

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-108

DECEMBER TERM, 2003

	}	APPEALED FROM:
	}	
State of Vermont	}	
	}	
v.	}	District Court of Vermont, Unit No. 2,
	}	Rutland Circuit
Shawn Pratt	}	
	}	
	}	DOCKET NO 1746-12-00 Rdcr
	}	
	}	Trial Judge: Nancy Corsones

In the above-entitled cause, the Clerk will enter:

Defendant Shawn Pratt appeals from his convictions of two counts of felony sale of cocaine in violation of 18 V.S.A. ' 4231(b)(2) and one count of misdemeanor possession of marijuana in violation of 18 V.S.A. ' 4230(a)(1). He argues that the trial court erred in: (1) denying his motion for a judgment of acquittal; and (2) admitting hearsay evidence. We affirm.

The following evidence was presented at trial. In December 2000, a police detective assigned to the Southern Vermont Drug Task Force met with a confidential informant named Michael Ross. In exchange for consideration on pending charges, Ross agreed to assist undercover officers in making controlled drug buys. Pursuant to this agreement, Ross informed police that defendant had contacted him about selling crack cocaine. Ross told defendant that his A cousin,@ an undercover police officer, was interested in purchasing cocaine. A meeting was set up, and on December 14, 2000, defendant sold \$1000 worth of crack cocaine to the officer. Ross informed defendant that there were other people who wanted to buy cocaine from him, and defendant told Ross to call him. Another police officer monitored and recorded this transaction over an electronic wire transmitter.

Defendant contacted Ross approximately one week later to see if his cousin was interested in purchasing more crack. Ross set up another meeting with defendant, stating that his cousin wanted to purchase \$1000 worth of cocaine. The officer brought \$1500 to the meeting and was able to purchase \$1500 of cocaine. When the officer asked defendant if he could buy more cocaine later that evening, defendant replied affirmatively and told the officer to call him. This transaction was recorded using a wire transmitter. Police arrested defendant after he left Ross= s apartment. During processing, police found two bags of marijuana on defendant, \$1500 from the drug sale, and a set of digital scales. After being arrested and read his Miranda rights, defendant told police that he had been selling crack cocaine on behalf of another individual for about two weeks.

Defendant relied on an entrapment defense at trial. He testified that he was an A in the closet@ drug user and had been informed that Ross could supply him with cocaine. Defendant stated that Ross told him that his cousin was coming by his apartment and asked defendant to come over and be a Amule@ or Afall guy.@ Defendant asserted that his incentive for agreeing to do so was the opportunity to smoke more crack cocaine. He denied telling police that he had been selling crack cocaine.

At the close of the State= s case, defendant moved for a judgment of acquittal on the second cocaine charge and on the possession of marijuana charge. He argued that he had been entrapped by law enforcement agents because they could have arrested him after the first transaction. The court denied the motion after concluding that the State had met its burden of proof and defendant had failed to adduce sufficient evidence to prove that he was not predisposed to commit

the crimes and was in fact induced by the government to commit them. Defendant renewed his motion at the close of his case, which the court denied on the same basis, adding that A with respect to the entrapment issue, the inducement was to smoke more crack.@ The jury found defendant guilty on all three charges. Defendant then filed a post-trial motion for judgment of acquittal, arguing that the court should find that he had been entrapped as a matter of law. The court denied the motion in a written order. This appeal followed.

Defendant first argues that the court erred in denying his motion for a judgment of acquittal because there was sufficient evidence to support a finding of entrapment. He asserts that the trial court found that he had been induced into selling crack so that he could A smoke more crack,@ but it incorrectly considered his predisposition to commit the crime instead of focusing on the conduct of law enforcement agents. Defendant also maintains that his marijuana possession conviction must be reversed because it was the A fruit@ of unlawful police entrapment.

In his post-judgment motion for acquittal, defendant argued that the evidence A readily established@ that he did not offer to sell cocaine on his own initiative but instead had been solicited to sell cocaine by Ross. Defendant asserted that police knew that he was a heavy drug user and likely addicted to crack cocaine, and offered him A exceptional profits@ of \$1500 to commit a crime. Thus, defendant argued that police entrapped him by contacting him through their agent Ross and using large sums of money and the promise of additional customers to create a A certain risk@ that he would commit the charged offenses. The trial court rejected these arguments, concluding that the evidence presented at trial fairly and reasonably tended to show defendant= s guilt on all three charges beyond a reasonable doubt. The court found no evidence that could have fairly or reasonably supported an entrapment defense. As the court explained, defendant= s entrapment defense was undermined by the following evidence: (1) defendant= s admission to police officers that he had come to the area to sell crack cocaine; (2) his unprompted contact with Ross after the first controlled buy to see if Ross= s A cousin@ wanted to buy more cocaine; (3) the eyewitness testimony of an undercover officer that defendant had not been at all hesitant to engage in the sale of crack cocaine on either occasion; and (4) defendant= s possession of a set of digital scales. The court also noted that a great deal of the evidence presented at trial had been corroborated by surveillance tapes made of the two transactions, which supported trial testimony that defendant had sold the cocaine without hesitation. Based on this and other evidence, the court denied defendant= s motion.

When reviewing the trial court= s denial of a motion for a judgment of acquittal, we ask whether A the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt.@ State v. Delisle, 162 Vt. 293, 307 (1994) (brackets, internal quotation marks, and citation omitted).

Defendant has not established that the trial court erred in rejecting his motion for a judgment of acquittal based on his claim that he had been entrapped as a matter of law. To establish the affirmative defense of entrapment, defendant needed to prove by a preponderance of the evidence that for the purpose of obtaining evidence of the commission of an offense, law enforcement agents induced or encouraged him to sell crack cocaine by using methods of persuasion or inducement that created a substantial risk that he would commit the crime, even though he was not A ready to commit it.@ State v. Vanderlas, 145 Vt. 135, 137 (1984) (internal quotation marks and citation omitted). A The question of entrapment is ordinarily for the jury.@ State v. George, 157 Vt. 580, 584 (1991). The court must determine the existence of entrapment as a matter of law where there are no disputed facts. However, when an entrapment claim raises disputed issues of fact, or where there is a dispute over the inferences to be drawn from undisputed facts, the matter must be submitted to the jury. Id.

Defendant= s claim of entrapment raised disputed questions of fact, and it was properly decided by the jury, rather than the court. The record shows that defendant testified that he sold cocaine to the undercover officer so that he could use more crack cocaine with Ross. The undercover officer testified that defendant had initiated the cocaine sales and engaged in the sales without hesitation. There was conflicting testimony presented as to whether defendant admitted to selling crack cocaine to police officers after his arrest. These factual disputes were for the jury to resolve, and we find no error in the court= s denial of defendant= s motion for a judgment of acquittal.

Defendant next argues that the court erred as a matter of law by admitting hearsay evidence. Specifically, defendant challenges the court= s admission of statements made by Ross on two audiotape recordings of the drug sales. Defendant asserts that because Ross did not testify at trial, the admission of these hearsay statements violated his confrontation

rights. Defendant also argues that the court erred in allowing the undercover officer to explain the substance of the tape recordings to the jury.

These arguments are without merit. Contrary to defendant's assertion, Ross's statements were not hearsay. Hearsay is defined as "A statement, other than one made by the declarant while testifying at the trial . . . , offered in evidence to prove the truth of the matter asserted." V.R.E. 801(c). At trial, the undercover officer who purchased the drugs from defendant testified that Ross said "Is it okay if he [the undercover officer] sees what he's buying?" to which defendant replied, "yes." The officer also testified that Ross said that other people may be looking to purchase crack, to which defendant replied "just give me a call." The officer then testified that Ross said that his "cousin" would go through him to get in touch with defendant. The officer did not testify to the substance of Ross's statements during the second drug buy. The statements at issue here were not offered for the truth of the matter they asserted but were instead offered to provide context for defendant's statements. Defendant's statements would have been meaningless without Ross's statements. See State v. Bernier, 157 Vt. 265, 269 (1991) (rejecting argument that police officer's statements in interrogation transcript were inadmissible, explaining that they provided context for defendant's responses and were not offered for the truth of the matter asserted). The trial court did not err in admitting the officer's testimony.

We also reject defendant's contention that the trial court erred in allowing the undercover officer to explain the content of the audiotapes. The court asked the officer to clarify portions of the recording that were unclear due to poor sound quality. Defendant did not object to the officer's testimony at trial and his claim of error is therefore waived on appeal. Defendant does not argue that the court committed plain error in allowing the officer's testimony, nor do we find plain error upon review of the record. See State v. Pelican, 160 Vt. 536, 538 (1993) ("A plain error exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights") (internal quotation marks and citation omitted). Contrary to defendant's characterization, the officer was not telling the jury what they "should have heard" on the tapes. He was present when the tapes were recorded, and he was telling the jury what had transpired based on his personal knowledge. See State v. Loveless, 308 N.W.2d 842, 847 (Neb. 1981) ("A [O]ne who was present and who heard the conversation in question at the time the recording was made may testify for the purpose of clarifying inaudible or unintelligible portions of the tape."). As the finder of fact, the jury was free to credit or discount the officer's testimony. Defendant's claim of error is therefore without merit.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice