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MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

GERMAN PITO AYALA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D16-3327

Opinion filed December 13, 2017.

Appeal from the Circuit Court for Lee County; Edward J. Volz, Jr., Senior Judge.

Howard L. Dimmig, II, Public Defender, and Ama N. Appiah, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Cerese Crawford Taylor, Assistant Attorney General, Tampa, for Appellee.

KHOUZAM, Judge.

German Pito Ayala appeals from his judgment and sentences for sale or delivery of a controlled substance and possession of heroin. Because the trial court erred in finding that Mr. Ayala was prohibited from raising the defense of entrapment, we reverse and remand for a new trial.

The State charged Mr. Ayala with sale or delivery of a controlled substance and possession of heroin. Mr. Ayala filed a written plea of not guilty and proceeded to trial. During opening statements, defense counsel asserted that Mr. Ayala was "entrapped" into providing drugs to a female police informant. The State did not object and thereafter presented its case against Mr. Ayala to the jury. The State's case relied upon a video recording of the drug transaction and the testimonies of the police informant, two law enforcement officers, and a crime laboratory analyst.

After the State rested, defense counsel called Mr. Ayala's girlfriend and Mr. Ayala himself to the stand. The girlfriend testified, in pertinent part, that she had been a friend of the informant for over ten years. She further testified that the informant had been "harassing" Mr. Ayala for heroin because the informant was "sick" and suffering from withdrawal. Corroborating his girlfriend's account, Mr. Ayala testified that the informant had called on "countless" occasions to acquire drugs. He further testified that he did not want to acquire drugs for the informant because the informant was a difficult person, she was "always calling" him, and he was concerned about getting her narcotics. The State then objected to Mr. Ayala's testimony, which prompted the trial court to hold a bench conference with both parties.

At side bar, the trial court asked defense counsel whether she had "file[d] any notice with the State that [Mr. Ayala] was using the defense of entrapment." When defense counsel stated that she did not know that filing such a notice was required, the trial court decided that it was going to "cut [Mr. Ayala's testimony] a little short." The trial court reasoned that because defense counsel failed to file the requisite notice, Mr.

Ayala was prohibited from arguing the defense of entrapment to the jury. The bench conference ended.

Despite the trial court's ruling, defense counsel continued attempting to elicit testimony from Mr. Ayala regarding entrapment. Defense counsel asked Mr. Ayala whether it was his "practice" to sell narcotics and whether it was his intent to sell narcotics to the informant. But on both occasions, the State objected and the trial court sustained those objections. The defense then rested.

At the charge conference and before closing arguments, defense counsel twice argued that Mr. Ayala was not required to provide any pretrial notice of his intent to rely upon the defense of entrapment. Relying primarily upon Weaver v. State, 370 So. 2d 1189 (Fla. 4th DCA 1979), defense counsel contended that the appropriate remedy for the lack of notice was to permit Mr. Ayala to present his entire entrapment defense and allow the State to introduce rebuttal evidence. But again, the trial court rejected defense counsel's argument and prevented any further argument on the issue stating, "No. I've ruled. Keep arguing. I've ruled." The jury was not instructed on entrapment and found Mr. Ayala guilty as charged. Mr. Ayala filed a motion for new trial, wherein he raised the same arguments once more. The trial court denied the motion, and this appeal followed.

"Normally under a plea of not guilty an accused may avail himself of any defense not required by law to be specifically pleaded, and all matters of justification and excuse." Ivory v. State, 173 So. 2d 759, 760 (Fla. 3d DCA 1965). The defense of "entrapment may be raised on a plea of not guilty." Id.; see also Koptyra v. State, 172 So. 2d 628, 632 (Fla. 2d DCA 1965) ("Within the scope of a defendant's plea of not

guilty he may interpose the defense of entrapment where he is charged with possession of narcotics."); Pope v. State, 458 So. 2d 327, 329 (Fla. 1st DCA 1984) (on rehearing) ("A plea of not guilty should not preclude the defense of voluntary intoxication anymore than it precludes a defense of entrapment." (citing Ivory, 173 So. 2d at 760)). In fact, "[t]here is no statute in Florida requiring that the defense of entrapment be specifically raised by the pleadings." Ivory, 173 So. 2d at 760 n.1; cf., e.g., Fla. R. Crim. P. 3.200, 3.201, 3.216 (providing that a criminal defendant must give the State notice of his or her intent to rely on certain defenses, including alibi, battered-spouse syndrome, and insanity, respectively).

In this case, the trial court erred in barring Mr. Ayala from raising the defense of entrapment. Based on the cases cited above, Mr. Ayala was under no obligation to give the State notice of his intent to rely specifically upon entrapment as a defense. Mr. Ayala's plea of not guilty was sufficient to notify the State of the possibility that he could raise the defense of entrapment.[1] And any concern regarding the seeming lack of notice could have been addressed by simply allowing the State an opportunity to rebut Mr. Ayala's entrapment defense. See Weaver, 370 So. 2d at 1191 (explaining that where the defense of entrapment is not raised until the charge conference, "the State may introduce rebuttal evidence of a defendant's predisposition to commit the crime"). Accordingly, we conclude that Mr. Ayala was entitled to raise the entrapment defense at trial.

[1]We note that the State did not argue in its answer brief that Mr. Ayala was required to give notice of his intent to raise the defense of entrapment.

We further conclude that the trial court's error was harmful because it deprived Mr. Ayala of his primary theory of defense. Regardless of the defense's likelihood of success, Mr. Ayala was entitled to raise entrapment as a defense and to introduce evidence in support of it. See Ivory, 173 So. 2d at 760; see also Mateo v. State, 932 So. 2d 376, 379 (Fla. 2d DCA 2006) (explaining that "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission" and that, therefore, "as a general proposition, any evidence that tends to support the defendant's theory of defense is admissible"); Morgan v. State, 112 So. 3d 122, 125 (Fla. 5th DCA 2013) ("[I]t is neither our role nor that of the trial court to weigh the sufficiency of that evidence or rule upon the likelihood of success of the entrapment defense."). Accordingly, because the trial court wrongly found as a matter of law that entrapment was not an available defense and that Mr. Ayala was precluded from introducing evidence regarding entrapment to the jury, Mr. Ayala's right to present his theory of defense was prejudiced. See, e.g., LeBron v. State, 127 So. 3d 597, 604 (Fla. 4th DCA 2012) (holding that trial court's error in refusing to allow defendant to present evidence on his one main theory of defense—entrapment—was not harmless); Flynn v. State, 351 So. 2d 377, 378 (Fla. 4th DCA 1977) (holding that a trial court's refusal to allow defendants' testimony as to conversations they had with informant in order to prove entrapment was reversible error because it "remove[d] the heart of their defense" and the conversations were for the purpose of proving defendants' state of mind).

And though the State contends that any error was ultimately harmless because Mr. Ayala failed to introduce or proffer evidence to sufficiently demonstrate

entrapment,[2] this argument misses the mark. The trial court repeatedly rejected and "cut short" Mr. Ayala's efforts to introduce evidence of entrapment. Indeed, when defense counsel attempted to argue that he needed to be able to elicit testimony from Mr. Ayala regarding his lack of predisposition to commit the crimes charged, the trial court shut down any further arguments. It was therefore unnecessary for Mr. Ayala to make such a proffer. See Reaves v. State, 531 So. 2d 401, 403 (Fla. 5th DCA 1988) ("[A] proffer is unnecessary where the offer would be a useless ceremony, where the evidence is rejected as a class, or where the court indicates the proffer would be unavailing." (citing Seeba v. Bowden, 86 So. 2d 432, 434 (Fla. 1956), Wright v. Schulte, 441 So. 2d 660, 663 (Fla. 2d DCA 1983)); see also Hammett v. State, 908 So. 2d 595, 597 (Fla. 2d DCA 2005) (citing Reaves with approval).

For the reasons set forth above, we reverse and remand for a new trial.[3]

Reversed and remanded.

VILLANTI and SLEET, JJ., Concur.

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[2]To establish entrapment, the defendant must show (1) "that a government agent induced him to commit the charged offense" and (2) that he lacked "predisposition to commit the crimes." Rivera v. State, 180 So. 3d 1195, 1197 (Fla. 2d DCA 2015); see also § 777.201, Fla. Stat. (2014) (codifying the defense of subjective entrapment).

[3]We express no opinion on whether the evidence was sufficient to warrant a jury instruction on entrapment. But we note that "[t]he threshold for the giving of an instruction on a legally permissible theory of defense is low." Morgan, 112 So. 3d at 124 (explaining that to warrant a jury instruction on entrapment, the evidence merely has to "suggest[] the possibility of entrapment" and that "[o]nce this threshold is met, regardless of how weak or improbable the evidence may be, the defense is entitled to the instruction" (citing Terwilliger v. State, 535 So. 2d 346, 347 (Fla. 1st DCA 1988))). We also note that the State makes various other arguments as to why the trial court's error was harmless, but we find these arguments to be unpersuasive.