Entrapment

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A national, empirical study of defenses found that the defense of entrapment arose in just 0.08% of cases, usually "to little avail." Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. Penn. L. Rev. 1709, 1716 (2005). But every now and again, arguing entrapment is just the right move for a defendant. The court of appeals recently decided an entrapment case with interesting facts that makes a good occasion for a refresher.

Entrapment basics. A defendant is entitled to a jury instruction on entrapment where there is evidence of (1) inducement, i.e., that there were "acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime," and (2) origin of intent or lack of predisposition, i.e., that "the criminal design originated in the minds of the government officials, rather than with the . . . defendant. *State v. Luster*, 306 N.C. 566 (1982) (internal citations and quotation marks omitted). The defendant has the burden of proving entrapment to the satisfaction of the jury. *State v. Thompson*, 141 N.C. App. 698 (2001). If the evidence of entrapment is sufficiently strong, the defense may be established as a matter of law. *State v. Stanley*, 288 N.C. 19 (1975).

Facts of *Foster.* In State v. Foster,__ N.C. App. __, __ S.E.2d __, 2014 WL 3820713 (Aug. 5, 2014), three Charlotte officers "were working undercover at . . . a male strip club . . . investigating a complaint of sexually-oriented business and narcotics violations." The defendant was a dancer at the club. He and another performer gave the officers lap dances, and one of the officers flirted and joked with the defendant.

In the officer's version of events, the officer then asked the defendant if he had a "hookup" for cocaine. The defendant said that he did, and followed up that night with text messages to the officer asking the officer exactly what he wanted. According to the officer, he didn't respond to those texts, but texted the defendant a week later asking him to "hook him up." The defendant again agreed to do so, and the officer returned to the club to consummate the deal. The defendant's supplier arrived at the club and the defendant got money from the officer and bought cocaine for him. The defendant was arrested and charged with drug offenses.

The defendant's version of events, based on his trial testimony, was that he believed that the officer was "interested in him." The officer asked whether the defendant was single, said that he was "into" the defendant, and gave the defendant a hug at the end of the night. According to the defendant, he did not do drugs but agreed to ask around on the officer's behalf because he had a crush on him and wanted to impress him. He denied sending several of the text messages referenced by the officer, and testified that he felt "pushed . . . to get [the drugs] or else the interest would have been lost on his part in me."

Trial court's ruling. The trial judge declined to instruct the jury on entrapment, for two reasons. First, the judge ruled that the defendant had presented insufficient evidence of entrapment. Second, the judge found that the defendant had failed to give sufficiently detailed pretrial notice of his intent to rely on the defense, as required by G.S. 15A-905.

Sufficient evidence of entrapment. The court of appeals found that the evidence, viewed in the light most favorable to the defendant, was sufficient to require an instruction on entrapment. The officer "falsely led [the] defendant to believe that he was romantically interested in [the] defendant," then "initiated the conversation regarding drugs" and

pursued it again a week later. The court noted that there was no evidence that the "defendant had previously used drugs, engaged in drug dealing," or had any predisposition to do so until the officer approached him. It characterized the officer's conduct as "emotional manipulation" of the defendant. However, the court stopped short of finding entrapment as a matter of law.

Discovery sanction too severe. As to the discovery issue, it appears that the defendant notified the State of his intent to claim entrapment months before trial, but did so without providing details about the intended defense. The trial court found that the defendant had not complied with G.S. 15A-905, which requires the disclosure of "specific information as to the nature . . . of the defense," and as a sanction, declined to instruct the jury on entrapment. The court of appeals ruled that, assuming *arguendo* that the defendant's notice was inadequate, the sanction imposed by the trial judge was too severe: there was no evidence of bad faith by the defendant, the State did not press for additional information and was not greatly prejudiced by the defendant's conduct, and refusing to submit a defense is a "harsh sanction that implicates defendant's fundamental right to present a defense."

Based on the foregoing analysis, the court unanimously ordered a new trial for the defendant. He isn't home free, of course, but he has already gotten more mileage out of the entrapment defense than most defendants ever do.