

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2265**

State of Minnesota,
Respondent,

vs.

Juan de Dios Candelaria Lopez,
Appellant.

**Filed February 10, 2013
Affirmed
Peterson, Judge**

Kandiyohi County District Court
File No. 34-CR-11-881

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Jennifer Kurud Fischer, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and Ross, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of first-degree controlled-substance crime, appellant argues that the district court (1) abused its discretion in refusing to instruct the

jury on entrapment, and (2) denied his constitutional right to present a defense when it did not allow counsel to argue in closing that he was not guilty because he sold drugs only at the informant's insistence. We affirm.

FACTS

In October 2011, Willmar Police Officer Bridget Coit Johnson spoke to a confidential informant (CI), who had indicated an interest in cooperating with the local multi-county drug task force. The CI told Johnson that he knew that narcotics were being sold at a dance club in Willmar.

On Saturday, October 22, the CI went to the club and, in the men's restroom, asked if anyone had any cocaine or knew where he could get some. Appellant Juan de Dios Candelaria Lopez, who was a stranger to the CI, approached the CI and gave him a small amount of cocaine to try. Appellant asked the CI what he was looking for, and the CI said that he wanted to buy two or three eight-balls of cocaine for a bachelor party. Appellant said that he could get the CI an ounce of cocaine for \$1,000, and the two exchanged telephone numbers.

During the next five days, the CI called appellant up to ten times. They discussed the price and amount of cocaine and the location of the sale. When the CI was asked whether he had to be persistent or keep persuading appellant to make the sale or whether appellant was agreeable to making the sale, the CI testified that appellant seemed agreeable.

A controlled buy occurred on October 27. Officers outfitted the CI with a body wire and transmitter and gave him \$1,000 in cash. The CI drove a pick-up truck to the

parking lot where he and appellant had agreed to meet. Appellant came to the parking lot and got into the truck. The CI gave appellant the \$1,000, and appellant gave the CI 27.7 grams of cocaine. The CI testified that appellant said, “If you like this, . . . I got more where it comes from. Just let me know.”

Appellant was arrested on his way back to his vehicle. An officer searched appellant and found the buy money in one of his pockets. The CI turned over the cocaine to the officers.

Appellant testified on his own behalf at trial. He admitted that he used cocaine, that he had cocaine with him at the club on October 22 for his personal use, and that he gave his personal-use cocaine to the CI. Appellant denied ever selling illegal drugs. He admitted on cross-examination that he exchanged telephone numbers with the CI because the CI wanted appellant to buy two eight-balls of cocaine for the CI, but he claimed that he “was having fun, and [he] was just going, yeah, that’s fine.” Appellant admitted that he responded “yes” when the CI sent appellant a text message asking if they were going to do the deal. Appellant testified that he only sold the cocaine to the CI because of the CI’s phone calls to him. He also testified that the phone conversations were mainly about prices, and he admitted that he agreed on prices during the conversations, but he also claimed that he was “just say[ing], okay, that’s fine, because [he] was always working when [the CI] called.”

A jury found appellant guilty of first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 1(1) (2010) (sale of 10 grams or more of cocaine during a 90-day period). The district court denied appellant’s motions for a new

trial and a sentencing departure and sentenced him to an executed 86-month prison term. This appeal followed.

DECISION

I.

A defendant is entitled to an instruction on his theory of the case if there is sufficient evidence to support the theory. *State v. Yang*, 644 N.W.2d 808, 818 (Minn. 2002). We review the district court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). In conducting this review, we view the evidence in the light most favorable to the party requesting the instruction. *See State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005) (stating that, in determining whether lesser-included instruction is required, district court must view the evidence in the light most favorable to the party requesting instruction because this rule best serves the presumption of innocence while reserving to the jury its responsibility to assess evidence).

To raise an entrapment defense, a defendant must show "by a fair preponderance of the evidence . . . that the government induced the commission of the crime." *State v. Vaughn*, 361 N.W.2d 54, 57 (Minn. 1985). To establish inducement, "the evidence must show that the state did something more than merely solicit the commission of a crime." *State v. Olkon*, 299 N.W.2d 89, 107 (Minn. 1980) (affirming district court's dismissal of entrapment defense when "state merely provided defendant with the opportunity to commit the crime"). "[S]omething in the nature of persuasion, badgering, or pressure by the state must occur before the inducement element is satisfied." *Id.* Once a defendant

has raised the issue of entrapment by showing inducement, the burden shifts to the state to “prove beyond a reasonable doubt that the defendant was predisposed to commit the offense.” *Vaughn*, 361 N.W.2d at 57.

Appellant argues that the evidence that the CI offered to help the drug task force because the CI had been charged with criminal damage to property and that it was the CI’s idea to focus on clubs frequented by Hispanics is evidence of inducement. But this evidence does not show that appellant was targeted by the CI or the state. The CI testified that appellant was a stranger to him, and there is no evidence that the initial meeting between them was anything other than a random, chance encounter. The initial meeting occurred when the CI asked whether anyone in the men’s restroom at the club had any cocaine or knew where he could get some and appellant responded by giving the CI a small amount of cocaine, asking what the CI was looking for, and saying that he could get the CI cocaine. Appellant was not pressured, badgered, or persuaded during this meeting.

Appellant also argues that the CI’s repeated phone calls to him induced him to sell the cocaine. Although there is evidence that the CI called appellant up to ten times between the initial meeting and the final agreement on the sale, there is no evidence that the CI pressured, persuaded, or badgered appellant. The only evidence about the conversations indicates that they were about finalizing the sale terms of amount, price, and location. Appellant admitted that the conversations were mainly about price. He also admitted that he exchanged telephone numbers with the CI during the initial meeting because the CI wanted to buy two eight-balls of cocaine and that he responded “yes”

when the CI sent a text message the next day asking if they were going to go through with the deal. The evidence was not sufficient to establish that the government induced appellant to sell the cocaine; the government did nothing more than solicit the commission of a crime.

Because the evidence was not sufficient to prove inducement by a fair preponderance of the evidence, appellant was not entitled to an instruction on entrapment, and the district court did not abuse its discretion when it refused to give an entrapment instruction. And because the evidence was not sufficient to prove inducement, it is not necessary for us to consider whether there was evidence that appellant was predisposed to commit the offense.

II.

Appellant argues that the district court denied his constitutional right to present a complete defense when it ruled that defense counsel was not allowed to argue during closing argument that appellant was not guilty because he only sold the drugs at the CI's insistence. A criminal defendant has a constitutional due process right to present a complete defense. *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). But the district court "may limit the scope of a defendant's arguments to ensure that the defendant does not confuse the jury with misleading inferences." *Id.* at 589. This court reviews a district court's restriction of the scope of a defendant's argument for an abuse of discretion. *State v. Romine*, 757 N.W.2d 884, 892 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009). A district court abuses its discretion when it acts arbitrarily, capriciously, or contrary to law. *State v. Profit*, 591 N.W.2d 451, 464 n.3 (Minn. 1999).

After asserting that appellant made a stupid decision and did not commit a heinous crime, defense counsel argued:

DEFENSE COUNSEL: Why isn't he guilty? And the answer to that is, sometimes in the commission of crimes, the law allows excuses –

PROSECUTOR: Your Honor, I'm going to object.

THE COURT: Well, continue at this point.

DEFENSE COUNSEL: – for the commission of a crime. And we've gotten this far in this process of the trial because I thought he had such an excuse, my client had an –

PROSECUTOR: I'm going to object, your Honor.

DEFENSE COUNSEL: [Appellant] had such an excuse.

THE COURT: That's sustained. The jury should disregard the last statement.

DEFENSE COUNSEL: So in conclusion, I would ask that you take into consideration what I've said thus far and not judge [appellant] guilty of this crime. As jurors, you're entitled to do that.

Appellant argues that “[f]undamental to due process is the defendant’s right to explain his conduct to the jury, whether or not his motive constitutes a valid defense.” In the context of evidentiary rulings, the supreme court has stated that a criminal defendant has a fundamental due process right to explain his conduct to a jury. *See, e.g., State v. Jacobson*, 617 N.W.2d 610, 616 (Minn. 2005). We also recognize “that the jury in a criminal case has the power of lenity – that is, the power to bring in a verdict of not guilty despite the law and the facts.” *State v. Perkins*, 353 N.W.2d 557, 561 (Minn. 1984). But it does not follow that defense counsel can argue that the jury should find a defendant not guilty based on something other than a legally recognized defense.

The *Perkins* court rejected the argument that a criminal defendant has a constitutional right to an instruction informing the jury of its power of lenity and held that

the district court did not err in refusing to give such an instruction. *Id.* at 562. The court explained

that the power to acquit despite the law and the facts is not a right of juries but something which results from a number of things including the right of a criminal defendant to have a jury trial, the rule prohibiting postverdict inquiry into the thought processes of jurors, and the rules against appellate review of verdicts of acquittal.

Certain things follow logically from the fact that the jury necessarily has this power of lenity — e.g., the rule [that a defendant is not entitled to a new trial or dismissal based on logically inconsistent verdicts]. Other things do not follow logically from a recognition of this power. Thus, that a jury has the raw power to bring in a verdict of acquittal in the teeth of the law and the facts does not mean that the defendant has a right to have all lesser offenses submitted. A defendant has a right to have lesser offenses submitted only if they are included offenses and only if the evidence would rationally permit a verdict of guilty of the lesser offense and not guilty of the charged offense.

Id. at 561-62; *see also State v. Hooks*, 752 N.W.2d 79, 87 (Minn. App. 2008) (holding that “[t]he district court did not err by instructing the jury that it must find [defendant] guilty if the state proved all elements of the crime beyond a reasonable doubt”).

Applying the rationale of *Perkins* and *Hooks*, we conclude that the district court did not abuse its discretion by restricting the scope of appellant’s argument to avoid confusing the jury by suggesting that the CI’s solicitation of the sale was a defense even though the solicitation did not constitute inducement. Our conclusion is consistent with the jury’s responsibility to decide a case according to the law. *See* Minn. R. Gen. Pract. 802 (defining jury as a body sworn “to try and determine, by verdict, any question or issue of fact in a civil or criminal action or proceeding, according to law and the evidence

as given them in court”). It is also consistent with the principle that a defendant does not have the right to argue to the jury that it should exercise its power of lenity. *See Perkins*, 353 N.W.2d at 562 (citing with approval *United States v. Brown*, 548 F.2d 204, 210 (7th Cir. 1977) (holding that district court may bar a defense attorney from arguing jury lenity)).

To the extent that defense counsel intended to convey his personal opinion that appellant should be found not guilty because he had an excuse for selling the cocaine, the argument was improper. “It is unprofessional conduct for [defense counsel] to express a personal belief or opinion in his or her client’s innocence” *State v. Salitros*, 499 N.W.2d 815, 817-18 (Minn. 1993) (quoting I ABA Standards for Criminal Justice, The Defense Function 4–7.8(d) (2d ed.1979)).

Affirmed.