[Cite as *State v. Daniels*, 2010-Ohio-3745.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-976 (C.P.C. No. 08CR04-2816)
Darrin M. Daniels,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 12, 2010

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Darrin M. Daniels ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting him on three counts of drug trafficking and two major drug offender specifications. For the reasons that follow, we affirm that judgment.

{¶2} Appellant's convictions arise from drug trafficking charges involving two offers to sell and an actual sale using a confidential informant and various law

enforcement officers. Appellant was indicted on April 16, 2008 on three counts of trafficking in cocaine and one count of possession of cocaine. All four offenses were first degree felonies. The first and second counts of cocaine trafficking also included a major drug offender specification. On April 18, 2008, appellant entered pleas of not guilty. The case proceeded to trial on August 11, 2009.

{¶3} In its case-in-chief, the State of Ohio introduced the testimony of confidential informant Gary Michael Hall, Detective Austin Francescone, and Corporal David Barrick, as well as evidence of recorded phone calls between Hall and appellant and between appellant and Detective Francescone, working undercover. Those witnesses provided the following testimony.

{¶4} Hall contacted Detective Francescone in late January 2008 after learning he could be facing criminal charges for his actions arising from a mortgage investment business venture. Hall had previously worked with Detective Francescone in 2006 after being indicted on drug related charges. During that time period, Hall worked as a confidential informant facilitating drug transactions pursuant to an agreement. In exchange, Hall was able to negotiate a favorable plea bargain and sentence on his drug charges. Hall was looking for the same sort of protection this time as well, in the event that he was prosecuted for his business ventures. Consequently, when he spoke with Detective Francescone about his current predicament, he also mentioned appellant as one of his mortgage business associates.

{¶5} Detective Francescone had previously investigated a citizen complaint involving appellant, which he had been unable to substantiate, and asked Hall if he knew whether appellant was selling narcotics. Hall stated he and appellant had previously

discussed selling narcotics. Hall informed Detective Francescone that he and appellant had a conversation at the Brio restaurant after the New Year holiday, during which he and appellant discussed ways to make money following the demise of their previous business venture. Hall testified appellant suggested they could sell drugs and advised Hall he knew someone who could obtain cocaine. Hall advised appellant that his brother was a big-time dealer who could re-sell the drugs, and Hall and appellant could make a profit as the middlemen.

{¶6} In order to verify Hall's assertions, Detective Francescone had Hall contact appellant via phone while Hall was still at the sheriff's office so that Detective Francescone could listen in on and record the conversation. Although the conversation was not properly recorded, Detective Francescone was able to hear bits and pieces of a conversation about drugs. Detective Francescone then re-activated Hall as a confidential informant and gave Hall a digital recorder, instructing him to record any drug related conversations he had with appellant. Hall did not enter into an agreement with Detective Francescone, but hoped his participation would somehow help him in the future if he were prosecuted.

{¶7} During the next couple of months, Hall recorded several phone conversations he had with appellant regarding arranging a drug transaction. Detective Francescone listened to those recorded calls in order to verify information and to make arrangements to have undercover officers and SWAT officers available for the transaction.

{¶8} Appellant eventually connected with David Jackson, a man with whom he had been friends in high school, to be his supplier. Between April 2 and 3, 2008, a series

of phone calls took place between Hall, appellant, and Jackson, during which they discussed the upcoming drug transaction, including the amount and price. The transaction was scheduled to take place on April 3, 2008, at the Wendy's located near the intersection of Parsons and Livingston Avenues. Hall, appellant, and Jackson were all present for the sale. However, despite waiting for several hours, the transaction did not occur because Jackson's supplier was not able to deliver the narcotics.

{¶9} In the days that followed the failed transaction, Detective Francescone, posing as Hall's drug-dealing brother, had a few phone conversations with appellant, during which they planned to attempt the transaction again on April 7, 2008. They discussed prices and amounts and arranged for the transaction to take place at the same Wendy's. Hall testified that he and appellant stood to split an $11,000 profit from the sale of the cocaine.

{¶10} On April 7, 2008, Corporal Barrick, working undercover as a friend of Hall and Hall's brother, arrived at Wendy's. Appellant and Jackson arrived together. The three met and discussed the transaction again. Jackson left briefly to pick up the drugs. During that time, Corporal Barrick and appellant had additional discussions about drugs, as well as other non-drug related topics. Appellant informed Corporal Barrick that Jackson had more cocaine available and that it would be easier to obtain large amounts in future transactions. Corporal Barrick testified that appellant did not appear to be nervous and seemed to know what he was doing.

{¶11} When Jackson returned, Corporal Barrick entered Jackson's vehicle while appellant remained 30 to 40 feet away, outside the vehicle. While in the vehicle, Jackson presented the cocaine to Corporal Barrick, who then learned there was only one kilo of

cocaine available for purchase, rather than the two kilos previously discussed. Corporal Barrick exited the vehicle to make a phone call and appellant and Jackson were arrested. The police recovered 980 grams of cocaine.

{¶12} Appellant testified on his own behalf. Appellant testified that he and Hall had previously participated in various real estate investment transactions together and made a lot of money. Appellant also stated he considered Hall to be a good friend. When Hall's company, Vanguard Mortgage, closed its doors, appellant fell on hard times. He became so financially strapped that his utilities had been turned off, he had not been paying the $5,000 to $6,000 per month rent on his house, and he was carrying $30,000 to $40,000 in debt on his investment properties.

{¶13} Appellant testified that Hall was the one who came up with the idea to sell cocaine to make money for both of them. Hall told appellant his brother was a major drug dealer who wanted to purchase large quantities of cocaine. Appellant stated he had no prior record and no previous exposure to selling drugs, and that Hall "schooled" him on drug transactions.

{¶14} Appellant testified Hall repeatedly badgered him for a period of several months about selling drugs and informed him that they both were going to need money to defend themselves as a result of their previous business dealings. Appellant stated the situation was so dire that Hall informed him he had even obtained a passport in case he needed to flee the country. Due to the badgering, as well as his own financial problems, his fear of being prosecuted for his previous business dealings, and his desire to help his good friend and former business associate, who was also allegedly in dire financial

straits, appellant finally agreed to work on setting up a transaction. However, appellant claimed he was simply a go-between who passed along messages.

{¶15} Appellant also testified Hall was the instigator and was motivated simply by his desire "to find someone to roll over on" in order to help himself stay out of prison for his mortgage and investment dealings. (Tr. 222.) He further testified the recorded calls played by the State of Ohio were biased and did not portray what really happened, since there were many conversations which were not recorded, and many other conversations where Hall was clearly the driving force behind the drug transaction.

{¶16} However, on cross-examination, appellant admitted that he had been willing to deal drugs in order to maintain the lifestyle to which he had recently become accustomed. Appellant also admitted he had a discussion with Hall about how easy it would be to sell six or seven kilos of cocaine.

{¶17} Following the end of testimony, counsel for appellant and counsel for the State of Ohio discussed jury instructions with the trial court. Counsel for appellant requested an instruction on the affirmative defense of entrapment, which the State of Ohio opposed. The court declined to give the instruction, finding appellant had failed to meet his burden of proof in demonstrating that the alleged "badgering" took place at the direction of law enforcement. Instead, the trial court determined the circumstances were such that appellant had been given the opportunity to commit a criminal offense and chose to act upon that opportunity.

{¶18} On August 14, 2009, the jury returned guilty verdicts for three counts of trafficking in cocaine and also found appellant guilty on two major drug offender specifications. At the sentencing hearing held on September 23, 2009, the trial court

sentenced appellant to ten years on each of the three counts and ran the counts concurrently to one another. The trial court declined to impose an additional penalty for the major drug offender specifications.

{¶19} Appellant filed a timely appeal on October 19, 2009. He asserts a single assignment of error for our review:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO PROPERLY INSTRUCT THE JURY AS TO THE AFFIRMATIVE DEFENSE OF ENTRAPMENT THEREBY DEPRIVING APPELLANT OF A FAIR TRIAL AS REQUIRED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION.

{¶20} A trial court must give all instructions which are "relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Joy*, 74 Ohio St.3d 178, 181, 1995-Ohio-259, citing *State v. Comen* (1990), 50 Ohio St.3d 206, paragraph two of the syllabus. If there is no evidence to support an issue, the trial court will not instruct the jury on that issue. *Murphy v. Carrollton Mfg. Co*. (1991), 61 Ohio St.3d 585, 591, citing *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287; *State v. Rahe*, 10th Dist. No. 06AP-997, 2007-Ohio-5864, ¶17.

{¶21} "When reviewing a trial court's jury instruction, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested instruction was an abuse of discretion under the facts and circumstances of the case." *State v. Gover*, 10th Dist. No. 05AP-1034, 2006-Ohio-4338, ¶22, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68; *State v. Dovangpraseuth*, 10th Dist. No. 05AP-88, 2006-Ohio-1533, ¶31. A decision regarding whether to give a jury instruction on an affirmative defense is reviewed for an abuse of discretion. *State v. Getsy* (1998), 84 Ohio St.3d 180,

198, 1998-Ohio-533; *State v. Rollins*, 5th Dist. No. 2007-CA-00162, 2008-Ohio-6116, ¶48. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶22} The trial court does not err in failing to instruct the jury on an affirmative defense where the evidence is insufficient to support the instruction. *State v. Melchior* (1978), 56 Ohio St.2d 15, 21-22; *State v. Roy*, 12th Dist. No. CA2009-06-168, 2010-Ohio-2540, ¶38. The standard for determining whether a defendant has successfully raised an affirmative defense under R.C. 2901.05 requires a determination of whether the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable jurors as to the existence of such an issue. *Melchior*, paragraph one of the syllabus.

{¶23} R.C. 2901.05(A) provides that when an affirmative defense is asserted, the burden of proof and the burden of going forward in putting on evidence of that affirmative defense, by a preponderance of the evidence, rests with the accused.

{¶24} Appellant requested a jury instruction for the defense of entrapment. Entrapment is an affirmative defense, and the accused is required to prove entrapment by a preponderance of the evidence. *Columbus v. Garrison*, 10th Dist. No. 07-AP-983, 2008-Ohio-3172, ¶18, citing *State v. Doran* (1983), 5 Ohio St.3d 187, 193-94. A defendant establishes the defense of entrapment "where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute." *Doran*, paragraph one of the syllabus; *State v. Armstead* (2000), 138 Ohio App.3d 866, 871. Entrapment occurs when there is conduct by government agents which

induces a defendant, who is not subjectively so predisposed, to commit a criminal act. *State v. Long* (Sep. 27, 1984), 10th Dist. No. 83AP-444, citing *State v. Hsie* (1973), 36 Ohio App.2d 99.

{¶25} "[E]ntrapment is not established when government officials 'merely afford opportunities or facilities for the commission of the offense' and it is shown that the accused was predisposed to commit the offense." *Doran* at 192, quoting *Sherman v. United States* (1985), 356 U.S. 369, 372, 78 S.Ct. 819, 821; *State v. Cates* (Nov. 21, 2000), 10th Dist. No. 00AP-73.

{¶26} In *Doran*, the Supreme Court of Ohio determined the defense of entrapment should be defined under a subjective test that focuses on the predisposition of the accused to commit the offense, rather than upon an objective test that focuses on the degree of inducement used by law enforcement. The *Doran* court went on to find the following factors to be relevant to the issue of predisposition: (1) the accused's previous involvement in criminal activity similar to the activity charged; (2) the accused's ready acquiescence to the inducement offered by law enforcement; (3) the accused's expert knowledge in the type of criminal activity with which he is charged; (4) the accused's ready access to contraband; and (5) the accused's willingness to get involved in criminal activity. Id. at 192.

{¶27} Furthermore, the State of Ohio does not have the burden to establish the defendant's predisposition to commit the offense, since entrapment is an affirmative defense. *State v. Pack*, 4th Dist. No. 09CA26, 2009-Ohio-6960, ¶10. Therefore, the defendant asserting an entrapment defense must present evidence supporting his lack of predisposition. Id., citing *Doran* at 193.

{¶28} "[W]here there exists credible evidence that one has the 'predisposition and criminal design' to commit the acts for which he claims entrapment and he was merely provided the opportunity to commit the act for which he was 'apt and willing' the defense of entrapment has not been established." *State v. Ellison*, 6th Dist. No. L-02-1292, 2003-Ohio-6748, ¶21, quoting *State v. Jones* (Mar. 17, 1995), 11th Dist. No. 94-L-060.

{¶29} In the instant case, appellant admits that he participated in the sale of narcotics, but contends that he was badgered into such activity. He also argues the transaction originated with the government because Hall, a confidential informant, is the one that came up with the idea to sell drugs to make money. Appellant submits Hall was a government agent who pressured appellant to find a supplier and suggested using his (Hall's) brother to buy and re-sell the drugs. Appellant further argues the trial court failed to properly apply the second component of the *Doran* test and instead used an objective approach by focusing on the culpability of the government and its agents, rather than on appellant's conduct.

{¶30} First, appellant contends Hall was a government agent and that the criminal design originated with him, and therefore he was entitled to an instruction on entrapment. We disagree.

{¶31} The testimony and evidence presented at trial establish that the plan to sell drugs was formulated prior to Hall making contact with Detective Francescone. Hall testified that he had a discussion with appellant at Brio about selling drugs some time in January, after the New Year's holiday, but prior to visiting Detective Francescone. Although appellant contends it was Hall, rather than appellant, who proposed the idea of selling drugs as a fast money-maker, appellant has not disputed the timing of that

discussion. In addition, Detective Francescone testified that when he met with Hall in January 2008, he overheard bits and pieces of a phone conversation between Hall and appellant and that there were references to drugs during the conversation. Detective Francescone also testified that when he questioned Hall during their initial conversation in January 2008, Hall reported that he and appellant had had a previous conversation about appellant's attempt to sell drugs. (Tr. 119.)

{¶32} Based upon this, the trial court did not abuse its discretion in determining there was insufficient evidence to establish that the events took place at the direction of law enforcement. We find the "criminal design" did not originate with the government. The evidence did not establish that Hall was an agent for the government at the time the plan was devised and therefore, the facts did not warrant submitting an entrapment instruction to the jury. See *State v. Klapka*, 11th Dist. No. 2003-L-044, 2004-Ohio-2921 (where former informant was not an informant at the time she initiated contact with the sheriff's office, and where she contacted the sheriff's office and informed them of the plan after she was approached about the plan, she was not an agent for the government; entrapment instruction was not required where there was insufficient evidence to establish she was an agent at the time the plan was devised).

{¶33} Additionally, an agency relationship exists where a principal has the right to control the actions of its agent and where the agent's actions are committed in furtherance of the principal's objectives. *Garrison* at ¶20, citing *Hanson v. Kynast* (1983), 24 Ohio St.3d 171, 173. Here, Hall had not entered into any agreement with law enforcement and the information he initially provided about appellant was incidental to his inquiry regarding his own problems with his investment business ventures. After this

initial conversation with Detective Francescone, Hall was "reactivated" as an informant and given a digital recorder to record any conversations with appellant about narcotics and criminal activity, but he was given no specific instructions beyond that. There is no evidence that he was acting under the direction or control of law enforcement or that Detective Francescone urged, directed, or requested Hall to induce appellant to traffic in cocaine. Furthermore, there is no evidence to demonstrate that Hall's alleged "badgering" of appellant occurred under the direction or instruction of law enforcement. See generally, *Garrison*.

{¶34} However, assuming, for the sake of argument, that Hall was a government agent, we shall also address the issue of appellant's predisposition. In doing so, we find the trial court did not abuse its discretion in declining to give a jury instruction on the affirmative defense of entrapment, as appellant failed to meet his burden in demonstrating a lack of predisposition and there is evidence to show appellant was predisposed to commit the crime.

{¶35} In analyzing the *Doran* predisposition factors, we first acknowledge that appellant had no prior record of criminal activity and no substantiated involvement in criminal activity similar to the activity with which he was charged.

{¶36} However, based upon the recorded calls and the testimony of the State's witnesses, there is evidence to demonstrate appellant was a willing participant. Although appellant claims he initially resisted Hall's badgering to sell drugs and only finally acquiesced after several months, his own testimony and the recordings of several phone calls support the idea that he made several attempts over a period of time to obtain a drug supplier and made connections with a few different people before eventually

connecting with Jackson. On cross-examination, appellant indicated he contacted Jackson in mid-March and that he initiated that contact after earlier efforts with other sources fizzled.

{¶37} Additionally, appellant was present at the first attempted sale and continued to participate in the efforts to complete a successful transaction and even initiated phone calls to the undercover officers. Furthermore, Hall testified that he did not "badger" appellant into arranging the transaction and nothing in the recorded calls supports appellant's assertions that he was an unwilling participant. Appellant himself testified that, given his financial problems, he was willing to sell drugs, rather than sell his expensive cars for a price below their actual value, in order to maintain his lifestyle.

{¶38} Although appellant may not have had previous experience in the drug trafficking industry, appellant used code words commonly employed in narcotics transactions as well as other jargon, which indicated a familiarity with the trafficking industry. Appellant was able to discuss prices and amounts without difficulty. Corporal Barrick, an experienced undercover narcotics officer, testified appellant did not appear nervous during their dealings and appeared to know what he was doing. In addition, even though appellant had no prior record of drug trafficking and denied ever selling drugs, by his own admission, he knew several people such as Jackson, Derek Ridgeway, and some individuals involved in his restaurant business, who were involved in the sale of narcotics and whom he contacted to participate in the transaction.

{¶39} Appellant asserts that he did not have ready access to the contraband, given that he had to rely upon Jackson to obtain it and was initially unable to produce it for the initial transaction on April 3, 2008. However, given the way the cocaine trafficking

industry works, it is expected that a "middleman" like appellant would have to depend upon another individual to supply the drugs. Moreover, while he was unable to follow through on the transaction on April 3, within just a few days, he was able to produce nearly one kilo of cocaine, a very significant amount.

{¶40} Finally, appellant denied that he was willing to involve himself in criminal activity and asserted that he steadfastly refused to participate in the plan for several months. Yet, the recorded phone calls and his interactions with various undercover officers indicate that he was "on board" and quite willing to participate. In fact, appellant's own testimony demonstrates his willingness to participate. On cross-examination, the prosecution asked appellant why he had not sold his BMW and Cadillac Escalade, both of which he owned free and clear, if he was really in financial straits. The following exchange then took place:

> A. Actually, I'm not going to have anyone give me a slap-in-the-face deal for what the cars are. It's the difference between someone saying, "Okay, your car is worth $50,000, but I'll give [I] you $10,000 because you're in financial straits." You wait until you get a better deal.
>
> Q. You're working to live, you're trying to scrape by. You were willing to deal drugs in order to maintain that good lifestyle?
>
> A. I was, but that doesn't make me a fool. That just makes me - -

(Tr. 276-277.)

{¶41} Appellant was clearly concerned with his financial situation and therefore was concerned about making fast cash. The evidence shows appellant was expecting to profit from the transaction by splitting $11,000 with Hall and was willing to get involved in the transaction in order to profit from it.

{¶42} Despite appellant's assertion to the contrary, the expertise or experience of Detective Francescone and Hall are not relevant here. "[A] person is not entrapped when an officer presents a defendant with the opportunity to commit an offense for the purpose of detecting a crime. Craft and pretense are available to officers of the law, and their agents, for such purposes." *State v. McDonald* (1972), 32 Ohio App.2d 231, 235, citing *Sorrells v. United States* (1932), 287 U.S. 435, 53 S.Ct. 210.

{¶43} The evidence was insufficient to support an instruction on the affirmative defense of entrapment because appellant failed to introduce sufficient evidence to raise a question in the minds of reasonable jurors as to the existence of a lack of predisposition to commit the crimes at issue. And, as previously discussed above, there was not sufficient evidence to demonstrate that the criminal design originated with the government. Therefore, an entrapment instruction was not warranted and we find no abuse of discretion in the trial court's decision to decline to instruct the jury on said affirmative defense. Accordingly, we overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.

_____