THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-010

State of New Hampshire

v.

Katherine Mendola

Appeal Pursuant to Rule 7 from Judgment of the Rockingham County Superior Court

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BRIEF FOR THE DEFENDANT

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(15 Minutes Oral Argument)

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QUESTIONS PRESENTED

1. Whether the trial court erred in failing to give an entrapment instruction.

Issue preserved by Notice of Entrapment Defense, App. A1-2*, State's objections to an entrapment instruction and hearing on those objections, T 43-44; 607-90, and the trial court's rulings. T 44; 648-51; 679-81.

2. Whether the trial court erred in excluding evidence of physical abuse and threatening behavior against Mendola as irrelevant.

Issue preserved by State's objections to evidence, Mendola's requests to admit such evidence, hearings on these motions, and the trial court's rulings. T 607-700; 777-78; 1105-1113.

3. Whether the trial court erred in admitting, in the State's case-in-chief, evidence of Mendola's statements about wanting to kill two other people.

Issue preserved by Mendola's motion *in limine*, App. A3-5, hearing on the motion and the court's ruling. T 8-9.

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*Citations to the record are as follows:
"App." refers to the Appendix to this brief;
"NOA" refers to the Notice of Appeal filed in this case;
"T" refers to the consecutively - paginated transcripts of the eight day jury trial held from September 22 to October 1, 2008.

STATEMENT OF THE CASE

Katherine Mendola was charged with criminal solicitation to commit murder. T 10-11. The indictment alleged that on November 19, 2007, Mendola solicited an undercover officer to kill Wendy Branch. Id.; T 34. After an eight day jury trial in September and October 2008, Mendola was convicted. T 1177. The court (Nadeau, J.) sentenced Mendola to serve 10 to 20 years at the New Hampshire State Prison. NOA.

STATEMENT OF THE FACTS

In the fall of 2007, Daniel Cloutier called the New Hampshire Attorney General's Drug Task Force (DTF). T 197. Cloutier had been a confidential informant for the DTF in the past, providing information and assistance that led to the arrest of three drug dealers. T 199; 539-43. Cloutier met with Detective Bilodeau of the DTF in mid-October and informed him that Katherine Mendola wanted to hire someone to kill the wife of the person with whom she was having an affair. T 200. The DTF officers told Cloutier to tell Mendola that he may know someone who could help her and to "maintain" Mendola's "interest" in the plan. T 507.

Cloutier and Mendola had known each other for about five years. T 449. Cloutier helped arrange for Mendola to live with Cloutier's elderly grandfather and help around the house. T 450-52. When Cloutier's grandfather needed hospice care in the summer of 2007, Mendola moved out at the family's request. T 452; 455-56. She and Cloutier lived at the same campground, T 456-57, and then moved into a house together in New Ipswich. T 445; 458. Cloutier told the officers that Mendola was his "roommate," T 200; 217, but during trial he testified that they had a sporadic romantic relationship. T 450. He ultimately conceded that they continued to have a sexual relationship while they lived together. T 521; 539. Mendola testified that during

the five years that she knew Cloutier, he was her boyfriend. T 840.

Cloutier testified that Mendola constantly talked about her attorney, Bartram Branch. T 466. Mendola called Branch's office repeatedly and wrote him love letters. T 468-69. She believed that Branch would be with her but for his wife and she talked about how to break up Branch's marriage. T 472-43. When they lived at the campground, Mendola asked Cloutier if he knew any hitmen. T 481. Thomas Austin, another resident of the campground, testified that Mendola asked him to kill Branch's wife. T 1119-22.

Once they moved to New Ipswich, Cloutier testified that Mendola continued to ask for help in getting a hitman to kill Branch's wife. T 490. Cloutier at first did not take Mendola seriously, T 473, but he became more concerned when Mendola threatened him with a knife, T 486, and asked for help in getting a gun. T 487-88. Cloutier testified that he contacted the DTF because of these concerns. T 493. Cloutier also testified that Mendola made his life "a living hell" and that he had wanted nothing more to do with her. T 532-33.

Branch testified that he represented Mendola, starting in 2004. T 400. He resolved a personal injury case related to a car accident for her in 2005. T 401. He continued to represent Mendola periodically on minor motor vehicle matters up to

November 2007. T 407; 415; 436. At some point in 2005, Mendola embraced Branch and told him she was interested in having a personal relationship. T 403. Branch told Mendola that was not possible because he was married and he was her lawyer. Id. Branch was aware that, as a lawyer, he could get into trouble for having a romantic relationship with a client. T 438. Branch took steps to maintain a professional relationship with Mendola and to document any inappropriate contact. T 404-09. Mendola sent Branch letters in 2005 indicating her desire to have a relationship with him. T 411.

Branch had almost no contact with Mendola in 2006 and 2007. T 424. Starting in the summer of 2007, Mendola left several messages for Branch, indicating concern about her living situation. T 415. Mendola's cell phone had been used to call Branch's office 458 times in the approximately 80 days prior to Mendola's arrest. T 121.

After Cloutier's meeting with officers from the DTF, the investigation was re-assigned to the State Police Major Crimes Unit. T 50-53; 199-200. Cloutier met with Detective Huse on November 15, 2007. T 57; 214. Cloutier provided information about Mendola that got the police investigation into Mendola "rolling," T 143-44, and for the purpose of obtaining information that could be used against her. T 148. Cloutier told Huse that

Mendola would pay a hitman $1000 up front and that she wanted the killing to look like a hunting accident. T 217.

Cloutier gave Huse Mendola's cell phone number. T 230. Huse instructed Cloutier to tell Mendola that Cloutier had spoken with a hitman and that she should expect a call from that person. Id. Huse told Cloutier to tell Mendola that the caller would say they had a "mutual friend." T 509-10. Cloutier also cooperated by being the "go-between," through which Mendola could contact Huse. T 149. Cloutier told Mendola to bring $1000 to her meeting with the "hitman." T 155. Huse remained in contact with Cloutier during the next six days to "keep him in the loop" on the investigation into Mendola. T 231.

On November 16, 2007, Huse, posing as a hitman, called Mendola and asked her if she was still interested in his services. T 232-34. Mendola indicated that she was. T 234. Huse said that he would call Mendola back in a few days. Id.

Huse called Mendola again on November 19 and she confirmed that she was serious about the plan. T 234; 253. Huse and Mendola arranged to meet in Manchester. T 65-66; 254. Prior to the meeting, Huse's vehicle was equipped with an audio and video recorder. T 64. The video and audio recordings of the trip were played for the jury. T 257-58.

Mendola got into Huse's vehicle. T 70. She had brought directions to the Branches' house. T 261-61. Huse drove to the

Branch residence in Northwood and then returned to Manchester. T 71-73; 78-84. During the trip, Mendola expressed her seriousness about the plan, T 253-71, and discussed with Huse various details. For example, they discussed making the "hit" look like a hunting accident. T 350-51; 359-60. Mendola indicated that her plan was to take a flight somewhere else, so that she would be away when the "hit" took place. T 299-300; 302-04. Mendola gave Huse $1000. T 74; 351-52. She also spoke with Huse about two other people she wanted to have killed. T 758-60.

Mendola discussed with Huse Cloutier's involvement in the plan numerous times during the trip to and from Northwood. T 343. Mendola said that the directions to the Branches' house were printed from Cloutier's computer. T 346. Cloutier had testified that he did not allow Mendola to use his computer. T 554. Mendola said that Cloutier had suggested that she be out of town when the "hit" occurred. T 347-48. Cloutier also had alternate plans if Mendola was not out of state when the "hit" occurred. T 365. Mendola said that it was Cloutier's intention that Mendola move in with Branch after the death of Branch's wife. T 353; 757-78. Mendola said that Cloutier had told her that she "can't be recognizable" on the trip to the Branch residence. T 361. Finally, Mendola said several times that Cloutier had been "training," T 368, or "coaching" her on what to say. T 368-69; 376. When asked whether Cloutier was involved in

the plan to kill Ms. Branch, Mendola paused and said, "He's encouraging me." T 369-70. Mendola also told Huse that things were "getting really bad" between Cloutier and her. T 266.

On November 21, Huse called Mendola again to make sure she was still serious. T 309. Huse pretended that he had pictures of Wendy Branch that he wanted Mendola to see, to make sure that he had the right person. T 310. They made arrangements to meet and, at that meeting, Mendola was arrested. T 91-94.

At trial, Mendola offered a contrasting picture of her relationship with Cloutier and the reason for her statements to Huse. Mendola testified that she had had a relationship with Branch in 2004 and 2005. T 749. She told Cloutier, with whom she was also having a relationship, and he became angry. T 765; 840-41. Since then, Mendola had tried to "fix" her relationship with Cloutier. T 813. She denied making 458 phone calls to Branch's office and denied writing some of the letters to Branch that had been entered into evidence. T 696; 886-92.

During the month prior to her arrest, Mendola testified that things between Cloutier and her were not going well. T 772. Cloutier told Mendola that he wanted to get rid of her and that he would set her up and have her arrested. T 701. Cloutier told Mendola that she would be meeting with someone posing as a hitman and he coached her to say certain things to this person. T 722; 725. Cloutier told Mendola that he would kill her if she did not

say the things he told her to say. T 788. Mendola knew the person she would be meeting with was an undercover police officer and expected that she would be arrested. T 737; 787; 791.

Mendola denied that she had asked Cloutier for a gun, that she had asked for help in finding a hitman, that she had asked Austin for help in killing the victim, and that she had wanted to cause the death of Wendy Branch. T 711; 775-76; 878.

SUMMARY OF THE ARGUMENT

1. The trial court erred in failing to give an entrapment instruction. Mendola offered some evidence that her actions were induced by the actions of the government informant, Cloutier, and that she was not predisposed to commit the crime. Mendola also offered some evidence that Cloutier was acting in cooperation with the police. The court erred in finding that Mendola must show that Cloutier's acts of abuse were at the direction of the police.

2. The court erred in excluding evidence that Mendola was abused by Cloutier. This evidence was relevant to the entrapment defense as well as to whether Mendola had the purpose that another commit the crime of murder.

3. The court erred in allowing the State to introduce evidence, in its case-in-chief, to rebut the entrapment defense. Unless and until Mendola had established an entrapment defense, the evidence of Mendola's statements about wanting to kill other people was irrelevant and highly prejudicial.

I. THE TRIAL COURT ERRED IN FAILING TO GIVE AN ENTRAPMENT INSTRUCTION.

The defense provided notice of its intention to rely on the defense of entrapment under RSA 626:5. App. A1-2. Mendola asserted that she was encouraged to commit the crime by Cloutier, who was cooperating with the police. Id. Following Mendola's opening statement, the State objected to the entrapment defense. T 43-44. The court deferred ruling until after the presentation of evidence. T 44.

Mendola was the first witness called by the defense. T 601. Within moments of her taking the stand, the State objected to her testimony that Cloutier had abused her and objected to an entrapment defense based on a theory of Cloutier's abuse of Mendola. T 607-44. The State argued that any abuse Cloutier perpetrated against Mendola was not at the behest of the police and thus could not form the basis of an entrapment defense. See, e.g., T 629-30. The court agreed and ruled that it would not give an entrapment instruction. T 648-51. In so ruling, the trial court erred.

"A trial court must grant a defendant's requested jury instruction on a specific defense if there is some evidence to support a rational finding in favor of that defense." State v. Larose, 157 N.H. 28, 33 (2008) (quotation and citation omitted). Failure to give such an instruction when required is reversible error. State v. McMinn, 141 N.H. 636, 645 (1997) (quotation and

citation omitted). This is so because once a defense is properly established, "the State bears the burden of disproving [the] defense beyond a reasonable doubt." Id. This Court reviews denials of instructions on defenses under an unsustainable exercise of discretion standard. Larose, 157 N.H. at 34 (citation omitted). "In reviewing the trial court's refusal to give a requested [defense] instruction," this Court must "search the record for evidence supporting the defendant's request." State v. Vassar, 154 N.H. 370, 373 (2006) (citation omitted).

"Some evidence" is defined as "more than a minutia or a scintilla of evidence." Larose, 157 N.H. at 33 (quotation and citation omitted). The evidence supporting the defense "cannot be vague, conjectural, or the mere suspicion about the existence of a fact." Id. (quotation and citation omitted). "A court need not 'give weight to allegations which are intrinsically improbable or flatly contradicted by irrefutable evidence.' United State v. Rodriguez, 858 F.2d 809, 815 (1st Cir. 1988)). Moreover, ... 'conclusory and self-serving statements, standing alone, will not suffice[.]' United States v. Ortiz, 804 F.2d 1161, 1165-66 (10th Cir. 1986))". Larose, 157 N.H. at 33.

However, the trial court "is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof." Rodriguez, 858 F.2d at 812. A defendant's version, even if contradicted by the State's case, may provide

sufficient evidence to justify an instruction. In Rodriguez, the First Circuit held that a defendant's testimony can provide sufficient evidence of entrapment to require an instruction where his "account is interlaced with considerable detail and has some circumstantial corroboration in the record." Id. at 815. The court acknowledged that the defendant's

> account need not have been believed - but, in the circumstances of this case, its creditworthiness was not for the district court to assess in passing on the request to charge. In the same vein, we recognize that Rodriguez's soliloquy was self-serving - but realistically, how better than through his own testimony can a defendant meet his entry-level burden? It is common wisdom - yet an uncommonly wise rule of law - that the testimony of a single witness is sufficient for proof of a discrete fact.

Id. See also, State v. Duran, 158 N.H. 146, 151-52 (2008) (impeached testimony sufficient to justify instruction because that "goes to the credibility of the witness and the proper weight to be given to the evidence, not the sufficiency of the evidence to warrant an instruction.") (citation omitted).

If the court finds some evidence, "taken most hospitably to the accused, [that] can plausibly support the theory of defense," the instruction must be given. Rodriguez, 858 F.2d at 812. The trial court's role is circumscribed because, once the defendant has met her minimal burden, "ordinarily entrapment raises an issue of

fact to be determined by the jury." Larose, 157 N.H. at 34 (citation omitted). Once there is a factual predicate for an entrapment defense, it is the jury's role to weigh the evidence.

Under RSA 626:5:

> It is an affirmative defense that the actor committed the offense because he was induced or encouraged to do so by a law enforcement official or by a person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence against him and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. However, conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

To establish an entrapment defense, a defendant must produce "some evidence" of the following two factors: "(1) government inducement; and (2) the lack of predisposition on the part of the defendant to engage in the alleged criminal conduct." Larose, 157 N.H. at 35 (quotation and citation omitted).

In this case, Mendola proffered sufficient evidence on both factors. The State did not argue that violence or the threat of violence is not sufficient to show inducement. While most entrapment cases deal with more subtle means of inducement or encouragement, undoubtably more overt methods also would suffice.

> Courts have found a basis for sending the entrapment issue to the jury (or finding entrapment established as a matter of law) where government officials: (1) used intimidation and threats against a defendant's family; (2) called every day, began threatening the defendant, and were belligerent; (3) engaged in forceful solicitation and dogged insistence until defendant capitulated; (4) played upon defendant's sympathy for informant's common narcotics experience and withdrawal symptoms; (5) played upon sentiment of one former war buddy for another to get liquor (during prohibition); (6) used repeated suggestions which succeeded only when defendant had lost his job and needed money for his family's food and rent; [and] (7) told defendant that she (the agent) was suicidal and in desperate need of money.

Id. at 36 (quotation and citation omitted). Mendola proffered her testimony about Cloutier's abuse as well as a photograph of a bruise caused by Cloutier when she refused to go along with his scheme. T 657; 668-78. She thus established some evidence that Cloutier induced her to commit the offense.

The State also did not contest that Mendola could introduce some evidence that she was not predisposed to commit the offense. Mendola's proffer, which incorporated her opening statement, T 668, established that Cloutier abused Mendola when "she expressed hesitation about going ahead with a scheme that Mr. Cloutier devised to have her arrested" and when "she refused to go along with his plan." T 36. Mendola established that she "would not have stepped

into that truck on November 19th, but for the abuse, the threats and the manipulating behavior of Daniel Cloutier." T 41. The State did not offer any evidence that Mendola had a criminal history or a history of violent or threatening behavior.

The State's sole argument, and the basis of the court's ruling, was that Cloutier's actions in abusing Mendola were not "at the behest of the police," T 610; 648-50, and therefore could not constitute entrapment. However, the State acknowledged, and the evidence established, that there was "some level of agency relationship" between Cloutier and the police. T 642. Cloutier not only provided the information to the police that started their investigation into Mendola, but also conveyed messages to her from the police, acted as the "go-between," T 149, and was told by the police to "maintain [Mendola's] interest." T 507.

The court also found that the evidence of Cloutier's abuse of Mendola "occurred well before any police involvement." T 648. However, this finding contradicted Mendola's offer of proof. See, e.g., T 36 ("abuse turned into physical beatings and murderous threats" in order to get Mendola to comply with Cloutier's scheme); T 36 (Cloutier assaulted Mendola when she "refused to go along with his plan" to get Mendola arrested); T 669 (Cloutier

held a gun to Mendola's head during period that he was in contact with police); T 670 (Cloutier held a knife to Mendola's throat in effort to get her to comply with his scheme); T 677-78 (Cloutier threatened to kill Mendola if she did not comply with his scheme).

The trial court's ruling is inconsistent with a United States Supreme Court case addressing a similar issue. In Sherman v. U.S., the Court found entrapment as a matter of law based on the actions of a government informer. 356 U.S. 369, 373 (1958). The informer, Kalchinian, had a relationship with the defendant prior to police involvement. Id. Kalchinian met the defendant at a doctor's office where both were undergoing treatment for narcotics addiction. Id. at 371. They had additional conversations either at the doctor's office or when both were filling prescriptions from the doctor. Id. Kalchinian discussed his difficulties in overcoming addiction with the defendant and then asked the defendant to supply him with drugs. Id. The defendant tried to avoid the issue, but after several requests, Sherman finally acquiesced. Id. It was only after he was "assured of a catch," that Kalchinian called the police "so that they could close the net." Id. at 373.

The Supreme Court found that Kalchinian was an "active government informer" and held that the "Government cannot

disown Kalchinian and insist it is not responsible for his actions." Id. "[T]he federal agent in charge of the case admitted that he never bothered to question Kalchinian about the way he had made contact with petitioner. The Government cannot make use of such an informer and then claim disassociation through ignorance." Id. at 374.

Although the inducement had occurred prior to police involvement, and depended on Kalchinian's unique relationship to the defendant, which had not been a product of the police's efforts to investigate and arrest Sherman, the Court found that:

> The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.

Id. at 376.

Mendola's case is analogous. Cloutier's abuse, even prior to police involvement, contributed to the force of his inducement of Mendola once he became a police informer. Even if some of the abuse predated police involvement, and

even if the police were unaware of it, the State cannot escape responsibility for his actions. The State has an obligation, when relying on informants, to make sure that the net they cast conforms with the law and proper law enforcement methods. Here, Cloutier's testimony established that the police asked him to "maintain [Mendola's] interest" in the murder-for-hire plan. T 507. Mendola established, through her offer of proof, that Cloutier actively maintained her interest and encouraged her through continued violence and threats. Thus, Mendola produced some evidence that she was induced or encouraged to commit the offense by a person cooperating with law enforcement and that she was not otherwise predisposed to commit the offense. Having produced some evidence of the defense, it was error to deny Mendola's request for an entrapment instruction and this Court must reverse.

II. THE COURT ERRED IN EXCLUDING EVIDENCE THAT MENDOLA WAS ABUSED BY CLOUTIER.

The State objected to Mendola's testimony that Cloutier abused her. T 607. The State argued that evidence of Cloutier's abuse of Mendola was not relevant to entrapment and that the defense could not sufficiently establish that defense. T 622-31. Mendola argued that the evidence of abuse was relevant to an entrapment defense and also to whether she formed the purposeful mental state. T 633-42. Mendola offered the evidence of abuse to "explain why she said the things" she said. T 677. The State countered that the evidence was not relevant to Mendola's mental state because she did, in fact, intend to commit the crime of murder. T 630; 663-65. The court excluded the evidence of abuse because it found that Mendola had not met her burden to support an entrapment defense and that the evidence was not relevant to whether Mendola acted purposely. T 648-51; 679-80. In so ruling, the court erred.

The evidence was relevant to an entrapment defense. In order to establish entrapment, Mendola had to submit some evidence that she was induced or encouraged to commit the offense by someone cooperating with law enforcement and that she was not predisposed to commit the offense. Larose, 157 N.H. at 35; RSA 626:5. While the parties disputed whether the specific inducement, Cloutier's abuse, needed to have

been directed by the police, the parties did not dispute that physical abuse and threats of violence would constitute inducement. The evidence of abuse also constituted some evidence that Mendola was not predisposed to commit the offense. As argued above, *supra*, Section I, Cloutier's abuse, even though not at the behest of the police, may constitute inducement by a person cooperating with law enforcement. Thus, evidence of Cloutier's abuse was relevant to Mendola's entrapment defense.

Even if the court properly denied Mendola's request for an instruction on entrapment, the evidence was relevant to whether Mendola acted purposely. The State had to prove that Mendola had the "purpose that another engage in conduct constituting" the crime of murder. RSA 629:2, I. "A person acts purposely ... when [her] conscious object is to cause the result or engage in the conduct that comprises" the offense. RSA 626:2, II(a). New Hampshire's Criminal Code "is largely derived from the Model Penal Code." State v. Lamy, 158 N.H. 511, 515 (2009) (quotation and citation omitted). Thus, in order to prove the requisite mental state for criminal solicitation, "[i]t is not enough for a person to be aware that his words may lead to a criminal act or even to be quite sure they will do so; it must be the

actor's purpose that the crime be committed." Model Penal Code, § 5.02, comment at 371.

Here, evidence of Cloutier's abuse was relevant to show that Mendola did not intend that Wendy Branch be killed. Rather, the evidence was relevant to show that her statements to Huse were the product of Cloutier's abuse and that Mendola's purpose in making those statements was to avoid further abuse. Mendola testified that she did not intend to cause the death of Ms. Branch, T 776, and that she followed through with Cloutier's scheme to have her arrested because of her fear of Cloutier. T 788-90. However, without being able to fully present evidence of Cloutier's abuse, the court improperly constrained Mendola's ability to produce all proofs favorable and to be fully heard in her defense. N.H. CONST. pt. I, art. 15; U.S. CONST. amend. VI. This Court must reverse.

III. THE COURT ERRED IN ALLOWING THE STATE TO PRESENT, IN ITS CASE-IN-CHIEF, EVIDENCE OF MENDOLA'S STATEMENTS ABOUT WANTING TO KILL TWO OTHER PEOPLE.

Mendola moved to exclude from evidence statements she had made to Huse about wanting to kill two other people. App. A3-5. Mendola argued that this evidence was not relevant to anything other than Mendola's propensity or, if minimally relevant for an admissible purpose, that its probative value was substantially outweighed by the danger of unfair prejudice. Id. The State argued that this evidence was relevant to prove Mendola's predisposition to commit the offense, in light of her notice of entrapment defense. T 9. The court agreed and allowed the State to introduce this evidence in its case-in-chief. Id. In so ruling, the court erred.

In criminal cases, "the State has the burden ... to demonstrate the admissibility of evidence of other bad acts committed by the defendant." State v. McGlew, 139 N.H. 505, 509 (1995). This Court reviews such rulings under an unsustainable exercise of discretion standard and an appellant "must show that the evidentiary ruling was clearly untenable or unreasonable to the prejudice of his case." State v. Walsh, 139 N.H. 435, 436 (1995) (quoting State v. Smith, 135 N.H. 524, 525 (1992)).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." New Hampshire Rule of Evidence (NHRE) 401. Evidence that is not relevant is not admissible. NHRE 402. Evidence of other bad acts is "not admissible to prove the character of a person in order to show that the person acted in conformity therewith." NHRE 404(b).

If a defendant has presented sufficient evidence of an entrapment defense, propensity evidence may be relevant and admissible to rebut that defense by showing that the defendant is predisposed to commit the offense. However, such rebuttal evidence is not relevant in the State's case-in-chief until the defendant has established sufficient evidence of the defense. Here, other bad act evidence, admissible to rebut the entrapment defense, was admitted in the State's case-in-chief. The State then successfully argued that Mendola had not sufficiently established an entrapment defense. While Mendola was denied her request for an entrapment instruction, the State had already been allowed to admit highly prejudicial evidence to rebut that defense. In allowing the State to admit this evidence in its case-in-chief, the court committed reversible error.

Even if this evidence had some probative value for another purpose, its value was substantially outweighed by the danger of unfair prejudice. Evidence Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"The purpose of Rule 404(b) is to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based upon evidence of other crimes or wrongs." State v. Cook, No. 2008-392, slip op. at 3 (N.H. May 15, 2009) (quotation and citation omitted).

Three steps comprise the analysis of the admissibility of such evidence:

> Evidence of other crimes is not admissible unless: (1) it is relevant for a purpose other than to show the defendant's bad character or disposition; (2) there is clear proof that the defendant committed the other crimes or acts; and (3) prejudice to the defendant does not substantially outweigh the probative value of the evidence.

State v. Bassett, 139 N.H. 493, 496 (1995) (citation omitted). Rule 404(b) incorporates the balancing test of

Evidence Rule 403. State v. Marti, 140 N.H. 692, 694 (1996).

When evidence of other bad acts is admitted and those other acts are "identical to the charged crime," such evidence, "by its nature is precisely the sort of evidence that could create an undue tendency to induce a decision against the defendant on some improper basis, for it effectively obscure[s] the charged offense and may ... tempt[] the jury to condemn the defendant for uncharged acts." Cook, slip op. at 6 (quoting Marti, 140 N.H. at 695). Here, the court admitted evidence of Mendola's statements to the "hitman" about wanting to engage his services in the future to kill two other people. T 758-60. In a trial for solicitation to commit murder, these other bad acts were identical to the charged act.

Furthermore, such acts have "a great emotional impact on a jury and have greater potential for appealing to a juror's sense of resentment or outrage." McGlew, 139 N.H. at 510. Consequently, "such evidence must possess significantly greater probative value." Id. The other bad act evidence in this case had an overwhelming capacity to induce a decision against Mendola based on an improper basis. The court erred in admitting this evidence and this Court must reverse.

CONCLUSION

WHEREFORE, Ms. Mendola respectfully requests that this Court vacate her conviction and remand for further proceedings consistent with the Court's ruling.

Fifteen minutes of oral argument before a full panel of this Court is requested by undersigned counsel.

Respectfully submitted,

By _____

Stephanie Hausman #15337
Assistant Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 2nd day of October, 2009.

_____

Stephanie Hausman

DATED: October 2, 2009

A P P E N D I X

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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

The State of New Hampshire

v.

Katherine Mendola

08-S-129

NOTICE OF DEFENSE OF ENTRAPMENT

NOW COMES the defendant KATHERINE MENDOLA by and through counsel, JOSEPH C. MALFITANI, without waiving any Constitutional or statutory protections that he may have, including the presumption of innocence and the State's burden of proving each element of the instant offense beyond a reasonable doubt, and hereby informs the Court and the prosecution that he intends to rely upon the defense of Entrapment pursuant to RSA 626:5. The defendant asserts that if she acted as alleged in the above-captioned indictments, he was encouraged to do so by a person acting in cooperation with law enforcement officials. The defendant further asserts that an individual known as Daniel Cloutier was working as a "confidential informant" with the New Hampshire Drug Task Force and/or the New Hampshire State Police and/or other law enforcement official and who encouraged the alleged conduct such as to create a substantial risk that the offense would be committed when the defendant was not otherwise disposed to commit such offense or conduct.

Respectfully submitted,

KATHERINE MENDOLA

By her attorney,

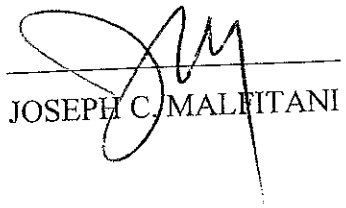
JOSEPH C. MALFITANI

Public Defender

Dated: March 3, 2008

CERTIFICATION

I hereby certify that a copy of this Notice of Defense of Entrapment has been mailed to the Office of the Rockingham County Attorney on this 4th day of March 2008.



JOSEPH C. MALFITANI

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

State of New Hampshire

v.

Katherine Mendola

08-S-129

MOTION IN LIMINE

NOW COMES the defendant KATHERINE MENDOLA by and through counsel Joseph C. Malfitani and Erin Murphy and hereby moves this Court in Limine to exclude at trial in the above matter certain statements allegedly made by the defendant. In support of this request, the defendant states through counsel:

1. Ms. Mendola has been charged with Solicitation to Commit Murder. The allegation is that the defendant solicited an undercover agent of the state police to cause the death of a person identified as W. B. The defendant has filed a Notice of Entrapment defense with respect to this allegation.
2. According to discovery documents, the defendant was videotaped by the undercover agent, a state police trooper by the name of Christopher Huse. This recording was made on November 19, 2007 while the defendant was driving with the trooper to a location in Northwood, New Hampshire. Based upon this videotape recording, a conversation occurred between the undercover trooper and the defendant.
3. During this conversation, the defendant, in addition to the solicitation alleged in the indictment, apparently suggests to the undercover trooper that she might want to have him cause the death of two other individuals. One of these individuals is simply identified as a "woman that lives up by the White Mountains out in the middle of the woods." The other individual is the defendant's father: "Now, because my father is a very bad man, okay, I'd love to knock him off too, but anyway…"
4. The defendant asks the court to exclude from trial that portion of the conversation regarding these other two individuals who are not the subject of the indictment. The defendant relies upon N.H. Rules of Evid. 402, 403 and 404(a).

5. Allowing the State to introduce evidence of these other "solicitations" is significantly more prejudicial to the defendant that probative of any issue in dispute. It would mislead the jury on the question of guilt or innocence.
6. These other solicitations are not probative of the defendant's intent with respect to the individual identified in the indictment as W.B. The conversation occurred after the defendant had already met with the undercover trooper. It is not probative on whether she had a "predisposition" to commit the crime alleged. It is arguably "propensity" or character evidence, which is excluded by N.H. Rule of Evid. 404(a).
7. Ms. Mendola relies upon her right to a fair trial as guaranteed by Part 1, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution in support of this motion in limine.

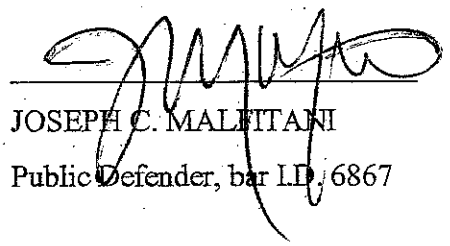
WHEREFORE, the defendant respectfully requests that this Court:

A) Grant the within Motion:

B) Exclude from trial that portion of the conversation between the defendant and the undercover trooper objected to above; and,

C) For such further relief as is just and reasonable.

Respectfully submitted,
KATHERINE MENDOLA
by her attorneys

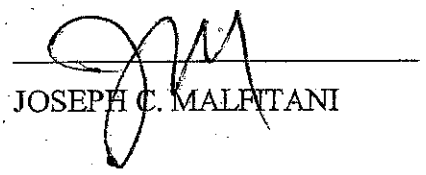


JOSEPH C. MALFITANI
Public Defender, bar I.D. 6867

Dated: September 10, 2008

CERTIFICATION

I hereby certify that a copy of the within Motion to Reduce Bail has been forwarded to the opposing counsel at the Office of the Rockingham County Attorney on this 11th day of September 2008.



JOSEPH C. MALFITANI