COURT OF APPEALS DECISION DATED AND FILED

October 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0670-CR

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DON R. SIMPSON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman, and Lundsten, JJ.

¶1 PER CURIAM. Don Simpson, Jr., appeals from a judgment convicting him of two counts of delivering cocaine base within one thousand feet of a school as a repeater. He challenges three evidentiary decisions and the trial court's jury instructions. We affirm.

¶2 The State's complaint alleges that Simpson twice sold cocaine base to a police informant, Lorie Henkel, on November 3 and November 8, 1999. At trial, Henkel testified to the transactions, and on direct examination she admitted to four prior criminal convictions. On cross-examination, defense counsel elicited her testimony that two of the convictions involved theft by fraud. Counsel also elicited details of those offenses.

¶3 Simpson testified that he used illegal drugs but did not deliver them. When the prosecutor asked him on cross-examination if he had ever confessed to anything more than using drugs, he indicated that he had not. In rebuttal, and over Simpson's objection, a police officer testified that Simpson had confessed two years previously to delivering drugs on several occasions. The jury also heard the tape of a conversation that occurred on November 8, 1999, between Henkel and Simpson. Prior to trial, Simpson moved to exclude the tape because it was not timely delivered to his attorney, and the trial court denied the motion. At the close of evidence, Simpson requested an instruction on the defense of entrapment, which the trial court refused.

¶4 The jury found Simpson guilty on both charges. Simpson's appellate issues are: (1) whether the trial court properly admitted the tape recording of Henkel's and Simpson's conversation; (2) whether the trial court erred by limiting cross-examination on Henkel's four prior convictions to just her two fraud convictions; (3) whether the trial court erred by allowing a police officer to testify about Simpson's confession of prior drug dealing; and (4) whether the trial court erred by refusing to give the entrapment instruction Simpson requested.

¶5 The decision to admit or exclude evidence is discretionary and is reviewed under the erroneous exercise of discretion standard. *See* ***State v.***

Jenkins, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). Specific and timely objections are necessary to preserve challenges to rulings admitting evidence. WIS. STAT. § 901.03(1)(a) (1999-2000).[1] Error may not be predicated upon a ruling which admits or excludes evidence unless a party's substantial right is affected. *See* § 901.03(1).

¶6 Simpson has waived his challenge to the admission of the tape of the November 8 conversation. On appeal, he contends that admitting the tape was error because it was irrelevant and unfairly prejudicial to him. However, he objected in the trial court only because the State failed to timely provide the tape to defense counsel. Consequently, this issue is waived on appeal. Additionally, the tape was largely inaudible, and what little the jury could hear did not prejudice Simpson. Although he contends that it unfairly bolstered Henkel's credibility by confirming that the two in fact conversed on November 8, Simpson freely admitted as much in his own testimony.

¶7 Simpson also waived his challenge to the trial court's ruling that limited his cross-examination of Henkel regarding prior convictions to her two fraud convictions. Before trial, Simpson moved to include in evidence "the specific instances of dishonesty and false statement that led to the informant [Henkel] being convicted of Felony Theft by False Representation and Felony Issuance of Worthless Checks." The trial court granted precisely what Simpson requested. We will not review an alleged error invited by the appellant. ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992).

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶8 Simpson has also waived his challenge to the officer's testimony that Simpson confessed to prior drug deliveries. On appeal Simpson contends that the trial court should have excluded that testimony under WIS. STAT. § 906.08(2), which bars the use of extrinsic evidence of a witness's conduct in order to impeach the witness. Again, however, Simpson objected on different grounds in the trial court, arguing there that the testimony was inadmissible other acts evidence under WIS. STAT. § 904.04(2). Simpson cannot now pursue relief on grounds he did not raise in the trial court.

¶9 The trial court properly denied Simpson an instruction on the entrapment defense. Agents of the State may not entrap a defendant by forming a criminal design, and then inducing an otherwise innocent person to commit it so that the government may prosecute. ***State v. Schuman***, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999). Essentially, the test for entrapment asks whether the defendant would not have committed an offense but for the urging of the State's agent. ***Id.*** The trial court may deny an instruction on entrapment if no reasonable construction of the evidence, viewed in the light most favorable to the defendant, will support it. ***Id.***

¶10 Here, Simpson argues that the following evidence was sufficient to require an entrapment instruction: (1) that he showed he was not otherwise disposed to delivering illegal drugs; (2) that he considered Henkel a friend, knew she used drugs, and had lent her money; and (3) that she initiated the communications that led to the drug transactions, and told him on November 8 that she had been in a bad fight with her ex-husband. However, that evidence proves little more than the fact that he and Henkel had a relationship that he perceived as friendship. The fact that the State's agent cultivates a friendship with a drug seller does not constitute entrapment. ***State v. Bjerkaas***, 163 Wis. 2d 949, 956, 472

N.W.2d 615 (Ct. App. 1991). The evidence here showed Henkel did nothing more than provide Simpson the opportunity to deliver drugs to her. The evidence does not allow the inference that Simpson was an otherwise innocent person unfairly induced to commit that crime.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.