STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0893

In the Matter of the Welfare of:
E. E. B., Child.

Filed May 19, 2009
Affirmed
Lansing, Judge

Olmsted County District Court
File No. 55-JV-07-7007

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant E. E. B.)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Mark A. Ostrem, Olmsted County Attorney, David F. McLeod, Assistant County Attorney, Government Center, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent state)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Schellhas, Judge.

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

LANSING, Judge

In an appeal from a determination of guilt in a juvenile proceeding alleging second-degree, controlled-substance crime, EEB argues that the district court should have

dismissed the petition because a government informant induced the controlled-substance crime, which she was not predisposed to commit. Alternatively, EEB argues that the government's use of this informant who had prior contacts with her family was so outrageous that it constituted a violation of due process. Because the state met its burden to counter the entrapment claim through proof of predisposition and because law enforcement's conduct was not sufficiently outrageous to violate EEB's due process rights, we affirm the determination.

F A C T S

The state charged EEB in a delinquency petition with second-degree, controlled-substance crime for the sale of 3.9 grams of a substance containing cocaine to a confidential reliable informant (CRI) for the Rochester Police Department. The petition was later amended to include a charge of aiding and abetting the second-degree sale of a controlled substance.

Before trial, EEB moved for dismissal of the petition, alleging entrapment and outrageous police conduct. The entrapment and outrageous-police-conduct issues were submitted to the district court following testimony at the omnibus hearing, according to the procedure set out in *State v. Grilli*, 304 Minn. 80, 95-96, 230 N.W.2d 445, 455-56 (1975).

The facts established that the sale took place on August 8, 2006. In the summer of 2006, EEB was fifteen years old. She regularly used cocaine and, at least once before the August 8 sale, she was present during another transaction when the CRI purchased cocaine. EEB testified that she had known the CRI for about one year, after meeting him

through her sister. The CRI, who is a drug user, testified that he and EEB's sister had been "doing methamphetamine deals" at the hotel where they worked. On August 8 the CRI approached a Rochester police investigator about arranging a controlled buy with EEB. The investigator, who had used the CRI as a paid informant for seven years, agreed to the controlled buy and paid the CRI $120 in addition to providing him with the buy money.

The CRI called EEB twice that day and then went to her workplace. She did not have any cocaine but said that someone could bring some to the place where she worked. Instead, they decided to leave the workplace and EEB suggested or directed the CRI to a series of places where she thought a sale could occur. Ultimately, they arrived at an apartment complex. After EEB went up to the building, a man whom the CRI had never met emerged and sold him 3.9 grams of a substance later determined to contain cocaine.

In a detailed ten-page order, the district court determined that EEB failed to meet her burden of proving that she was induced to sell drugs and that the state had met its burden to prove predisposition because EEB "had engaged in identical illegal behavior" before the August 8 sale. EEB waived her trial rights, and the case was submitted for determination to the district court on stipulated facts. The district court found EEB guilty and entered a disposition order staying adjudication of delinquency for six months and placing EEB on probation. EEB appeals, renewing her arguments that entrapment and outrageous police conduct preclude the finding of guilt.

D E C I S I O N

I

To raise an entrapment defense, a defendant must show by a fair preponderance of the evidence that the government has instigated or manufactured the offense by inducing the commission of the crime. *State v. Vaughn*, 361 N.W.2d 54, 57 (Minn. 1985). If the defendant meets the burden of showing inducement, the prosecution is barred unless the state can show beyond a reasonable doubt that the defendant was predisposed to commit the crime. *Grilli*, 304 Minn. at 96, 230 N.W.2d at 456.

Predisposition evidence is grounded on the general rule "that it is not unlawful to provide a person with the opportunity to voluntarily and deliberately do what there was reason to believe he would do if afforded the opportunity." *Id.* at 88, 230 N.W.2d at 452 (quoting *State v. Poague*, 245 Minn. 438, 433, 72 N.W.2d 620, 624 (1955)). Predisposition is determined on the facts of each case, but the defense of entrapment is generally not proved if the state establishes beyond a reasonable doubt that the defendant engaged in prior similar criminal activity that did not result in conviction. *Id.* at 89, 230 N.W.2d at 452 (listing types of evidence that defeat entrapment claims). The state's evidence, however, "must prove the defendant was predisposed 'prior to first being approached by government agents.'" *State v. Johnson*, 511 N.W.2d 753, 755 (Minn. App. 1994) (quoting *Jacobson v. United States*, 503 U.S. 540, 549, 112 S. Ct. 1535, 1540 (1992)), *review denied* (Minn. Apr. 19, 1994).

The district court determined both that EEB failed to meet her burden of proving that she was induced to sell drugs and that the state had met its burden to prove

predisposition because EEB "had engaged in identical illegal behavior" before the August 8 sale. In making those determinations, the district court relied on the testimony at the omnibus hearing. When entrapment is tried to the court instead of a jury, the court sits as fact-finder on the questions of inducement and predisposition. *State v. Ford*, 276 N.W.2d 178, 182-83 (Minn. 1979). On appeal, we review the district court's findings of fact for clear error. *State v. Gomez*, 721 N.W.2d 871, 883 (Minn. 2006).

Although it was not necessary for the court to consider predisposition when there has been no government inducement to commit the crime, the district court carefully analyzed the facts and the law relating to predisposition. Because predisposition is the primary focus of entrapment and is dispositive of the entrapment issue, we address predisposition first. Two different sets of facts were referred to in the district court's order finding that EEB "had engaged in identical illegal behavior" before the August 8 sale. Those facts relate to EEB's prior drug use and to a previous sale of drugs to the CRI.

EEB's prior drug use was undisputed. But prior drug use, even though criminal, is insufficient on its own to establish a predisposition to sell. When proving sale crimes, drug use alone does not establish *intent* to sell, which is an element. *See State v. White*, 332 N.W.2d 910, 912 (Minn. 1983) (noting evidence capable of establishing intent to sell could include packaging for sale or possession of large quantity). The predisposition question is similar to that of intent. *See Grilli*, 304 Minn. at 89, 230 N.W.2d at 452 (noting that focus of entrapment is "element of defendant's predisposition: *whether it was his own original intent to commit the crime charged*" (emphasis added)). Thus, drug use

alone will not establish *predisposition* to sell, which is an element the state must prove to rebut entrapment.

The evidence of EEB's prior involvement in uncharged cocaine sales, however, is sufficient to establish predisposition. The CRI described buying cocaine from EEB for his personal use, which occurred a week or so before August 8. And EEB admitted that she was willingly present during that sale and that she passed the drugs and money between the CRI and another person. The CRI testified that EEB had sold drugs to him at other times as well, and he said that she told him she could supply him with as much cocaine as he wanted. EEB sought to minimize her role in the pre-August-8 transaction and denied ever selling drugs to anyone else. She insisted that she only sold to the CRI because she was afraid of him and because he kept pushing her to sell him drugs.

EEB's testimony, if credited, could raise a reasonable doubt on the issue of predisposition. On appeal, however, we do not resolve conflicting evidence; we must assume that the fact-finder "believed the state's witnesses and disbelieved any contrary evidence." *State v. McKenzie*, 511 N.W.2d 14, 17 (Minn. 1994). We also defer to the fact-finder's determinations on credibility. *DeMars v. State*, 352 N.W.2d 13, 16 (Minn. 1984). Assuming, as we must, that the district court credited the CRI, his testimony about the pre-August-8 transaction alone is sufficient to show a predisposition to sell. The district court stated the prosecutor's burden to establish predisposition beyond a reasonable doubt and found that the burden was met.

We also conclude that the district court's determination on the predisposition issue is not defeated by the rule established in *Johnson*, which provides that the state had to

show that EEB was predisposed "*prior* to first being approached by government agents." 511 N.W.2d at 755. Under this rule, EEB's acquiescence in prior sales to the CRI would not establish predisposition if the CRI was acting on behalf of the government during all of those sales. Although EEB established some general outlines of the CRI's working relationship with the Rochester Police Department, the record nonetheless allows a conclusion that the CRI was not acting as an agent of the Rochester Police Department during the pre-August-8 interactions with EEB, but was acting in the capacity of a cocaine user making purchases on his own behalf. The district court made the decision that the CRI was acting independently based on the law and the facts, and the record sufficiently supports that conclusion.

II

Alternatively, EEB argues that it is outrageous for police to use CRIs who commit independent drug crimes while not under police supervision, particularly when the controlled sale involves a fifteen-year-old girl who has a past family history with the CRI and might be frightened or pressured by that CRI.

The issue of outrageous police behavior implicates the due process defense, which raises a question of law that we review de novo. *Ford*, 276 N.W.2d at 182; *see also State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005) (noting that constitutional question about whether defendant was deprived of fair trial received de novo review). The due process defense focuses on police conduct. *State v. James*, 484 N.W.2d 799, 801 (Minn. App. 1992), *review denied* (Minn. June 30, 1992). To qualify as a bar to prosecution on due process grounds, the police conduct must be sufficiently egregious to "shock[] the

conscience" and evince a lack of respect for the "decencies of civilized conduct." *Rochin v. California*, 342 U.S. 165 172-73, 72 S. Ct. 205, 209-10 (1952).

Minnesota appellate courts, relying on decisions from the New York state courts, have considered the due process defense by applying a four-factor test. *See James*, 484 N.W.2d at 802 (citing *People v. Isaacson*, 378 N.E.2d 78, 83 (N.Y. 1978)). As relevant to EEB's claim, the considerations include whether: (1) "police manufactured the crime . . . or merely involved themselves in ongoing criminal activity," (2) the police behavior is "repugnant to a sense of justice," (3) police overcame defendant's reluctance by persistent solicitation, and (4) the police motive was merely to obtain a conviction, and not "to prevent further crime or protect the populace." *Id.*

Consistent with the reverse-sting transaction upheld in *James*, none of the factors weigh heavily toward a showing of outrageousness. First, the August 8 transaction shows that EEB was peripherally connected to a sizable network of ongoing cocaine suppliers in and around Rochester. The evidence does not establish that the police manufactured a sale that would not have otherwise happened.

Second, cases applying *James* have repeatedly held that catching drug dealers in street-level transactions carried out by CRIs is not repugnant to justice. *See, e.g.*, *State v. Johnson*¸ No. A04-1970, 2005 WL 3159715, at *3 (Minn. App. Nov. 29, 2005) (stating that "[u]se of a confidential informant does not violate the second [*James*] factor"), *review denied* (Minn. Jan 17, 2006). Appellate cases have not directly addressed the use of CRIs in the apprehension of juveniles, but the same reasoning would apply. Although it is troubling to observe the use of a CRI to target young people who, because of their

age, may be more receptive to requests to set up sales, these same young people are also a more vulnerable market for the use and sale of drugs and tactical police enforcement may be all the more necessary.

Third, the district court did not credit, as a matter of fact, EEB's claims that she relented to the CRI's sale demand because she felt threatened by the CRI. The district court found that EEB was predisposed to sell, and the record supports that determination.

Finally, the fact that the police paid the CRI does not necessarily mean that he or the police had an improper motive. The CRI reported that EEB had access to and was willing to sell significant amounts of cocaine, and nothing in the record suggests that the police had a motive other than to thwart a perceived drug dealer and to attempt ultimately to limit the illegal sales of drugs. For these reasons, we conclude that the police conduct in using the CRI was not so outrageous that EEB's due process rights were violated.

Affirmed.