STATE OF MINNESOTA
IN COURT OF APPEALS
A11-537

State of Minnesota,
Respondent,

vs.

Jesus Yosmany Wilson Lombida,
Appellant.

Filed April 23, 2012
Affirmed
Connolly, Judge

Freeborn County District Court
File No. 24-CR-08-2997

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Craig S. Nelson, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant was convicted of first-degree sale of a controlled substance and challenges the district court's determination that he did not establish an entrapment defense by a fair preponderance of the evidence. Because we conclude that the district court did not err when it ruled that appellant did not meet his burden, we affirm.

FACTS

Officer Petersen of the Nicollet County Sheriff's Office is assigned to the Minnesota River Valley Drug Task Force. In 2008, a confidential informant (CI) worked with the task force. Sometime prior to a controlled buy on March 19, the officer and the CI met appellant Jesus Yosmany Wilson Lombida at a business in Albert Lea. At this meeting, appellant sold two "8-balls" of cocaine to the CI. At a later date, but still prior to March 19, appellant sold cocaine directly to the officer in the parking lot of the hospital in Albert Lea.

On March 18, 2008, the officer called appellant regarding a purchase of some cocaine. During the phone conversation, the officer asked appellant about purchasing "four 8-balls" of cocaine. The next day the officer called appellant to arrange a meeting. Appellant instructed the officer to go to a park located in Albert Lea. The officer was equipped with an electronic listening device and was provided money for the purchase.

At the park, appellant and a passenger entered the officer's vehicle. Appellant instructed the officer to drive to a nearby residence. The officer waited in the car while the appellant and appellant's passenger exited the vehicle and entered the residence.

Appellant returned to the vehicle without the passenger and directed the officer to drive to another nearby residence. Appellant sold the officer approximately one ounce of cocaine in a plastic bag. The officer paid appellant $800 and both agreed that the officer would pay an additional $400 the following week. Appellant retrieved the cocaine from a red thermos he was carrying. The officer testified that approximately four to six additional ounces of cocaine remained in the thermos.

On March 24, 2008, the officer again contacted appellant to arrange a meeting to complete the sale. At the meeting the officer was equipped with an electronic listening device and gave appellant the additional $400. During the meeting, the officer told appellant that he was interested in future transactions, but in larger amounts. The officer asked how much five ounces of cocaine would cost. Appellant responded that each ounce would cost $1,000. The officer then asked about a greater quantity. Appellant responded he could sell a "kilo" for $23,000, but needed two days to arrange the sale. The officer told appellant he would call next week regarding the kilo.

During the bench trial, the prosecutor objected to testimony relating to an entrapment defense, arguing that appellant did not comply with Minn. R. Crim. P. 9.02 (6) because appellant did not inform the prosecutor in advance of any facts supporting the entrapment defense. After the parties discussed the issue with the district court, it was agreed that the testimony of the appellant would continue. The district court would then make a credibility determination, evaluate the entrapment defense, and decide whether appellant had carried his burden of proving inducement by the state by a fair preponderance of the evidence. Appellant testified that the CI owed him money for rent

and he would be paid if he delivered a package to someone. Appellant also testified that he delivered the package to the officer in order to collect the rent owed. Appellant denied knowing the contents of the plastic bag he gave to the officer in exchange for the $1,200.

After appellant's testimony the district court found that the appellant did not meet his burden to show by a fair preponderance of the evidence that he was entrapped. The district court reasoned that appellant's testimony was not credible and that there were no facts supporting the claim that appellant was pressured or badgered into making the sale to the officer.

Appellant was charged with a first-degree controlled-substance crime for the sale of cocaine. After a bench trial he was convicted of the charge. He was sentenced to 86 months in prison. He challenges his conviction.

D E C I S I O N

Appellant argues that the district court erred when it did not consider whether appellant had been entrapped. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

> To raise an entrapment defense, a defendant must establish by a fair preponderance of the evidence that the state induced the defendant to commit the offense by improper pressure, badgering, or persuasion. The evidence must establish that the state did something more than merely solicit the commission of a crime. If the defendant establishes inducement by the state, the burden shifts to the state to prove

> beyond a reasonable doubt that the defendant was predisposed to commit the offense.

State v. Bauer, 776 N.W.2d 462, 470 (Minn. App. 2009), *aff'd*, 792 N.W.2d 825 (Minn. 2011) (citations omitted). If the defense does not establish by a fair preponderance of the evidence that defendant was entrapped, the district court need not decide if the state proved beyond a reasonable doubt that the defendant was predisposed to commit the offense. *Id.* at 471.

Appellant first contends that the district court erred because appellant did establish by a fair preponderance of the evidence that he was entrapped. This court has held that challenges to the burden of proof for affirmative defense cases are,

> akin to a challenge to the sufficiency of the evidence [and] our review is limited to a careful review of the evidence to determine whether, when the evidence is viewed in the light most favorable to the conviction, the fact-finder, giving due regard to the presumption of innocence and the state's burden of proof, could reasonably find the defendant guilty. We recognize that the fact-finder is in the best position to evaluate the credibility of witnesses, and we assume that the state's witnesses were believed.

State v. Kramer, 668 N.W.2d 32, 37 (Minn. App. 2003) (citations omitted), *review denied* (Nov. 18, 2003). When the sufficiency of the evidence is appealed, this court's standard of review is the same for bench trials as it is for jury trials. *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998). The fair-preponderance-of-the-evidence standard requires a showing that the claim "must be established by a greater weight of the evidence. It must be of a greater or more convincing effect and it must . . . lead to [a] belie[f] that it is more

likely that the claim . . . is true than that it is not true." *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

Appellant testified that he delivered the bag to the officer so he could be paid for rent that the CI owed him. Appellant claimed he did not know the package contained cocaine. When asked why he thought he received $1,200 in exchange for a small package appellant stated, "I don't know. . . . I gave him the package and he gave me my money. I didn't know what was in it."

Appellant claimed that he did not knowingly sell illegal drugs to the officer nor did he have discussions about future drug deals. During the officer's first recorded conversation on March 18 they discussed a purchase of "four balls," meaning four 8-balls of cocaine. During the March 19 meeting appellant told the officer, "I sell one ounce for $1,200." When asked how much five ounces would cost appellant stated, "[y]ou can buy five for a thousand a piece," and that a kilo would cost "twenty-three." During appellant's testimony, he either did not remember these conversations or claimed to not know what the officer was referring to when he asked about "ounces," "balls," or "kilos." Appellant's willingness to meet with the officer a second time to complete the earlier transaction and discuss future sales demonstrates that appellant understood the circumstances and purpose of the meeting.

Moreover, appellant's testimony conflicted with the officer's testimony. The officer testified that appellant gave him the plastic bag in the car. During cross-examination, appellant testified that he brought the thermos in the car, took the package out of the thermos, and handed it to the officer. During the same cross-examination,

appellant later stated he gave the officer the package outside of the car and that he placed the thermos in a nearby garbage can outside.

Appellant claims that the evidence shows he was induced to commit the offense by improper pressure, badgering, or persuasion because he would receive the $1,200 the CI owed him if he delivered a package to the officer. However, the record establishes that appellant previously sold cocaine to the CI with the officer present, willingly met with the officer regarding a sale of cocaine, willingly met with the officer on a second occasion to complete the sale, and discussed future illegal drug transactions with the officer. Even if the officer solicited the sale of these drugs, "[t]he evidence must establish that the state did something more than merely solicit the commission of a crime." *Bauer*, 776 N.W.2d at 470. Because the fact-finder is in the best position to evaluate the credibility of witnesses and because it does not appear that appellant presented any evidence that leads to a belief that it is more likely that the claim of improper pressure, badgering, or persuasion, is true than that it is not true, the trial court did not err. Therefore, appellant failed to meet his burden, and the state was not required to prove beyond a reasonable doubt that appellant was predisposed to commit the crime.

Appellant also contends that the district court improperly assessed appellant's credibility. In order to properly decide if appellant met his burden of showing by a fair preponderance of the evidence that he was pressured, badgered, or persuaded, the district court had to weigh the credibility of the testimony. *See Kramer*, 668 N.W.2d at 37 (stating that the fact-finder is in the best position to evaluate the credibility of witnesses). The district court did not find appellant's testimony to be credible, stating, "[appellant]'s

testimony is not credible . . . in many ways," and agreed with the state's characterization of the evidence.

Lastly, appellant argues that the district court prematurely weighed the merits of the case and contends the district court made a determination of guilt when it ruled appellant did not establish by a fair preponderance of the evidence that the state induced the defendant to commit the offense by improper pressure, badgering, or persuasion. A criminal defendant has the right to have the entrapment defense decided by a jury. *State v. Ford*, 276 N.W.2d 178, 182-83 (Minn. 1979). However, in the alternative, a defendant may choose to have the defense "decided by the court in any case in which the defendant elects to waive his right to have a jury decide the issue." *Id.* at 183 (citing *State v. Grilli*, 304 Minn. 80, 95, 230 N.W.2d 445, 455 (1975)).

Appellant waived his right to a jury trial. Because it was a bench trial, the district court makes all credibility determinations and determines the guilt or innocence of the defendant. *See Hough*, 585 N.W.2d at 396 (stating that during a bench trial, the fact-finder evaluates credibility); *see also* Minn. R. Crim. P. 26.01 subd. 2 (in cases decided without a jury, the court must make a general finding of guilty or not guilty).

The record shows that the district court made two separate rulings as to the entrapment issue, first stating, "I find that . . . [appellant] has not met the burden by a fair preponderance of the evidence that there's been entrapment." The district court went on to say, "there is no showing of badgering or pressure or something in the nature of badgering or pressure or persuasion on the part of the [appellant] to be involved in this transaction . . . [i]t just isn't there. So that's my finding." After this finding both parties

agreed it was proper to proceed to final statements. Later, after closing arguments, the district court made its second ruling and found that the state proved beyond a reasonable doubt that appellant was guilty. The district court then issued its verdict after hearing all arguments. There was no error.

Affirmed.