IN THE SUPREME COURT OF THE STATE OF NEVADA

CODY GRAF,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56003

FILED

MAR 17 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a controlled substance and trafficking in a controlled substance. Sixth Judicial District Court, Pershing County; Michael Montero, Judge.

Entrapment

Appellant Cody Graf contends that he was entrapped into committing the instant offenses by undercover law enforcement personnel. We disagree. A defendant bears the burden of proving the existence of the affirmative defense of entrapment by a preponderance of the evidence. See Foster v. State, 116 Nev. 1088, 1091-92, 13 P.3d 61, 63-64 (2000). An entrapment defense consists of two elements: the State presenting the opportunity to commit a crime and a defendant who is not predisposed to commit the act. Miller v. State, 121 Nev. 92, 95, 110 P.3d 53, 56 (2005). Here, the evidence adduced at trial proved that Graf was already in possession of cocaine and a level-two trafficking amount of psilocybin mushrooms when he met the undercover agent and indicated a willingness to trade and that Graf was clearly predisposed to commit criminal activity. See Foster 116 Nev. at 1093, 13 P.3d at 64. Therefore, we conclude that Graf was not entrapped and his contention lacks merit.

Free Speech

Graf contends that his right to free speech and a fair trial was violated because he was precluded from criticizing and informing the jury about "the mandatory nature of the punishment" imposed if he was convicted. See U.S. Const. amends. I, VI; Nev. Const. art. 1, § 9. Although Graf cites to numerous cases that address the Free Speech Clause, he has failed to articulate with any factual specificity how they apply to his case or how he was prejudiced. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present . . . cogent argument; issues not so presented need not be addressed by this court."). Further, Graf does not claim to have objected or raised the issue at any point in the proceedings below. Therefore, we conclude that Graf has failed to satisfy his burden and demonstrate that he was prejudiced in any way amounting to reversible plain error. See NRS 178.602; Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); see also Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991) ("It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."); Flanagan v. State, 112 Nev. 1409, 1417-18, 930 P.2d 691, 696-97 (1996) (admission of constitutionally protected First Amendment activity is erroneous when "[t]he evidence was irrelevant to the crimes charged").

Outrageous conduct defense

Graf contends that "outrageous governmental conduct"—the dress and behavior of the undercover officers—violated his right to due process. See United States v. Russell, 411 U.S. 423, 431-32 (1973). There is no indication in the record on appeal that Graf filed a motion to dismiss based on outrageous governmental conduct and he fails to state, let alone

demonstrate, how the allegedly provocative dress and behavior of the undercover officers contributed to him already being in possession of cocaine and a level-two trafficking amount of psilocybin mushrooms when they met. See United States v. Stenberg, 803 F.2d 422, 429 (9th Cir. 1986) ("the outrageous conduct defense is generally unavailable where the criminal enterprise was already in progress before the government became involved"). Therefore, we conclude that Graf's contention is without merit.

Abuse of discretion at sentencing

Graf contends that the district court abused its discretion by imposing a sentence for the trafficking count that shocks the conscience and amounts to cruel and unusual punishment. This court will not disturb a district court's sentencing determination absent an abuse of discretion. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Graf has not alleged that the district court relied solely on impalpable or highly suspect evidence or demonstrated that the relevant sentencing statute is unconstitutional. See Denson v. State, 112 Nev. 489, 492-93, 915 P.2d 284, 286-87 (1996); see also Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004). Graf's prison term of 24-60 months falls within the parameters provided by the relevant statute, NRS 453.3385(2), and the sentence is not "so unreasonably disproportionate to the offense as to shock the conscience," Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979); see also Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). Therefore, we conclude that the district court did not abuse its discretion at sentencing.

Prosecutorial misconduct

First, Graf contends that the prosecutor committed misconduct during closing arguments by disparaging defense tactics and

referring to his "attempt to put up a smoke screen." The district court overruled Graf's objection and we conclude that, considered in context, the prosecutor's comment was not improper. See Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 71 (2000) ("A prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" (quoting United States v. Young, 470 U.S. 1, 11 (1985))).

Second, Graf contends that "drug possession is not drug trafficking, but that notion was used to rebut the alleged predisposition of the defendant at closing argument" and amounts to prosecutorial misconduct. Graf did not object to the challenged argument and we conclude that he has failed to satisfy his burden and demonstrate reversible plain error. See NRS 178.602; Valdez, 124 Nev. at 1190, 196 P.3d at 477; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Cumulative error

Graf contends that cumulative error warrants a new trial. Because Graf has failed to demonstrate any error, we conclude that his contention lacks merit. See Pascua v. State, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006).

Having concluded that Graf's contentions lack merit, we ORDER the judgment of conviction AFFIRMED.

Saitta, J.

Saitta

Hardesty, J.

Hardesty

Parraguirre, J.

Parraguirre

cc: Hon. Michael Montero, District Judge
Pershing County Public Defender
Attorney General/Carson City
Pershing County District Attorney
Pershing County Clerk