IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL DAVID LAUB, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52847

FILED

SEP 23 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge. The district court sentenced appellant Daniel David Laub, Sr., to serve a prison term of 24 to 60 months.

Laub's sole contention on appeal is that the district court erred in refusing to give his proposed jury instruction on entrapment. Specifically, Laub argues that because evidence adduced at trial showed that a confidential informant working with the police encouraged him to commit the crime and actually instructed him on how it should be executed, the district court erred by finding that no evidence supported the requested instruction. We conclude that Laub's contention lacks merit.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id. (internal quotation marks and citation omitted). A defendant is entitled to a jury instruction on his theory of

defense, provided there is some evidence to support it, "no matter how weak or incredible" that evidence may appear to be." Rosas v. State, 122 Nev. 1258, 1262, 147 P.3d 1101, 1104 (2006). The district court's refusal to instruct the jury on entrapment in instances where there is some evidence to support such a defense is error warranting reversal. See Froggatt v. State, 86 Nev. 267, 271, 467 P.2d 1011, 1013 (1970). However, the district court may properly refuse the defendant's proffered instruction on his defense theory if there is no evidence supporting it. Williams v. State, 91 Nev. 533, 535, 539 P.2d 461, 462 (1975).

Entrapment occurs when the State presents an opportunity to commit a crime to a person who is not predisposed to commit the crime. DePasquale v. State, 104 Nev. 338, 340, 757 P.2d 367, 368 (1988). Entrapment is an affirmative defense, and the defendant initially bears the burden to show governmental instigation. State v. Colosimo, 122 Nev. 950, 957, 142 P.3d 352, 357 (2006). Once the defendant puts forth evidence that the government induced him to commit the offense, the burden shifts to the State to prove that the defendant was predisposed to commit the crime. Id. at 957-58, 142 P.3d at 357. Five factors that may be considered in determining whether a defendant was predisposed are: "'(1) the character of the defendant; (2) who first suggested the criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant demonstrated reluctance; and (5) the nature of the government's inducement.'" Id. at 958, 142 P.3d at 357 (quoting Foster v. State, 116 Nev. 1088, 1093, 13 P.3d 61, 64 (2000)).

In this case, the uncontroverted evidence was that Laub planned and executed the crime without inducement by the State. Laub hatched a plan to steal money from Dotty's, a small neighborhood casino. As a former employee, Laub knew that upwards of $20,000 in cash was

kept in an unlocked safe behind the cashier's counter at Dotty's. Several weeks before the planned burglary, Laub approached some acquaintances to explain his plan and recruit assistance; he wanted to prevent customers from sitting in the row of slot machines with a clear view of the cashier's counter and he needed someone to create a diversion so he could slip behind the counter and exit with the money unobserved. On the day of the planned burglary, Laub's chief confederate reported the plan to a police officer and agreed to wear a wire as she and Laub made their final preparations. Laub's confederate supplied the getaway vehicle, the backpack Laub wore to hold the money and the coat that closed over it, and she cut eye-holes in the bandana Laub wore under his hat to use as a mask. And, on Laub's signal, she feigned a seizure some distance from the counter to divert attention elsewhere. Despite the confidential informant's significant contributions in the planning and execution, there was no evidence on which a jury could base a finding that the government presented the opportunity to commit the crime to Laub and that Laub was not predisposed to commit the crime. Therefore, we conclude that the district court did not abuse its discretion in refusing to give Laub's proposed jury instruction on entrapment, and we

ORDER the judgment of conviction AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Hon. Robert W. Lane, District Judge
Carl M. Joerger
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk