 (App. 2007). "'Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.'" *Id*., *quoting State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). The state bears "the burden of convincing us th[e] error is harmless." *Bible*, 175 Ariz. at 588, 858 P.2d at 1191. Here, the state contends that it presented overwhelming evidence, apart from the prior contact, that Hull had not been entrapped.

¶12 Based on Hull's own testimony, the officer merely asked where the officer could get some drugs, without raising his voice or using intimidation, force or threats. Hull then admitted he "saw an opportunity to get high." Thus the officer did not "urge[] and induce[]" Hull to sell drugs, but rather he merely provided Hull "with an opportunity" to do so. § 13-206 (B)(2), (C). Hull's testimony as well as the officer's provided overwhelming evidence that Hull had not been entrapped. Hull failed to sustain

his burden of establishing he had been entrapped. *Id.*; *State v. Kiser*, 26 Ariz. App. 106, 111, 546 P.2d 831, 836 (1976) (finding no entrapment as a matter of law in similar circumstances). We can thus say beyond a reasonable doubt that the erroneous admission of the evidence of the prior contact with the officer did not contribute to or affect the verdict.

¶13 Hull next argues the trial court erred in refusing his request for a jury instruction on the offense of simple possession of a narcotic, a lesser included offense of possession for sale or transportation. "We review the trial court's decision to give or refuse a jury instruction for an abuse of discretion." *State v. Hurley*, 197 Ariz. 400, ¶ 9, 4 P.3d 455, 457 (App. 2000). "Both the defendant and the prosecutor are entitled to instructions on any lesser included offense for which there is evidentiary support." *Id.* ¶ 13. Our supreme court has considered this issue and noted "[t]he entrapment defense 'is a relatively limited defense,' available only to defendants who have 'committed all the elements of a proscribed offense.'" *State v. Soule*, 168 Ariz. 134, 137, 811 P.2d 1071, 1074 (1991), *quoting Mathews v. United States*, 485 U.S. 58, 71 (1988). "Under *State v. Ballinger*, 110 Ariz. 422, 520 P.2d 294 (1974)[,] an instruction on the lesser included offense of possession should not be given where possession of the drugs was obtained solely for the purpose of the particular sale. This rule has been applied where the defense was entrapment." *Kiser*, 26 Ariz. App. at 112, 546 P.2d at 837. Although possession is a lesser included of sale under the rationale of *State v. Cheramie*, 218 Ariz. 447, ¶ 22, 189 P.3d 374, 378 (2008), that does not change the rule established in *Kiser*.

¶14 Thus, we find no error in the trial court's refusal to give the jury a lesser included offense instruction.

Conclusion

¶15 In light of the foregoing, we affirm Hull's conviction and sentence.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

GARYE L. VÁSQUEZ, Judge