

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20040702-CA
v.)	
)	
Howard Raymond Rice,)	F I L E D
)	(March 9, 2006)
)	
Defendant and Appellant.)	2006 UT App 93

Fifth District, Cedar City Department, 031500329
The Honorable J. Philip Eves

Attorneys: Randall C. Allen, Cedar City, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake
City, for Appellee

Before Judges Billings, McHugh, and Thorne.

McHUGH, Judge:

Howard Raymond Rice appeals his convictions by a jury of possession of a clandestine drug laboratory, a first degree felony, in violation of Utah Code sections 58-37d-4 and 58-37d-5(1)(d)-(f), see Utah Code Ann. §§ 58-37d-4, 58-37d-5(1)(d)-(f) (2002), and unlawful possession of a controlled substance (methamphetamine), a third degree felony, in violation of Utah Code section 58-37-8,¹ see Utah Code Ann. § 58-37-8 (2002). He argues that the jury erred in rejecting his affirmative defense of entrapment.² We affirm.

1. Rice was charged with three violations--the two noted above and unlawful possession of a controlled substance precursor chemical (red phosphorous), a second degree felony, in violation of Utah Code section 58-37d-4(1)(a). See Utah Code Ann. § 58-37d-4(1)(a) (2002). The jury returned a guilty verdict on the latter charge as well. On Rice's motion, this count was merged with the first degree felony count of possession of a clandestine drug laboratory.

2. The State briefly challenges Rice's preservation of the
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Rice met an individual named Michael Patrick at the home of Patrick's neighbor. Rice approached Patrick and asked him if he would supply Rice with red phosphorous, a methamphetamine precursor. Patrick indicated he probably could do so.

Unbeknownst to Rice, Patrick had, for some time, been a confidential informant under the supervision of the Iron County Narcotics Task Force (Task Force). Following Rice's inquiry, Patrick contacted his Task Force controller. Arrangements were made to enable Patrick to supply Rice with a quantity of red phosphorous. A few days after the arrangements were made, Patrick contacted Rice, as directed by his controller. They agreed to meet on March 17, 2003, to transfer the red phosphorous to Rice. Rice was to produce methamphetamine and give Patrick a portion of it in exchange for providing the precursor.

At about 5:00 p.m. on March 17, 2003, Rice met with his Adult Probation and Parole (AP&P) supervisor. At this meeting, Rice offered to become a confidential informant in a drug-related transaction. A member of the Task Force was notified and immediately came to the AP&P supervisor's office. Rice did not provide enough information to the Task Force officer to enable that officer to determine if an informant relationship was feasible. The Task Force officer informed Rice that, based on the lack of definitive information, the officer was unable to employ Rice as a confidential informant.³ Minutes after this meeting ended, Rice called his AP&P supervisor and asked what he could do about the impending transaction. The AP&P supervisor told Rice he could do nothing without first contacting him or the Task Force officer.

A few hours later, Patrick met with Rice to make the transfer. Patrick drove Rice to the transfer location. By means of an electronic listening device, Task Force members monitored the conversation between Rice and Patrick, during which Rice told Patrick about his ability to produce methamphetamine. Rice

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entrapment defense. Our review of the record shows that the issue was raised at trial through evidence and arguments of the defense. The trial court also conducted an evidentiary hearing on the defense in accordance with Utah Code section 76-2-303(4). See Utah Code Ann. § 76-2-303(4) (2003). For these reasons, we conclude that the issue was adequately preserved for appeal.

3. The Task Force has a defined procedure for enrolling a person to work as a confidential informant, including a rather lengthy set of forms and disclosures. Rice did not receive or complete such an application.

referred to a number of precursors to methamphetamine, including ephedrine, red phosphorous, and iodine. Rice told Patrick he could produce a batch of methamphetamine in a single night.

Upon arriving at Patrick's home, Patrick transferred the red phosphorous to Rice.⁴ He then drove Rice back to their original meeting place. Rice drove to his residence, where he was arrested. Once Rice was arrested, his residence was searched. In Rice's home, Task Force officers found methamphetamine, precursors and postcursors of methamphetamine production, and a functional methamphetamine lab.

The sole issue on appeal is whether the jury erred in rejecting Rice's affirmative defense of entrapment. We view a jury verdict in the light most favorable to the verdict, setting it aside only when "the evidence[, so viewed,] is so inconclusive or so inherently improbable . . . that reasonable minds must have entertained a reasonable doubt." State v. Workman, 852 P.2d 981, 984 (Utah 1993). The Utah Supreme Court has repeatedly held that the jury--not the court--"serves as the exclusive judge of both the credibility of the witness and the weight to be given particular evidence." State v. Martin, 2002 UT 34, ¶34, 44 P.3d 805 (quotations and citations omitted).

The jury here found that the State had disproved Rice's affirmative defense of entrapment, which occurs

when a peace officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it.

Utah Code Ann. § 76-2-303(1) (2003). Entrapment is "inducement based on improper police conduct." State v. Torres, 2000 UT 100, ¶9, 16 P.3d 1242. We determine, by an objective test, whether police conduct "falls below standards, to which common feelings respond, for the proper use of governmental power." State v. Byrns, 911 P.2d 981, 988 (Utah Ct. App. 1995). However, the statute makes clear that "[c]onduct merely affording a person an opportunity to commit an offense does not constitute entrapment." Utah Code Ann. § 76-2-303(1). Where law

4. Earlier in the day, Task Force officers had placed a package containing three-quarters of a pound of red phosphorous in the garbage can at Patrick's home. This was kept under close surveillance until after the transfer.

enforcement knows or suspects "that a person is engaged in criminal activities, or is desiring to do so, it is not an entrapment to provide an opportunity for such person to carry out his criminal intentions.'" Torres, 2000 UT 100 at ¶14 (citation omitted). Furthermore, there is no entrapment if, without inducement by law enforcement, Rice demonstrated eagerness to procure an illegal precursor and produce methamphetamine. See Byrns, 911 P.2d at 988.

Rice argues that his crimes were a result of "inducement based on improper police conduct." Torres, 2000 UT 100 at ¶9. He urges us to find improper conduct in the fact that the Task Force did not inform Rice that the proposed transaction involved a planned sting against him. Rice would have this court hold that the Task Force had a duty, at the meeting in the AP&P agent's office, to disclose the ongoing covert investigation. No such duty exists in our case law or statutes.

Rice further argues that the State created a substantial risk that Rice would commit an offense that he was otherwise not ready to commit. Specifically, Rice asserts that "[t]he Task Force deceived [him], and allowed him to walk into a trap, even though [Rice] himself had approached the Task Force regarding acting as their agent with respect to that very trap." The fact that Rice offered to become a confidential informant has no bearing on the determination. Indeed, during cross-examination at trial, Rice acknowledged that he had not been authorized to act as a confidential informant. The issue is whether, viewed objectively, the Task Force acted improperly. Here, the Task Force officer informed Rice that he had not been hired to act as an informant in the transaction with Patrick.

Furthermore, we note that Rice initiated the contact with Patrick and proposed the illegal exchange. In Patrick's car, Rice discussed his use of iodine, red phosphorous, and ephedrine in methamphetamine production and bragged that he could produce a batch of methamphetamine in just one night. At the time of his arrest, Rice had a fully functional methamphetamine lab in his home, including "flares with striker caps, . . . glassware in the form of a separatory funnel, solvents, acids, bases, unknown liquids, heating elements, coffee filters, tubing with a white residue, a pH kit, pseudoephedrine tablets, an empty can of denatured alcohol, lye, and hydrochloric acid." This evidence strongly demonstrates eagerness to engage in methamphetamine production. See Byrns, 911 P.2d at 988.

A reasonable jury could find that Rice had ample information that he was not authorized to act as an informant. Likewise, a reasonable jury could find that Rice demonstrated eagerness to

engage in methamphetamine production without inducement from law enforcement.

Affirmed.

Carolyn B. McHugh, Judge

WE CONCUR:

Judith M. Billings, Judge

William A. Thorne Jr., Judge