

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0010

The State Of New Hampshire

v.

Katherine Mendola

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(3JX, 5 minutes)

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ISSUES PRESENTED

I. Whether the trial court correctly determined that the defendant was not entitled to a jury instruction on the affirmative defense of entrapment, where the evidence showed that she had been asking people to help her find a way to kill Wendy Branch before the police became involved in the case.

II. Whether the trial court correctly prohibited the defendant from offering evidence that she had been abused by her off-and-on boyfriend, where there was no nexus between the alleged abuse and government or police action.

III. Whether the trial court correctly permitted the State to offer evidence that the defendant asked an undercover police officer, posing as a hit man, if he could kill two people in addition to the intended victim in this case, where the defendant raised an entrapment defense and courts have held that the prosecution may introduce evidence of other bad acts to rebut an entrapment defense and show that a defendant was predisposed to commit the charged crime.

STATEMENT OF THE CASE

A grand jury in Rockingham County indicted the defendant on one count of criminal solicitation to commit murder. T 10.¹ See RSA 629:2 (2007); RSA 630:1 (2007). Following an eight-day trial, the jury convicted her and the superior court (Nadeau, J.) sentenced her to an incarcerative term of ten to twenty years. NOA 7. This appeal followed.

¹ References to the transcript of trial will be made as T ____.
References to the defendant's brief will be made as DB ____, and the appendix thereto as DBA ____.
References to the notice of appeal will be made as NOA ____.
References to the appendix to the State's brief will be made as SBA ____.

STATEMENT OF FACTS

A. The Charged Conduct.

Bartram (“B.J.”) Branch, an attorney, lived with his wife of twenty-five years, Wendy, on Ledges Road in Northwood. T 390-91. He worked at the Manchester law firm of Backus, Meyer, and Branch. T 390. The bulk of his caseload involved personal injury and workers’ compensation cases, but he occasionally handled minor criminal matters for his clients. T 392.

The defendant became his client in late 2004 or early 2005 when she asked him to handle litigation arising out of a car accident in which she had been involved. T 401. Branch agreed to represent her and settled the case in 2005. T 403, 433. He also helped her to resolve some traffic citations that she had received. T 402. Over the course of the litigation, Branch saw the defendant fairly frequently. T 401.

The defendant developed passionate feelings for Branch and expressed those feelings in letters to him. T 411, 829. Before going to see Branch at his office or at court, she would ask if she looked good and if she “was showing enough cleavage.” T 467. Moreover, she would often call Branch’s office just to hear his voice. T 165, 468. For example, between September 1, 2007, and November 21, 2007, she called Branch’s office 458 times. T 121. She believed that his voicemail greeting contained secret messages for her. T 468. Sometimes, she left messages for him. In one message, she told him that she was “young,” “hot,” “sexy,” and “free.” T 425. In another, she told him, “B.J., forgive me and just forget I said this. But I just want you to know that I miss you very much. And that is not the alcohol talking. And I would make the best wife in the whole wide world.” T 426-27. In a third she said, “I’m going to make a great wife one day and you’re a stupid a-hole.” T 427. In yet another, she told him

that he was a source of “stability” in her life. T 431. She also talked about Branch “all the time” and told others that she would be a “really good wife for him.” T 466.

During one visit to Branch’s office, the defendant embraced him and told him that she was interested in a romantic relationship. T 403. Branch demurred, saying that he was married and her lawyer, circumstances which meant that he could not have a romantic relationship with her. T 403. Branch’s negative response notwithstanding, she told at least one person that she had kissed Branch and that her relationship with him had gone beyond attorney-client. T 466. She even posited that people in Branch’s office may have suspected a romance because they had emerged from his office with their hair messy. T 466.

After the episode in his office, Branch met with the senior partner at his law firm, Jon Meyer, to discuss it. T 404. He warned Meyer that the defendant could be “combustible and unpredictable.” T 404. Meyer advised Branch to involve a female associate in all future dealings with the defendant and to explain clearly to the defendant the bounds of their attorney-client relationship. T 404. Both lawyers also agreed that Branch should try to conclude the matters that he was handling for the defendant and “move forward.” T 405.

After the meeting, Branch made a record of it and sent a letter to the defendant outlining the appropriate boundaries of their professional relationship. T 409. He then continued to represent her by trying to resolve a few outstanding traffic tickets. T 407. Although he thought that she understood “that there was a line now that was not to be crossed,” T 407, he nevertheless always left the door open when he met with her. T 405.

In mid-2007, the defendant went to Branch’s office “in an absolute crisis” because she had been asked to leave the house in which she had been living. T 408, 436, 461. The house belonged to Warren Murdough, who was the grandfather of the defendant’s “off and on” boyfriend, Daniel Cloutier. T 450-52. Cloutier’s family had asked the defendant to move

because Murdough was sick and was going to require hospice care and family support, tasks that the defendant's presence would make more difficult for the family because they did not get along with her. T 455-56.

After the defendant was asked to leave Murdough's home, she moved into Cloutier's mobile home at a campground in Fitzwilliam. T 456-57. That arrangement lasted only one night. Then, the defendant moved into a camper of her own that was parked on the space next to Cloutier's. T 456-57. A few weeks later, the defendant and Cloutier moved into a house in New Ipswich. T 458-59.

While at the campground, the defendant told Cloutier and other residents that she loved Branch and wanted to marry him. T 472, 1119. She said that she thought that Branch yearned to be with her but did not want to disrupt his relationship with his wife. T 472. So, she tried to devise a means of separating Branch from his wife, and wondered if magic spells might work. T 473. To that end, she ordered love spells from witchcraft sites. T 471. She also ordered a "terminator spell, which involved writing the name Wendy with a circle around it with an X." T 511. Apparently, neither had the desired effect. T 471, 511.

Soon, the defendant's plans turned more sinister. T 173. She began to refer to Branch's wife as "that bitch" and asked at least one resident of the campground, T. Thomas Austin, if he could eliminate her. T 175, 473, 1119. Austin said no. Before long, Cloutier heard rumors about the defendant's efforts and asked her if she really wanted to find a hit man to kill Branch's wife. T 481. She said yes and asked him if he knew anyone who could do the job. T 481-82. She continued to ask him about hiring a hit man even after they had moved to the house in New Ipswich. T 490. At some point, he told her that he might know someone. T 495. She also asked Cloutier how she could go about obtaining a gun. T 489.

Although Cloutier initially did not take the defendant particularly seriously, one night she climbed on top of him and threatened him with a knife. T 171, 486. At that point, Cloutier began to grow concerned that she might actually harm someone. T 487; see T 505 (Cloutier testified that he waited to call the police because he was unsure how serious the defendant was about her plans). In particular, he became concerned about the life and safety of Wendy Branch. T 217. So, he decided to report the defendant's conduct to the police.

In October 2007, Cloutier contacted agents working on the Attorney General's Drug Task Force (DTF). T 194-97. He chose to contact the DTF because, some ten years earlier, he had worked as a reliable informant for the DTF for a period of approximately one year. T 214, 493. Since that time, however, he had not had any contact with the DTF. T 199, 494. In fact, the DTF officer who testified at trial explained that he did not even know who Cloutier was and that command staff referred to him as "inactive." T 198-99. When Cloutier made the report to the DTF officers, he did not have any pending charges, was not working for any law enforcement agency, and did not ask for consideration of any type. T 178-79, 203, 216.

In all events, Cloutier told two DTF agents that he had a roommate who wanted to hire an assassin to kill the wife of a man with whom she was having an affair. T 200. The agents instructed him to tell his roommate that he had spoken with someone who might be interested in the job. T 497, 507. The agents then spoke with members of the state police. Christopher Huse, a state trooper who worked in the narcotics investigation unit, was assigned to work on the case in an undercover capacity, posing as a hit man. T 52-53, 56, 209.

Huse began by meeting with Cloutier to discuss what the defendant had told him. T 215-16. Cloutier informed him that the defendant was his roommate and that she wanted to hire an assassin to kill Wendy Branch. T 217. Huse told Cloutier to go back and tell the

defendant that he knew someone who would contact her when he was available to do the job. T 509. When Cloutier did as Huse had requested, the defendant was “overjoyed.” T 509.

On November 16, 2007, Huse, posing as an assassin, called the defendant for the first time. T 232; SBA 1. He asked her “if she was still interested in [his] services and she said yes, she was still interested.” T 234, 241; SBA 1. He then told her that he would call her in a few days to make arrangements to meet with her. T 234, 243-44; SBA 2. When Huse told the defendant that the job “would be taken care of,” she said that she “appreciated” it and laughed. T 246; SBA 3.

On November 19, 2007, Huse called the defendant a second time. T 234; SBA 5. (Between the two calls, Huse did not instruct Cloutier to do anything. T 247.) During the call, he asked her if she was “sure [she] still want[ed] to [have Wendy Branch killed].” T 253; SBA 11. She said that she was “very serious” about it. T 253; SBA 11. In fact, she told Huse that, with respect to the plot to kill Wendy Branch, she had “thought like 10 steps ahead.” T 250; SBA 8.

So, Huse told her that he wanted meet with her. T 234. She informed him that during the meeting, she would wear a hood and sunglasses so that no one would recognize her. T 250; SBA 8. In addition, she suggested that she could use the meeting to give him directions to the Branches’ home. T 249; SBA 8. Branch testified that he had never invited the defendant to his house or told her where he lived. T 416-417. In any event, referring to the remote location of the Branches’ home, the defendant told Huse, “You know, it was kinda like a godsend because this place is in the middle of nowhere, so you’re like—this is the best situation for you.” T 251; SBA 9, 81. She then laughed. T 251; SBA 9.

Later that day, Huse met the defendant in the parking lot of a Wendy’s restaurant in Manchester. T 66. She found the location—Wendy’s—funny because Wendy was also the

name of the woman that she wanted Huse to kill. SBA 18. She got into Huse's truck and together they drove to the Branches' home, following directions that she had printed from her computer. T 71-72, 261. During the ride, the defendant seemed "very excited." T 71. She talked about how she had been wanting to kill Wendy Branch "for quite some time." T 72. In fact, she said that if she had known about Huse (in his capacity as a hit man) a year earlier, she "would have jumped on this sooner." T 265. Similarly, she said, "[I]f I had known about you five years ago, I would have hired you five years ago." T 269; SBA 20 ("I've been waiting for this for five years."); SBA 29.

In remarks laced with profanities, she made derogatory comments about Wendy Branch and told Huse that she had repeatedly insisted that Cloutier help find someone to kill her. T 266-67, 269-71; SBA 128-29. The defendant also promised to "reward [Huse] handsomely," counted out \$1,000 in \$100 bills, and gave the money to him as payment for the murder. T 74, 259; SBA 21, 36-37. She made clear to Huse that in exchange for the payment, she wanted Wendy Branch to be dead—"not in the hospital, dead." T 298; see SBA 20 ("She needs to go. She needs to go."); SBA 138.

The conversation also covered the details of the actual murder. For example, the defendant told Huse, "I want her dead and I want it to look like an accident." SBA 35, 53; T 170 (murder should look like a hunting accident). She suggested that he call out the name "Wendy" before he fired the gun, just to make sure he was about to kill the correct person. SBA 56, 70, 86, 112. She also told Huse to shoot Wendy Branch in the head because "[p]eople rarely survive head shot gun wounds." DBA 57.

In addition, the defendant told Huse that she wanted to know one week before he planned to kill Wendy Branch so that she could buy a plane ticket and rent a hotel room in a far away location, the purpose being to create an alibi for the time of the crime. T 296, 510; SBA

21, 24-26, 31, 54, 121, 139-40. She posited that, as an alternative alibi, she might go shopping at Wal-Mart at the time of the murder so that the store's security cameras would record her at that location. T 366-67; SBA 115. Further, she asked Huse not to kill Wendy Branch if a blue Volvo was in the driveway because that car belonged to B.J. Branch and its presence in the driveway would mean that he was at home. T 299; SBA 55, 113-14. Branch testified that he never told the defendant what kind of car he drove or what kind of car his wife drove. T 417. In any event, after meeting with Huse, the defendant went home and excitedly told Cloutier, "[I]t's definitely going down." T 510.

The police did not arrest the defendant after her meeting with Huse because they wanted to determine whether B.J. Branch was involved in the plot to kill his wife. T 88-89. As part of their effort to make this determination, the police decided to arrest the defendant, interview B.J. Branch, and take Wendy Branch into protective custody all at the same time. T 90. To that end, Huse called the defendant and told her that he wanted to meet with her so that she could identify a picture of Wendy Branch that he had obtained. T 92, 310; SBA 150. He arranged to meet her at an auto parts store across from the state police barracks in Milford. T 93; SBA 151-55. When she arrived, the police arrested her. T 94, 309. They conducted an inventory search of her car and recovered prepaid credit cards, a piece of paper with notes about airline flights, a note with "withdraw \$1,000" crossed off, B.J. Branch's business card, and a bank book. T 106-115.

With respect to B.J. and Wendy Branch, the state police went to B.J.'s office and spoke with him in a conference room. T 398-99. As time passed, "it very quickly became obvious [to him] that some fairly serious stuff was happening." T 398. Indeed, the police informed him that a plot was afoot to murder his wife, which came as a "complete and shocking surprise" to him. T 399. Meanwhile, the police went to the courthouse where Wendy worked

and, out of concern that “there was an ongoing threat,” “secrete[d] her into a room to make sure she was safe.” T 399. These events were “profoundly embarrassing” and “awkward” for Wendy because she apparently did not know why she was being whisked away and felt that she was “being treated essentially like a criminal” T 400. In the end, both Wendy and B.J. were “confined until the police determined that a threat no longer existed.” T 400.

B. The Defendant’s Case.

At trial, the defendant testified in her own behalf. She contended that almost all of her words and actions were the result of continuous abuse and threats by Cloutier. T 602-907. She portrayed herself as an unwilling participant in an elaborate scheme (to hire a hit man to kill Wendy Branch) that Cloutier concocted to have her arrested and thus removed from his house in New Ipswich. T 710, 756, 792

C. Relevant Events At Trial.

Before trial, the defendant filed a notice that she intended to present the affirmative defense of entrapment. DBA A1. See RSA 626:5 (2007); Super. Ct. Rs 98 B(1), 100. At trial, the parties contested whether the court was required to give a jury instruction on entrapment. One of the earliest points at which the issue arose was after opening statements when the State contended that the defense had argued a theory of defense involving duress or competing harms. T 43. It objected to the assertion of those defenses because the defendant had not filed a notice that she intended to present either one. T 43. With respect to the entrapment defense, the State asked the court to strike it because defense counsel had not articulated any theory upon which the defendant was induced to solicit murder by an officer or agent of the State. T 43-44. The defendant objected. T 44.

The trial court denied the State's motion to strike the entrapment defense, ruling that it would not decide the issue until it had heard the evidence. T 44. With respect to duress and competing harms, the trial court ruled that the defendant would not be permitted to argue either one. T 44-45.

Later, issues involving entrapment arose again. Defense counsel attempted to elicit evidence that Cloutier had abused the defendant. T 607-08. The theory on which she sought admission of the evidence was that she perpetrated the charged crime because Cloutier had forced her to do so. T 607-08, 617. The State objected, arguing, among other things, that evidence of alleged abuse was irrelevant unless the defendant could establish a nexus between Cloutier and law enforcement officials at the relevant time. T 609, 617, 624-31.

The defendant propounded a rejoinder: that evidence of the abuse was relevant to an entrapment defense because Cloutier went to the police, reported the defendant's conduct, and then acted as an informant or conduit between the police and the defendant. T 635-42; see T 637 (defense counsel characterized Cloutier as a "go-between"). The court asked the defendant, "Where is the connection between law enforcement and his coercion of her?" T 611. Defense counsel replied, "He is doing it on his own. And eventually he does go to law enforcement." T 611. Later, defense counsel said, "Mr. Cloutier did manufacture this plan and he became an agent of the police. . . . He enlisted the police and used them to manufacture his crime." T 615-16. The court replied, "That makes the State's point." T 616.

But the defendant adhered firmly to her position:

In this case Daniel Cloutier is saying, look comply or die, you got to do this or I am going to beat the crap out of you. Now it so happens in this case that that conduct may have occurred before mid-October when [Cloutier] goes to the police, but it is relevant because if it there—if there hadn't been this build up of abuse, when October 15th comes along, mid-October or when November 19th comes along, she wouldn't have complied because there had to be this history of abuse to make her fearful of Daniel Cloutier.

So that is how his behavior, whether it precedes him contacting the police, is relevant. Because you need that abuse over time to create the duress to make her get into that truck [with Huse].

T 639.

In response, the State acknowledged that “there [wa]s some level of agency relationship” but pointed out that, as defense counsel had conceded, whatever agency relationship existed came into being only after the defendant already had decided to solicit someone to kill Wendy Branch; therefore, in light of the timing, there was no nexus between evidence of abuse and inducement by the government. T 642.

Following an overnight recess, the court ruled that the defendant would not be permitted to offer evidence of abuse because “the alleged abuse occurred well before any police involvement and did not result from a directive from law enforcement as an effort to induce the defendant to act.” T 648. With respect to the entrapment defense, the court issued a tentative ruling, expressly stating that it was willing to “reconsider” the ruling “[i]f more or different evidence [wa]s admitted.” T 649. The court began by noting that the defendant would be entitled to an instruction on entrapment only if she “present[ed] some evidence to support the theory.” T 649. It then ruled:

The defendant has specifically argued that Cloutier is the government agent who caused the inducement; however, there is no nexus between Cloutier’s alleged abuse of the defendant in the past and the government action necessary to demonstrate that Cloutier was acting in cooperation with the government at the time he allegedly induced her to commit the crime.

Entrapment requires some evidence that the defendant was induced to commit the crime by a government or agents. Entrapment does not contemplate circumstances where an individual allegedly coerces or induces the defendant in some way and then, thereafter, reports to the police the defendant’s misconduct for their investigation. The defense is designed to prevent improper police conduct. This is not a case where any coercion committed by Cloutier was accomplished at the behest of the police. Indeed, there is no evidence that the police were ever aware of any potential abuse committed by Cloutier at any time during the investigation.

Simply because the police conduct an investigation based on information provided by a person the defendant claims coerced her does not render the relationship between the reporter of the information and the police one of agency. This is not a case where the police used Cloutier to reach out to the defendant; rather, Cloutier reported potential criminal conduct which the police then investigated. This is not the type of cooperation the statute was designed to address.

The evidence thus far demonstrates that the police took steps to investigate Cloutier's report and provided the defendant an opportunity to commit the crime which, under the law, is insufficient to support an entrapment defense. The fact that the police informed Cloutier generally of the status of the investigation after he reported the defendant to them and advised him to tell the defendant that a hit man would be in contact does not impute his alleged coercion of the defendant in the past to law enforcement at the time the defendant committed the crime.

To follow the defendant's argument would require an entrapment defense every time the police use a confidential informant in an investigation of a crime, and that is not the law.

So based on the facts of the case so far, the Court finds no legal basis for an entrapment instruction.

T 649-51.

The defendant had an alternative argument. She argued that evidence of the alleged abuse was relevant to the issue of whether she perpetrated a voluntary act within the meaning of RSA 626:1 (2007). T 633. The court rejected that argument too, citing State v. Daoud, 141 N.H. 142 (1996). T 648.

SUMMARY OF THE ARGUMENT

I. The trial court correctly determined that the defendant was not entitled to a jury instruction on the affirmative defense of entrapment. To obtain a jury instruction on the affirmative defense of entrapment, the defendant had to offer some evidence that the charged offense was induced by government officials and that she was not predisposed to commit it. She did not. Well before the police became involved in the case, the defendant had repeatedly expressed a desire to have Wendy Branch killed. Therefore, she was predisposed to solicit murder. Although an undercover officer did meet with the defendant, for all that appears in the record, he was simply providing her with an opportunity to fulfill a preformed desire to solicit murder. That is not entrapment.

II. The trial court ruled that the defendant would not be permitted to offer evidence that she had been abused by her off-and-on boyfriend. The trial court's ruling notwithstanding, the defendant testified about the alleged abuse. Therefore, whether the trial court's ruling was correct is now a moot issue. Even if the issue were not moot, however, any error is harmless because the defendant testified about the abuse anyway and there was overwhelming evidence of her guilt, including a videotape of the actual solicitation.

III. The trial court correctly permitted the State to introduce evidence that the defendant asked the undercover police officer, who was posing as a hit man, if she could hire him to kill two people other than the intended victim in this case. Courts in other jurisdictions routinely allow the government to introduce evidence of other bad acts—even if identical to the charged crime—to rebut an entrapment defense. Even if this Court concludes that the trial court erred, the error was harmless because there was overwhelming evidence of the defendant's guilt, including a videotape of the actual solicitation.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE DEFENDANT WAS NOT ENTITLED TO A JURY INSTRUCTION ON ENTRAPMENT BECAUSE THE EVIDENCE SHOWED THAT SHE HAD BEEN ASKING PEOPLE TO HELP HER FIND A WAY TO KILL WENDY BRANCH BEFORE THE POLICE BECAME INVOLVED IN THE CASE AND WAS THEREFORE PREDISPOSED TO COMMIT THE CHARGED CRIME.

The defendant contends that the trial court erred when it issued a preliminary or tentative ruling that she had not offered sufficient evidence to support a jury instruction on entrapment. DB 11-19. This argument must be rejected.

This Court “will review the trial court’s decision not to give a jury instruction for an unsustainable exercise of discretion.” State v. Ayer, 154 N.H. 500, 514 (2006) (quotation omitted). “[I]n reviewing the trial court’s refusal to provide a requested . . . instruction [this Court will] search the record for evidence supporting the defendant’s request.” State v. Chen, 148 N.H. 565, 569-70 (2002).

“Although the scope and wording of jury instructions is generally within the sound discretion of the trial court, the 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.” Ayer, 154 N.H. at 514 (quotation omitted). “By ‘some evidence,’ [this Court has] mean[t] that there must be more than a minutia or scintilla of evidence.” Id. (quotation omitted). “To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be of such quality as to induce conviction.” State v. Larose, 157 N.H. 28, 33 (2008) (quotation omitted).

In deciding whether to give a particular jury instruction, the trial court “need not give weight to allegations which are intrinsically improbable or flatly contradicted by irrefutable evidence.” Id. (quotation omitted). To that end, “conclusory and self-serving statements,

alone, will not suffice[,] [but] a defendant's account, though self-serving, may have weight if it is interlaced with considerable detail and has some circumstantial corroboration in the record."

Id. (quotations omitted). "Where . . . there is simply no evidentiary basis to support the theory of the requested jury instruction, the party is not entitled to such an instruction, and the trial court may properly deny the party's request." Ayer, 154 N.H. at 514 (quotation omitted).

Here, the issue is whether the trial court was obligated to instruct the jury on entrapment. Entrapment is defined by statute:

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.

RSA 626:5 (2007).²

"The general purpose of the affirmative defense of entrapment is to prevent a defendant from being convicted of a crime manufactured by law enforcement officers." Larose, 157 N.H. at 34 (quotation omitted). To prevail under the defense, a defendant must prove, by a preponderance of the evidence, "that: (1) the charged offense was induced by government officials; and (2) [she] was not predisposed to engage in it." Id. "While ordinarily entrapment raises an issue of fact to be determined by the jury, if the defendant fails to meet [her] burden of producing some evidence in support of the defense, the trial court should not submit the issue to the jury." Id. Here, the defendant failed to produce some evidence that she was

² Because entrapment is an affirmative defense, see RSA 626:5, it is not among the defenses that the State must disprove beyond a reasonable doubt, see RSA 626:7, I (2007) (explaining the difference between defenses and affirmative defenses). The defendant's suggestion to the contrary ought to be rejected. DB 12.

induced by a government official and that she was not predisposed to commit the crime. Therefore, the trial court correctly refused to give an entrapment instruction.

Under the first prong of the entrapment defense, the defendant had to offer some evidence that she was induced by government officials to commit the charged act. Larose, 157 N.H. at 35; see United States v. Morris, 549 F.3d 548, 551 (7th Cir. 2008) (“Entrapment refers to the use of inducements that cause a normally law-abiding person to commit a crime, and is a defense when the entrapment is conduct by law enforcement officers or their agents.”). This prong has two components: inducement and government action.

With respect to inducement, this Court has held:

[I]nducement goes beyond providing an ordinary opportunity to commit a crime. An inducement, by its very nature, contemplates more than a request and an affirmative response. It is more than a solicitation. It is more even than a successful solicitation. . . . An inducement consists of an opportunity plus something else—typically, excessive pressure by the government upon the defendant or the government’s taking advantage of an alternative, non-criminal type of motive.

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. The background and context of each example illustrate possible government overreaching—of its having acted unfairly by employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

Larose, 157 N.H. at 35-36 (quotations, citations, brackets, and ellipsis omitted).

None of those things happened here. The police did not intimidate the defendant or her family. They did not harass or threaten her. Nor did they doggedly insist that she perpetrate a

crime or play upon her sympathies. In addition, they did not prey upon any mental health issues that she may have had or try to take advantage of a substance abuse problem. (There was no testimony that she had a substance abuse problem or a mental illness, although there was some evidence that she drank alcohol. T 426-27.)

Rather, the defendant developed an infatuation with B.J. Branch early in their attorney-client relationship—before the police became involved in the case. Her infatuation manifested itself in the form of letters, voicemail messages, and declarations of love. T 402-03, 411, 472, 1119. Indeed, she placed hundreds of calls to his office and asserted that she would make a good wife for him. T 121, 426-27. Moreover, before going to see Branch at his office or at court, she would ask if she looked good and if she “was showing enough cleavage.” T 467. The defendant even embraced Branch and told him that she was interested in a romantic relationship. T 403.

In due course, the infatuation inspired the defendant to devise plans to separate Branch from his wife. See T 472 (the defendant told Cloutier that she thought that Branch really wanted to be with her but did not want to disrupt his relationship with his wife). To accomplish her goal of separating the Branches, she tried magic spells. T 471, 473. In addition to love spells, she ordered a “terminator spell, which involved writing the name Wendy with a circle around it with an X.” T 511.

Soon, the defendant’s infatuation with Branch and her thoughts of separating him from his wife turned to plans of murder—again, before the police became involved in the case. The defendant began to refer to Branch’s wife as “that bitch” and asked Austin if he could eliminate her. T 175, 473, 1119. When Cloutier heard rumors about the defendant’s efforts, he asked her if she really wanted to find a hit man to kill Branch’s wife. T 481. She said yes and repeatedly asked him if he knew anyone who could do the job. T 481-82, 490. She also asked

Cloutier how she could go about obtaining a gun. T 489. Further, the defendant's telephone calls with Huse and her interaction with him during the actual solicitation make clear that she had independently and previously formed the desire to have someone murder Wendy Branch. SBA 1-148.

It was against this backdrop—an infatuation with B.J. Branch and a pre-formed determination to murder Wendy Branch—that the police became involved in the case. And so, for all that appears in the record, the police set up a sting or ruse to give the defendant an opportunity to commit the crime that she already was determined to perpetrate. It is not entrapment to provide a defendant with the opportunity to commit a crime. Larose, 157 N.H. at 35; see also United States v. Pennell, 737 F.2d 521, 534 (6th Cir. 1984) (“The question of entrapment focuses on whether law enforcement officials have implanted the criminal design in the mind of an otherwise law-abiding citizen or whether the government merely provided an opportunity to commit a crime to one who is already predisposed to do so.”). Further, “[t]he rule is clear that ruses, stings, and decoys are permissible stratagems in the enforcement of criminal law, and they become invalid only when badgering or importuning takes place to an extent and degree that is likely to induce an otherwise law-abiding person to commit a crime.” People v. Watson, 990 P.2d 1031, 1032 (Cal. 2000); see Larose, 157 N.H. at 36-38 (refusing to find entrapment where a police informant repeatedly asked the defendant to sell her drugs); State v. Bacon, 114 N.H. 306, 309 (1974) (refusing to find entrapment where two undercover police officers asked the defendant to sell them some marijuana). It is also worth noting that far from browbeating or cajoling the defendant into committing a crime, Huse repeatedly asked her if she was sure she wanted him to carry out the murder. T 234, 241, 253. Each time she said yes. T 234, 241, 253.

The defendant's position on appeal, as it was at trial, is that Cloutier induced her to commit the charged crime. DB 15-16. But the defendant told Huse that Cloutier was reluctant to help her find someone to kill Wendy Branch and made her wait for an extended period. SBA 130. So her own words undermine her litigation position and render her self-serving assertion "intrinsically improbable." Larose, 157 N.H. at 33.

That point aside, even if the defendant had adduced some evidence that Cloutier induced her to solicit murder, she still would not have been entitled to an instruction on entrapment unless she also adduced some evidence that Cloutier was acting as a government agent or official at the time. This additional showing was necessary because "[t]here is no defense of private entrapment." Morris, 549 F.3d at 551; see Larose, 157 N.H. at 34-35.

Here, there was no evidence that Cloutier was acting as a government official or agent at or before the point when the defendant told him (and other residents at the campground in Fitzwilliam) that she wanted to have Wendy Branch killed. It was only after the defendant expressed a desire to have Wendy Branch killed—several times—that Cloutier went to the police.

To be sure, some ten years before Cloutier reported the defendant to the police, he had worked as a reliable informant for the DTF for about a year. T 214, 493. But since then he had not had any contact with the DTF. T 199, 494. In fact, the DTF officer who testified at trial explained that he did not even know who Cloutier was and that command staff referred to him as "inactive." T 198-99. Equally important, when Cloutier made the report to the DTF officers, he did not have any pending charges, was not working for any law enforcement agency, and did not ask for consideration of any type. T 178-79, 203, 216. No evidence suggested anything to the contrary. Therefore, the defendant failed to offer any evidence that she was induced by a government official or agent to commit the charged crime.

Even putting inducement aside, however, the defendant still cannot prevail on appeal. She cannot satisfy the second prong of the entrapment inquiry because she did not offer some evidence to show that she was not predisposed to committing the crime by the time the police became involved. Larose, 157 N.H. at 35. For the reasons expressed above, most notably the defendant's independent requests that Austin help her murder Wendy Branch, that Cloutier help her find someone who would murder Wendy Branch, and that Cloutier tell her how to obtain a gun—all before Cloutier went to the police—the defendant was predisposed to solicit the murder of Wendy Branch well before the police became involved. Rather than repeat its earlier analysis, the State incorporates it here by reference.

In addition, the defendant talked about how she had been wanting to kill Wendy Branch “for quite some time.” T 72. She admitted that she had developed a desire to murder Wendy Branch at least one year—and possibly up to five—before she first met Huse. More specifically, she said that if she had known about Huse (in his capacity as a hit man) a year earlier, she “would have jumped on this sooner.” T 265. Similarly, she said, “[I]f I had known about you five years ago, I would have hired you five years ago.” T 269. She also said that she had to demand—repeatedly—that Cloutier help her to find someone to kill Wendy Branch before he actually did. SBA 130-31. Accordingly, the defendant was predisposed to solicit the murder of Wendy Branch even before she met Huse. She did not present “some evidence” to the contrary.

Citing Sherman v. United States, 356 U.S. 369 (1958), the defendant asserts that the trial court's ruling ran afoul of United States Supreme Court precedent. DB 17-19. It did not. In Sherman, “Kalchinian, a government informer, first met petitioner at a doctor's office where apparently both were being treated to be cured of narcotics addiction.” Sherman, 356 U.S. at 371. “Although he was not being paid, Kalchinian was an active government informer who

had but recently been the instigatory of at least two other prosecutions.” Id. at 373-74.

Further, Kalchinian admitted that “it was [his] job while working with [narcotics] agents to go out and try and induce a person to sell narcotics to [him.]” Id. at 374 n.2.

“From mere greetings, conversation [between Kalchinian and the petitioner] progressed to a discussion of mutual experiences and problems, including their attempts to overcome addiction to narcotics.” Id. at 371. Kalchinian then began to ask the petitioner if he knew of a good source to obtain narcotics. Id. Initially, the petitioner tried to avoid discussing narcotics suppliers with Kalchinian but he finally acquiesced and sold Kalchinian some drugs. Id. “After several such sales, Kalchinian informed agents of the Bureau of Narcotics that he had another seller for them.” Id. The agents soon arrested the petitioner. Id. Under these circumstances, the United States Supreme Court concluded, as a matter of law, that the petitioner had been entrapped by Kalchinian, who was then acting as a government agent. Id. at 374-75.

Nothing like that happened here. Here, as noted above, Cloutier had not worked for, or had contact with, the DTF for approximately ten years. T 199, 214, 493-94. The DTF officer who testified at trial explained that he did not even know who Cloutier was. T 188-89. Moreover, the DTF officer expressly stated that the command staff referred to Cloutier as “inactive.” T 198-99. In addition, when Cloutier made the report to the DTF officers, he did not have any pending charges, was not working for any law enforcement agency, and did not ask for consideration of any type. T 178-79, 203, 216. Thus, Cloutier was not at all like Kalchinian. Instead, Cloutier more closely resembled a private citizen who reported criminal conduct. Because the factors that led the Supreme Court to conclude that Kalchinian was a government agent are absent here, Sherman is inapposite.

The defendant also emphasizes her allegation that Cloutier abused her. DB 16-17, 18-19. Her argument appears to be that, through abuse, Cloutier forced her to perpetrate the charged crime. That argument must fail for at least two reasons.

First, the only evidence of the alleged abuse was the defendant's own self-serving account and proffer. This Court has held that conclusory and self-serving statements, standing alone, are not sufficient to require that a trial court give an instruction on entrapment. See Larose, 157 N.H. at 37 (rejecting an entrapment claim because, among other things, the "sole" evidence to support it was the defendant's "own self-serving account").

Second, whatever Cloutier may have said or done before he spoke with the police does not matter because "[t]here is no defense of private entrapment." Morris, 549 F.3d at 551; see Larose, 157 N.H. at 34-35. Thus, even if Cloutier did abuse the defendant, the only abuse that would even arguably matter would be whatever took place after he went to the police. But the defendant was asking people to help her kill Wendy Branch before Cloutier went to the police. T 72, 265, 269, 481-82, 490, 1119. Indeed, she argued at several points during the trial that Cloutier forced her to solicit Wendy Branch's murder and then went to the police. See T 611 ("He is doing it on his own. And eventually he does go to law enforcement."); T 615-16 ("Mr. Cloutier did manufacture this plan and he became an agent of the police. . . . He enlisted the police and used them to manufacture his crime."); T 639 ("Now it so happens in this case that that conduct may have occurred before mid-October when [Cloutier] goes to the police . . ."). So, by the time the police became involved, she was predisposed to commit the charged crime. Because entrapment requires both inducement and a lack of predisposition, the defendant was not entitled to an entrapment instruction even if Cloutier had been abusing her.

II. THE TRIAL COURT CORRECTLY PROHIBITED THE DEFENDANT FROM OFFERING EVIDENCE THAT SHE HAD BEEN ABUSED BY HER OFF-AND-ON BOYFRIEND BECAUSE THERE WAS NO NEXUS BETWEEN THE ALLEGED ABUSE AND GOVERNMENT OR POLICE ACTION.

The defendant contends that the trial court erred by ruling that evidence that Cloutier had abused her should have been excluded. DB 20-22. She argues that the evidence was relevant to her entrapment defense and to whether she acted purposely, the mental state that the State was required to prove. DB 20-21. Those contentions must be rejected for several reasons.

First, the argument is moot.

The doctrine of mootness is designed to avoid deciding issues that have become academic or dead. However, the question of mootness is not subject to rigid rules, but is regarded as one of convenience and discretion. A decision upon the merits may be justified where there is a pressing public interest involved, or future litigation may be avoided.

LeBaron v. Wight, 156 N.H. 583, 585 (2007) (quotation omitted).

Here, the issue has become academic or dead because, despite the trial court's ruling, the defendant testified about the abuse that she allegedly suffered at Cloutier's hands. In fact, the trial court specifically told defense counsel, "[S]he's already testified to everything I said couldn't come in." T 1068. For example, the defendant testified that Cloutier "always threatened" to "get rid of [her]." T 701. She said that Cloutier beat her and issued "[c]onstant death threats." T 704. In a similar vein, she said that he "beat[] the daylight[s] out of [her]." T 1072. According to the defendant, Cloutier "kept beating on [her] . . . and suffocating [her] with a pillow." T 841. She said that he also brought her outside and "beat [her] up severely." T 782. She said that he expressly threatened to kill her if she did not do what he told her to do. T 788, 803. She claimed that he threatened to murder her and then bury her body in "different

places.” T 789. She also claimed that he threatened to buy and wear larger-sized boots when he buried her body so that the police would not be able to discover his identity. T 907.

In addition, she said that he abused and blackmailed her, T 1070, and that when she tried to report the abuse, she “suffered dearly.” T 790. In fact, she claimed that Cloutier told her that if she reported him to the police, he would “hunt [her] down.” T 856. She also said that Cloutier used “scare tactics and violence,” and that every time she tried to go to the police, “he would get more violen[t], and it would get worse and worse and worse” T 1056. Additionally, she said that he threatened to put drugs in her car and then call the police so that she would be arrested. T 807-08. She also said that she was afraid of Cloutier and that he controlled her life. T 717, 728. Under these circumstances, the jury ended up hearing the evidence that the defendant claims it was error to have excluded, so her appellate argument is moot. No compelling interest requires this Court to exercise its discretion to decide the issue on the merits.

But even if this Court considers the issue on the merits, the trial court’s ruling should be upheld. This Court reviews a trial court’s decision concerning the admission of evidence for an unsustainable exercise of discretion. State v. Pepin, 156 N.H. 269, 276 (2007). To show that the trial court’s decision is not sustainable, the defendant must demonstrate that it was clearly untenable or unreasonable to the prejudice of her case. State v. Scognamiglio, 150 N.H. 534, 537 (2004).

The trial court ruled that evidence of the alleged abuse was not admissible because it was not relevant. “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by [the] rules [of evidence] or by other rules prescribed by [this] Court. Evidence which is not relevant is not admissible.” N.H. R. Ev. 402. “‘Relevant evidence’ means evidence having 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.” N.H. R. Ev. 401.

Here, evidence that Cloutier abused the defendant to induce her to commit the charged crime would be relevant to an entrapment defense only if he was acting as a government agent at the time he perpetrated the alleged abuse. Larose, 157 N.H. at 34. As explained earlier, by the time Cloutier went to the police (the only circumstance that could possibly have turned him into an “agent”), the defendant already had expressed—several times—a desire to have Wendy Branch killed. For the reasons set forth above, the defendant’s repeated expressions of her desire to have Wendy Branch killed, preceding Cloutier’s interaction with the police, rendered an entrapment defense impossible because entrapment requires the lack of a predisposition to commit the charged crime. Therefore, evidence of Cloutier’s alleged abuse was irrelevant. Rather than repeat its earlier analysis, the State incorporates it here by reference.

The defendant says that evidence of the alleged abuse was admissible for another reason: to show that she did not act with the requisite mental state, purposely. She also contends that the court’s refusal to allow her to present this evidence violated the state and federal constitutions. DB 22. These contentions must be rejected.

The defendant’s argument, reduced to its essence, appears to be an alternative means of litigating a competing harms or duress defense. In other words, the defendant claims that evidence of the abuse was relevant to explain why she committed the charged crime, but the reasons why the crime was committed are relevant only if her defense was duress or competing harms. After all, under a duress or competing harms defense, a defendant admits that she committed the crime but argues that its commission was justified. See Daoud, 141 N.H. at 146-48 (explaining duress); RSA 627:3, I (2007) (explaining competing harms defense).

Here, the trial court did not permit the defendant to offer a defense based upon either duress or competing harms because she did not provide notice of either of those defenses before trial. T 45. The defendant has not appealed that ruling. And as the trial court ruled, “Providing a reason why does not negate intent.” T 680. Cf. State v. Jenot, 158 N.H. 181, 186 (2008) (rejecting the defendant’s argument that his motive to avoid shame negated the mental state for the crime with which he was charged). Therefore, evidence explaining why the defendant engaged in particular conduct was not relevant.

Although the trial court’s ruling can be upheld on all of the bases outlined above, there is yet another: harmless error. That is, even if the trial court erred by ruling that evidence that Cloutier abused her should have been excluded, the error was harmless. An error “in admitting or excluding evidence is subject to harmless error review.” United States v. Yanez Sosa, 513 F.3d 194, 201 (5th Cir. 2008); see Matthews v. Matthews, 142 N.H. 733, 736 (1998) (error in excluding evidence subject to harmless error review); Appeal of Chickering, 141 N.H. 794, 796 (1997) (“It has long been recognized that the erroneous decision to admit or exclude cumulative evidence is almost invariably harmless.”). Where evidence has been improperly excluded, the question is whether the outcome of the proceeding would have been different had the evidence been presented to the trier of fact. Yanez Sosa, 513 F.3d at 201; Matthews, 142 N.H. at 736.

Here, there can be no argument that the outcome of this case would have been different had the trial court ruled in the defendant’s favor. As set forth more fully above, the defendant testified about all of the abuse that she allegedly suffered at Cloutier’s hands. Therefore, the jury heard about the alleged abuse and the defendant was free to argue, as she did, that she perpetrated the crime because Cloutier would have harmed her if she did not. T 1141 (“If

things hadn't gone well, what would have happened? Katie told you which that would happen [sic]."). The jury simply and plainly rejected her contention.

Moreover, the evidence against the defendant was overwhelming. Cloutier, Huse, Austin, B.J. Branch, Sergeant Steve Rowland, and Detective Mark Bilodeau all gave consistent accounts describing how the defendant became infatuated with Branch, how her infatuation turned to plans of murder, and how she asked several people to help her kill Wendy Branch. Perhaps most importantly, the jury saw the video recording of the trip that Huse and the defendant took in Huse's truck. SBA 14-148. During that trip, the defendant repeatedly described Wendy Branch in derogatory terms, explained the reasons why she wanted Wendy Branch to be killed, excitedly discussed the plan to murder her, and paid Huse \$1,000 to do the job. SBA 148. Under all of these circumstances, any error in ordering that evidence of the alleged abuse be excluded was harmless.

III. THE TRIAL COURT CORRECTLY PERMITTED THE STATE TO OFFER EVIDENCE THAT THE DEFENDANT ASKED AN UNDERCOVER POLICE OFFICER, POSING AS A HIT MAN, IF HE COULD KILL TWO PEOPLE IN ADDITION TO THE INTENDED VICTIM IN THIS CASE BECAUSE THE DEFENDANT RAISED AN ENTRAPMENT DEFENSE AND THEREFORE EVIDENCE OF OTHER BAD ACTS WAS RELEVANT TO ESTABLISH THAT SHE WAS PREDISPOSED TO COMMIT THE CHARGED CRIME.

Before trial, the defendant filed a motion in limine, seeking to exclude the defendant's statement to Huse (in his capacity as a hit man) that she wanted to hire him to kill two people in addition to Wendy Branch. DBA A3. See SBA 49-50 (transcript of the defendant speaking with Huse about hiring him to kill a woman in the White Mountains and her father). In support of her motion, she "relie[d] upon N.H. Rules of Evid. 402, 403 and 404(a)." DBA A3. The State objected, arguing because the defendant was "raising the defense of entrapment, . . . the State [wa]s permitted to introduce evidence that would show the defendant already had a

predisposition toward committing the crime.” T 9. The trial court agreed with the State’s argument and specifically found that the evidence was not more prejudicial than probative.

T 9.

On appeal, the defendant contends that the trial court’s ruling was erroneous and relies upon New Hampshire Rule of Evidence 404(b) for support. DB 24-26. This argument must be rejected.

First, the argument is not preserved. At trial, the defendant made arguments based upon Rules 402, 403, and 404(a). DBA A3. She did not cite, or make arguments based upon, Rule 404(b). Therefore, arguments based upon Rule 404(b) are not preserved for appeal. See State v. Croft, 142 N.H. 76, 80 (1997) (holding that an argument was unpreserved for purposes of appeal where the defendant failed to cite, in the trial court, the specific rule of evidence upon which he relied on appeal); accord State v. Zeta Chi Fraternity, 142 N.H. 16, 25-26 (1997); State v. VanDerHeyden, 136 N.H. 277, 282 (1992).

Even if this Court were to undertake an analysis under Rule 404(b), the defendant’s contention must be rejected. This Court reviews a trial court’s decision concerning the admissibility of evidence for an unsustainable exercise of discretion. Pepin, 156 N.H. at 276. To show that the trial court’s decision is not sustainable, the defendant must demonstrate that it was clearly untenable or unreasonable to the prejudice of her case. Scognamiglio, 150 N.H. at 537.

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.

Under Rule 404(b), evidence of other acts is inadmissible unless: (1) it is relevant for a purpose other than to show the person's bad character or disposition; (2) there is clear proof that the person committed the other crimes or acts; and (3) the prejudicial effect of the evidence does not substantially outweigh its probative value. Pepin, 156 N.H. at 277 (quotation omitted).

With respect to the first prong of the test, “[t]here must be a clear connection between the particular evidentiary purpose and the other bad acts.” State v. Douthart, 146 N.H. 445, 447-48 (2001) (quotation and ellipsis omitted). Here, the evidence at issue was relevant to rebut the defendant's entrapment defense and establish that she had a predisposition to solicit the murder of Wendy Branch. Similarly, it rebutted the defendant's claims that she solicited the murder of Wendy Branch only because Cloutier forced her to do so. It showed that she had a personal interest in killing those whom she did not like, independent of whatever she alleged that Cloutier may have said or done.

Courts routinely allow the government to introduce evidence of prior bad acts—even if identical to the charged crime—to rebut an entrapment defense. See United States v. Santiago, 566 F.3d 65, 72 (1st Cir. 2009) (upholding, against a Rule 404(b) challenge, the admission of a prior conviction for possession of powder cocaine in a trial for possession of crack cocaine because it was relevant to rebut the defense of entrapment by showing that the defendant had a predisposition to commit the crime); United States v. Richardson, 515 F.3d 74, 83 (1st Cir. 2008) (evidence of other drug transactions was relevant to rebut an entrapment defense on charged drug offenses); United States v. Abumayyaleh, 530 F.3d 641, 650 (8th Cir. 2008) (stating that “[e]vidence of prior bad acts is admissible to show a defendant's predisposition once the defendant has asserted the entrapment defense,” and holding that, in a trial for possession of a firearm, evidence of prior convictions for receiving a stolen firearm and possessing a firearm was relevant to rebut an entrapment defense); United States v. VanHorn,

277 F.3d 48, 57 (1st Cir. 2002) (“in situations where the defendant employs entrapment as a defense to criminal liability, prior bad acts relevant to a defendant’s predisposition to commit a crime are highly probative and can overcome the Rule 404(b) bar”); United States v. Bastanipour, 41 F.3d 1178, 1183 (7th Cir. 1994) (affirming admissibility of twelve-year-old narcotics conviction in heroin conspiracy trial as relevant to the predisposition to commit a drug conspiracy); United States v. Padilla, 869 F.2d 372, 380 (8th Cir. 1989) (testimony indicating that the defendant was in the business of selling illegal drugs was admissible to show the defendant’s predisposition to traffic in controlled substances); United States v. French, 683 F.2d 1189, 1193 (8th Cir. 1982) (previous purchase of discounted food stamps was relevant to the question of the defendant’s predisposition to later buy discounted food stamps); United States v. Demetre, 464 F.2d 1105, 1108 (8th Cir. 1972) (defendant’s earlier passing of counterfeit currency was admissible to show a predisposition to commit later acts of counterfeiting and forgery); Tate v. State, 912 So. 2d 919, 924-925 (Miss. 2005) (evidence of a defendant’s prior convictions for sale of marijuana was admissible in a trial for delivery of marijuana to show the defendant’s predisposition to sell marijuana, where the defendant raised an entrapment defense at trial).

The second prong of the 404(b) test “is satisfied when the [proponent] presents evidence firmly establishing that the defendant, and not some other person, committed the prior bad act.” State v. Lesnick, 141 N.H. 121, 126 (1996) (quotation omitted). There is not, however, any requirement that a trial court hold an evidentiary hearing on a motion to admit evidence under Rule 404(b). State v. Haley, 141 N.H. 541, 543-45 (1997). Here, the defendant was recorded on videotape making the statements at issue. The proof could not be clearer.

Under the third prong of the Rule 404(b) test, evidence should not be admitted if its prejudicial effect substantially outweighs its probative value. Pepin, 156 N.H. at 277. Here, the trial court specifically found that the evidence was not substantially more prejudicial than probative. T 9. “Only rarely—and in extraordinarily compelling circumstances—will [the appellate court], from the vista of a cold appellate record, reverse a trial court’s on-the-spot judgment concerning the weighing of probative value and unfair effect.” United States v. Rodriguez-Estrada, 877 F.2d 153, 155-56 (1st Cir. 1989) (quotation and ellipsis omitted.).

Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury’s sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case. Unfair prejudice is not, of course, mere detriment to a defendant from the tendency of the evidence to prove his guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial. Rather, the prejudice required to predicate reversible error is an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged.

State v. Yates, 152 N.H. 245, 249-50 (2005) (quotation omitted).

Here, the evidence at issue was highly probative for the reason expressed earlier: to rebut the defendant’s entrapment defense by showing that she had a predisposition to commit the charged crime. Any prejudicial effect was minimal. After all, specific references to these two other people were brief. SBA 49-50. Moreover, throughout the trial there was significant testimony about the defendant’s plans to solicit the murder of Wendy Branch. And the jury watched a videotape of her excitedly soliciting the murder. SBA 14-148. Against the backdrop of this admissible evidence, brief and limited references to a desire to have two other people killed would not cause undue horror or trigger the mainsprings of human action. Therefore, whatever prejudicial value the evidence may have had did not substantially outweigh its probative value.

Without citation to any legal authority, the defendant contends,

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.

DB 24. The defendant did not make this type of "timing" argument to the superior court.

Therefore, she should not be able to unveil it for the first time on appeal. State v. Ryan, 135 N.H. 587, 588 (1992) (a specific and contemporaneous objection is required for preservation).

Preservation issues aside, the defendant argued entrapment in her opening statement and she geared her cross-examination of several witnesses toward that defense. It was not until the beginning of the defendant's case that the court tentatively ruled that no entrapment instruction would be given. Courts have repeatedly ruled that the prosecution may introduce prior bad acts evidence, during its case-in-chief, to rebut an entrapment defense. See, e.g., State v. Canelo, 924 P.2d 1230, 1236-38 (Idaho Ct. App. 1996) (upholding admission of evidence of prior drug transaction during State's case-in-chief to rebut entrapment defense); State v. Davis, 916 A.2d 493, 506 (N.J. Super. Ct. App. Div. 2007); State v. White, 207 A.2d 178, 185 (N.J. Super. Ct. App. Div. 1965) ("While such testimony ordinarily would be presented in rebuttal, in view of the fact that the defense of entrapment had been raised in the defendant's opening, we cannot say that it was error to permit it to stand."). Had the defendant been concerned that the jury would use the evidence at issue for an impermissible purpose—other than to rebut entrapment—she could have requested a limiting instruction. She did not.

Even if the trial court erred by admitting the evidence, however, the error was harmless. The evidence of the defendant's guilt was overwhelming and any error was inconsequential in relation to the strength of the State's case.

The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. The harmless error doctrine promotes public respect for the criminal

process by focusing upon the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. . . . An error may be harmless beyond a reasonable doubt if the alternative evidence of the defendant's guilt is of an overwhelming nature, quantity, or weight, and if the inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt.

State v. Wall, 154 N.H. 237, 245 (2006) (quotation and citations omitted).

Cloutier, Huse, Austin, B.J. Branch, Sergeant Steve Rowland, and Detective Mark Bilodeau all gave consistent accounts describing how the defendant became infatuated with Branch, how her infatuation turned to plans of murder, and how she asked several people to help her kill Wendy Branch. Perhaps most importantly, the jury saw the video recording of the trip that Huse and the defendant took in Huse's truck. During that trip, the defendant repeatedly described Wendy Branch in derogatory terms, explained the reasons why she wanted Wendy Branch to be killed, excitedly discussed the plan to murder her, and paid Huse \$1,000 to do the job. SBA 14-148. In light of this overwhelming evidence, any error was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 5-minute oral argument before a 3JX panel.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Assistant Appellate Defender Stephanie Hausman, counsel of record.


Thomas E. Bocian