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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	Supreme Court No.20110082
vs.	)	District Ct. No. 09-2010-CR-02772
	)	
Kari Ann Schmidt,	)	
	)	
Defendant and Appellant.	)	

Appeal of Criminal Judgment and Commitment entered March 7, 2011, Cass County District Court
East Central Judicial District
the Honorable Steven E. McCullough Presiding

APPELLEE'S BRIEF

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[¶3] **STATEMENT OF ISSUES**

[¶4] I. Whether the district court correctly concluded the Defendant did not establish the affirmative defense of entrapment.

[¶5] II. Whether the Defendant properly preserved the issue of whether the attempt came dangerously close to the commission of the crime for this appeal; therefore, any appellate review would require application of the "clear error" standard.

[¶6] **STATEMENT OF CASE**

[¶ 7] On August 5, 2010, Officer Al Schmidt, working with the DEA Task Force, made arrangements with a confidential informant (CI) to attempt to sell a large quantity of methamphetamine to the Defendant, Kari Ann Schmidt. Transcript of Trial (Tr.) at 5:19-25. Approximately two to three weeks prior, the CI contacted Officer Schmidt and told him the Defendant had been actively selling and purchasing methamphetamine. (Tr. at 6:4-16.) The CI and the Defendant began texting and talking on the phone discussing a methamphetamine transaction. (Tr. at 34-37.) The Defendant told the CI she wanted to purchase a large quantity of methamphetamine. (Tr. at 7:19-21.) The Defendant further indicated she wanted to purchase one-half ounce of methamphetamine and said she would be coming to Fargo in the morning to get it. (Tr. at 8:8-10.) The CI planned to meet the Defendant in the parking lot of the Sunset Motel in West Fargo where the Defendant would meet the CI and give her the money to purchase the methamphetamine. (Tr. at 9:21-5.)

[¶ 8] The next morning, at 1:39 a.m., the CI drove from Jamestown, North Dakota, to the parking lot of the Sunset Motel. (Tr. at 10-11.) Officer Schmidt, working in an undercover capacity, rode with the CI. (Tr. at 9:21-5.) As Officer Schmidt and the CI waited in the parking lot, the Defendant drove up in her vehicle, parking near the CI's vehicle. (Tr. at 12:8-23.) The CI, carrying a digital recorder, got out of her vehicle and went into the Defendant's vehicle. (Tr. at

12:25 and 13:1-6.) As the CI entered the vehicle, the CI noticed the Defendant looked nervous. (Tr. at 44:3-5.) The Defendant abruptly started feeling around the CI's pockets and clothing but did not feel the recording device. (Tr. at 44:2-13.) The Defendant then gave the CI one thousand two hundred dollars ($1,200) to purchase the methamphetamine. (Tr. at 13:1-15.) The CI got out of the Defendant's vehicle with the money. (Tr. at 13:1-15.) At that point, officers arrested the Defendant. (Tr. at 13:5-6.) Officer Schmidt testified he had not actually brought one-half ounce of methamphetamine to the motel parking lot because they "didn't have more than 3 or 4 officers present to help do surveillance and take down, so [Officer Schmidt] was actually worried about her getting away with a half ounce of methamphetamine." (Tr. at 20:3-8.)

[¶ 9] On August 6, 2010, the State filed charges of attempt to possess methamphetamine, a class C felony, possession of hydrocodone, a class C felony, and possession of alprazolam, a class C felony, against the Defendant based on the attempted methamphetamine transaction and items found in the Defendant's possession at the time of arrest. Defendant's Appendix (App.) at 4. On March 7, 2010, the State filed an amended information dismissing two of the charges and proceeding on the attempted possession of methamphetamine charge. (App. at 6.) On December 13, 2010, the case came before the district court for a bench trial. The district court found the Defendant guilty. (Tr. at 80:5-6.) The district court further found there was insufficient evidence to establish an entrapment defense. (Tr. at 80:2-4.) The district court ordered a pre-sentence investigation and the case

was continued for sentencing. (Tr. at 80:9-11.)

[¶ 10] On March 7, 2011, nearly three months after trial, the case came before the district court for sentencing. The district court sentenced the Defendant to three (3) years in the custody of the North Dakota Department of Corrections, first to serve one hundred eighty (180) days incarceration to be followed by three years of supervised probation. Sentencing Transcript (S. Tr.) at 5:15-25. The district court stayed the execution of the sentence for thirty (30) days to give the Defendant time to consider an appeal. (S. Tr. at 6:16-20.) The Defendant filed notice of appeal on March 25, 2011. (App. at 14.)

[¶ 11] The Defendant claims there was sufficient evidence to establish the affirmative defense of entrapment and sufficient evidence presented to establish the attempt did not come dangerously close to the commission of the crime. The State disagrees, arguing the district court correctly concluded the Defendant did not establish the entrapment defense and also correctly refrained from addressing whether the attempt came dangerously close to the commission of the crime because the Defendant did not properly raise the issue.

[¶ 12] **LAW AND ARGUMENT**

[¶ 13] **I. The district court correctly concluded the Defendant did not establish the affirmative defense of entrapment.**

[¶ 14] Under N.D.C.C. 12.1-05-11(2):

> A law enforcement agent perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, the law enforcement agent induces or encourages and, as a direct result, causes another person to engage in conduct constituting such a crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

[¶ 15] State v. Hammeren, 2003 ND 6, ¶ 7, 655 N.W.2d 707.

[¶ 16] Entrapment is an affirmative defense. N.D.C.C. § 12.1-05-11(1); Hammeren, 2003 ND 6, ¶ 7, 655 N.W.2d 707. A defendant must prove an affirmative defense by a preponderance of evidence. N.D.C.C. § 12.1-01-03(3); Hammeren, 2003 ND 6, ¶ 7, 655 N.W.2d 707.

[¶ 17] A. The undisputed facts of this case do not establish entrapment as a matter of law.

[¶ 18] In its brief, the Defendant argues that the district court "erred in failing to find that Defendant was entrapped as a matter of law." Defendant's brief (D. Br.) at ¶ 13. "'Questions of law are fully reviewable on appeal.'" State v. Johnson, 2011 ND 48, ¶ 9, 795 N.W.2d 367 (quoting State v. Lunde, 2008 ND 142, ¶ 10, 752 N.W.2d 630) (citations omitted).

[¶ 19] "Whether a person has been entrapped 'is almost invariably a question of fact, and a court can only find entrapment as a matter of law where the facts and their inferences supporting a finding of entrapment are undisputed.'" Hammeren 2003 ND 6, ¶ 7, 655 N.W.2d 707 (quoting State v. Baumgartner, 2001 ND 2002, ¶ 16, 637 N.W.2d 14). Entrapment as a matter of law is established "'when undisputed facts show that the police used unlawful means to induce the crime.'" Baumgartner, 2001 ND 2002, ¶ 16, 637 N.W.2d 14 (quoting State v. Kummer, 481 N.W.2d 437, 438 (N.D. 1992)). The police use unlawful means when they "violate the law in order to induce a crime." Kummer, 481 N.W.2d at 442. Entrapment as a matter of law cannot be established solely on the "'mere fact that an acquaintance persuaded'" a defendant to commit a crime or that law enforcement hired an informant. Hammeren, 2003 ND 6, ¶ 10, 655 N.W.2d 707 (quoting State v. Overby, 497 N.W.2d 408, 414 (N.D. 1993)).

[¶ 20] In Kummer, the police conducted a reverse-sting operation in which they provided a confidential informant with three ounces of cocaine to sell to the defendant. 481 N.W.2d at 439. The officers had obtained the cocaine from an evidence locker without authorization. Id. at 443. Ultimately, the sale was completed with the unlawfully obtained cocaine and the defendant was convicted of possession of a controlled substance with the intent to deliver. Id. at 438.

[¶ 21] In Kummer, this Court concluded "police use of unlawful means is entrapment." 481 N.W.2d at 441. In adopting a per se rule of entrapment for cases where law enforcement provided the controlled substance sold to the

defendant, the Court reasoned that several public policy reasons support the adoption of a per se rule: law enforcement can make a decoy purchase; law enforcement need not provide controlled substances to a drug dealer because a drug dealer will have their own sources; law enforcement providing the contraband "raises a suspicion that the target was not predisposed; and law enforcement providing the controlled substance presents a greater danger of inducing an innocent person to commit a crime." Id. at 443 (citing R. Park, *The Entrapment Controversy*, 60 Minn.L.Rev. 163, 191 (1976)). Additionally, this Court reasoned the per se rule of entrapment "eliminates any excuse for law enforcement officers or agents to possess controlled substances" and thus facilitates the enforcement of "anticorruption measures." Id. at 443. Therefore, because it was undisputed the officers had illegally obtained the cocaine the defendant purchased, the defendant had established entrapment. Id. at 444.

[¶ 22] The present case is distinguishable from Kummer. In Kummer, the police unlawfully obtained cocaine from the evidence custodian and used it in an undercover operation. Kummer, 481 N.W.2d at 443. "The conduct of law enforcement was unauthorized and illegal." Id. at 444 (J. Vande Walle concurring specially). In the present case, Officer Schmidt and the CI merely pretended to have the methamphetamine. Officer Schmidt did not have any methamphetamine to provide to the Defendant. Officer Schmidt's actions were not illegal. The Court in Kummer recognized "if officers and informers are allowed to possess and sell drugs for the purposes of trapping users and sellers, there is a chance not only

that the drugs will be used by the recipients, including novice users, but also that the drugs will be diverted to illegal channels." Id. at 443 (citing R. Park, *The Entrapment Controversy*, 60 Minn.L.Rev. 163, 191, n.89 (1976)). "The per se rule eliminates any excuses for law enforcement officers or agents to possess controlled substances, except during that brief span between the seizure or undercover purchase and the placement of the drugs in the police evidence locker, thereby facilitating enforcement of anticorruption measures." Id.

[¶ 23] The kind of police misconduct Kummer sought to deter did not occur in the present case. Officer Schmidt did not obtain any controlled substances. Through the CI, Officer Schmidt lead the Defendant to believe the one-half ounce of methamphetamine existed but, in fact, it did not. (Tr. at 19:9-13.) Officer Schmidt testified he did not bring methamphetamine to the deal because there were a small number of officers present and because he was "worried about [the Defendant] getting away with one-half ounce of methamphetamine." (Tr. at 20:3-8.) This is exactly the type of thing over which the Court in Kummer expressed concern. See Kummer, 481 N.W.2d at 443. Because the conduct of law enforcement in the present case was unlike the conduct of law enforcement in Kummer, the State believes this case is distinguishable from Kummer. See generally, State v. Nehring, 509 N.W.2d at 45 (noting that "[t]he Kummer analysis is unique because it focused exclusively on the *illegal* conduct of the law enforcement agents") (emphasis added).

[¶ 24] Despite the difference between this case and Kummer, the Defendant

relies heavily on Kummer. (D. Br. at ¶ 18-22.) The Defendant, however, acknowledges the entrapment statute changed after Kummer. (D. Br. at ¶ 20.) "The amended statute became effective on August 1, 1993." State v. Nehring, 509 N.W.2d 42 (N.D. 1993). After the statute changed, this Court explained:

> Before the amendment, the first sentence of NDCC 12.1-05-11(2)(1995) read: 'Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense.' We had interpreted this language to create an "objective test" for entrapment, with the "focus" being "on the conduct of law enforcement officials and the effect it would have on the normally law-abiding citizen." State v. Kummer, 481 N.W.2d 437, 441 (N.D. 1992). As we explained in State v. Brooks, 520 N.W.2d 796, 801 (N.D. 1994), the accused's predisposition to commit the crime was irrelevant under this "objective test." That is no longer so.

[¶ 25] State v. Murchison, 541 N.W.2d 435, 440 (N.D. 1995). This Court continued:

> In amending NDCC 12.1-05-11, the legislature replaced the wording that defined entrapment conduct as that 'likely to cause normally law-abiding persons to commit the offense,' with wording that defined entrapment conduct as that 'creat[ing] a substantial risk that such crime will be committed by a person other than one who is ready to commit it.' This new wording appears to make more relevant an acused's subjective predisposition to commit the crime, although the new wording does not shift the focus completely away from the law-enforcement conduct.

[¶ 26] Murchison, 541 N.W.2d at 440. This change from an "objective" test to a "subjective" test made North Dakota "consistent with the United States

Supreme Court and the majority of the states." Id. at 440, fn.2. The statutory changes did not specifically overrule Kummer; however, it did make a defendant's predisposition to commit the crime a relevant factor along with the conduct of law enforcement. Id. at 440.

[¶ 27] Since the entrapment statute changed, this Court has had a number of opportunities to address whether conduct of law enforcement established entrapment as a matter of law.

[¶ 28] In State v. Barnes, 551 N.W.2d 279, 283 (N.D. 1996), the court held the defendant had not been entrapped as a matter of law because the officer's conduct did "not rise to the level of unlawful conduct in Kummer." The defendant in Barnes had been approached by two officers because she "fit the general description" of someone whom they thought might be dealing drugs. Id. at 280. The officers bought her some drinks, asked her to buy them some marijuana, and told her she could use some of the marijuana if she was able to get it. Id. at 280, 283. The Court found that telling the defendant she could use some of the marijuana after she delivered it was not unlawful. Id. at 283. Therefore, the officer's conduct was not as outrageous as the illegal conduct exhibited by the officers in Kummer. Id.

[¶ 29] Further, in Hammeren, the Court held the defendant had not established entrapment as a matter of law because the officers did not use unlawful means to induce the defendant into selling a controlled substance. Hammeren, 2003 ND 6, ¶¶ 2, 9, 655 N.W.2d 707. A confidential informant had informed the

officers he had bought drugs from the defendant in past, so the officers set up a buy through two recorded telephone calls between the informant and the defendant. Id. at ¶ 2. Law enforcement officers provided the informant with three hundred ($300) dollars to buy cocaine and lysergic acid diethylamide (LSD) from the defendant. Id. at ¶ 2. The Court, in distinguishing Hammeren from Kummer, considered the informant had previously bought drugs from the defendant, the defendant provided the LSD to complete the sale, and the sale was completed at the defendant's home. Id. at ¶ 9. The Court reasoned the hiring of a confidential informant by officers and the persuasion to commit a crime by an acquaintance do not establish entrapment as a matter of law. Id. at ¶ 10.

[¶ 30] Additionally, in Murchison, this Court held the defendant had not established entrapment as a matter of law because the compensation law enforcement gave the confidential informant to induce others to sell drugs was not unlawful. 541 N.W.2d at 441. The confidential informant was given twelve hundred ($1,200) dollars per month, two hundred ($200) dollars per week for expenses, seventy-five ($75) dollars for each person the informant bought drugs from, and an additional two hundred ($200) dollars if the informant's purchase led to the seller being charged. Id. at 441. Law enforcement also gave the informant a motorcycle, paid to have the motorcycle repaired, paid the informant's motorcycle, auto, and renter's insurance, and also gave him a one thousand ($1,000) dollar down payment to buy a car. Id. The Court found the compensation was "not exorbitant" and "not contingent on a conviction."

Therefore, "neither the amount nor the nature of the fees poses a risk of perjury or improper inducement." Id.

[¶ 31] Finally, in United States v. Harris, the court held the defendant had not been entrapped as a matter of law because evidence the defendant had previously used and dealt drugs and "quickly overcame his reticence" after initially refusing to purchase cocaine raised issues as to the defendant's predisposition and the informant's inducement. 9 F.3d 493, 498–99 (6th Cir. 1993). The defendant disputed he was predisposed to purchase drugs and testified that although he had been a drug addict, he told the informant he was going to "clean up his life," but the informant "continually" pressured him "over a two-year period" to purchase drugs. Id. at 498. The court found "although the suggestion of the criminal activity initially was made by the government," it was not sufficient to establish entrapment as a matter of law. Id. (citing United States v. Barger, 931 F.2d 359, 367 (6th Cir. 1991)).

[¶ 32] In the present case, the undisputed facts do not support a finding of entrapment as a matter of law because the police officers did not use unlawful means to induce the crime, persuasion by the CI was not outrageous or unacceptable, and law enforcement had a sufficient basis for targeting the Defendant for illegal drug activity. Just as the Harris court found "the suggestion of criminal activity" made by the government was not sufficient to establish entrapment, the CI initially offering to sell methamphetamine to the Defendant does not establish entrapment because the Defendant's prior drug use and the CI's

testimony the Defendant was using and selling drugs provided a sufficient basis for law enforcement to target the Defendant. The CI's compensation for inducing suspects to sell or buy drugs could not have created a "risk of perjury or improper inducement" because it was not as great as the compensation given to the informant in Murchison. Thus, the Defendant in the present case was not entrapped as a matter of law.

[¶ 33] B. The trial court properly concluded the facts presented at trial did not support a finding of entrapment.

[¶ 34] The Defendant argues the district court "erred in failing to determine that sufficient evidence was produced to raise the entrapment defense." (D. Br. at ¶ 13.)

[¶ 35] The Court, "'in reviewing a factual conclusion that entrapment did not occur,'" does not "'weigh conflicting evidence'" and does not "'judge the credibility of witnesses.'" Murchison, 541 N.W.2d at 440–41 (quoting State v. Nehring, 509 N.W.2d 42, 44 (N.D. 1993)). The Court will "'look only to the evidence and its reasonable inferences most favorable to the verdict to see if substantial evidence exists to warrant a conviction.'" Id. at 441. The Defendant argues providing a drug addict with an opportunity to purchase drugs coupled with a low price necessitates a finding of entrapment.

[¶ 36] In its brief, the Defendant states "one of the most effective ways to get a person to relapse is to provide the addict an opportunity to get drugs." (D. Br. at ¶ 15.) The Defendant argues because she was a known drug addict, the CI

offering to sell her drugs constituted entrapment. However, N.D.C.C. section 12.1-05-11(2) clearly states "[c]onduct merely affording a person an opportunity to commit an offense does not constitute entrapment." Hammeren, 203 ND 6, ¶ 10, 655 N.W.2d 707.

[¶ 37] In State v. Overby, 497 N.W.2d 408, 414 (N.D. 1993), this Court found sufficient evidence for the jury to reject the defendant's entrapment defense because the "psychological pressure" used to induce the defendant to sell drugs was "not so contrary to public policy as to warrant entrapment" and law enforcement had a sufficient basis to suspect the defendant was a drug dealer. 497 N.W.2d at 414. In Overby, the defendant sold cocaine to the informant after the informant repeatedly told the defendant he was having financial troubles which might have forced him to drop out of school. Id. at 410 – 11. The defendant indicated he wanted to sell drugs to help his financial situation. Id. at 410–11. The court concluded the "mere fact that an acquaintance persuaded [a defendant] to make the sale does not establish entrapment." Id. at 414. The court also recognized "[i]n considering an entrapment defense, we have previously rejected claims of undue psychological pressure in inducing one to sell drugs." Id.

[¶ 38] In Murchison, this Court found sufficient evidence for the jury to reject the defendant's entrapment defense because the informant's befriending of and pressuring the defendant was "not of the outrageous and unacceptable nature" the entrapment defense was "designed to prevent." 541 N.W.2d at 441. The Court reasoned, although the informant's actions may have "'constituted trickery

and deception,'" those actions did not rise to the level needed to establish entrapment. Id. (quoting State v. Hoffman, 291 N.W.2d 430, 432 (N.D.1980)).

[¶ 39] In this case, the CI testified she knew the Defendant because the CI's aunt and friend were friends with the Defendant. (Tr. at 31:19-25.) The CI testified she had seen the Defendant smoking a methamphetamine pipe at the CI's aunt's house. (Tr. at 32:16-20.) The first time the CI approached the Defendant asking her if she was interested in purchasing methamphetamine, the Defendant indicated she was interested. (Tr. at 36:1-22.) The Defendant testified the "great deal" persuaded her to attempt to purchase the methamphetamine indicating the CI "was giving [her] something that was such great deal [she] couldn't turn it down." (Tr. at 67:15-6.)

[¶ 40] The Defendant testified she has a drug addiction and she relapsed "approximately mid to end of '09." (Tr. at 64:19-25.) The Defendant admitted she had prior drug convictions. (Tr. at 68:18-24.) When the CI and the Defendant arranged for the transaction to take place, the Defendant drove from Jamestown to Fargo, met with the CI, allowed the CI into her vehicle, "frisked" the CI looking for a wire, handed twelve hundred ($1,200) dollars in cash to the CI, and allowed the CI to leave the vehicle with the money, fully expecting the CI to return in a short time with one-half ounce of methamphetamine for the Defendant. (Tr. at 71-73.) The Defendant clearly was predisposed to commit the crime. Because the Defendant was predisposed to commit the crime and the conduct of law enforcement was reasonable, the trial court correctly concluded the Defendant had

not been entrapped by law enforcement.

[¶ 41] **II. The Defendant has not properly preserved the issue of whether the attempt came dangerously close to the commission of the crime for this appeal; therefore, any appellate review would require application of the "clear error" standard.**

[¶ 42] The Defendant did not properly raise the issue of whether the Defendant came dangerously close to possessing methamphetamine or offered any evidence at sentencing on the issue; therefore, the State does not believe the Defendant has preserved this issue for appeal.

[¶ 43] The Court will not hear issues raised for the first time on appeal. State v. Bucholz, 2004 ND 77, ¶ 34, 678 N.W.2d 144. An issue "must be appropriately raised in the trial court" so it can be addressed on appeal. State v. Osier, 1999 ND 28, ¶ 14, 590 N.W.2d 205. N.D.R.Ev. 103 requires the parties "'create a record which will permit informed appellate review.'" Id. (quoting Gorusch v. Gorusch, 392 N.W.2d 392, 394 (N.D. 1986)). If an issue is not preserved for appeal, the "standard of review requires a showing of 'obvious error which affects substantial rights of the defendant.'" State v. Glass, 2000 ND 212, ¶ 4, 620 N.W.2d 146 (quoting State v. Jones, 557 N.W.2d 375, 378 (N.D.1996)). The Court exercises its "power to consider obvious error cautiously and only in 'exceptional situations where the defendant has suffered serious injustice.'" Id. (quoting State v. Ash, 526 N.W.2d 472, 482 (N.D. 1995)).

[¶ 44] In this case, the State charged the Defendant with a class C felony.

Under N.D.C.C. § 12.1-06-01(3), "whenever it is established by a preponderance of the evidence *at sentencing* that the conduct constituting the attempt did not come dangerously close to the commission of the crime, an attempt to commit a . . . class C felony shall be a class A misdemeanor." N.D.C.C. § 12.1-06-01(3) (emphasis added). At trial, defense counsel asked Officer Schmidt whether the Defendant's "offer to purchase drugs [ever] came dangerously close to procuring any drugs?" (Tr. at 20:21-2.) Officer Schmidt said, given what had transpired, he "felt it was dangerously close." (Tr. at 21:14.) The State addressed the issue in its closing argument, arguing although defense counsel's questioning appeared to address the "dangerously close" issue, the "dangerously close" issue was a sentencing issue. (Tr. at 74:19-25) and (Tr. 75:1-2.) Defense counsel never discussed the "dangerously close" issue at the close of trial. At the conclusion of the trial, the district court indicated there "may be some sentencing issues" but nothing more was discussed at trial. (Tr. at 79:11-2.) Nearly three months later, at the sentencing hearing, defense counsel did not raise the issue of whether the offense for which the Defendant was convicted should be converted from a class C felony to a class A misdemeanor under the provisions of N.D.C.C. § 12.1-06-01(3). Defense counsel offered no evidence on the issue of "dangerously close." Defense counsel did not really raise the issue at trial in any meaningful way and certainly did not raise the issue at sentencing as required by the statute. Therefore, this issue was not properly preserved for appeal and should be reviewed under the "obvious error" standard.

[¶ 45] Under N.D.R.Crim.P. 52(b), "obvious errors or defects affecting substantial rights" not properly raised in the trial court, can be corrected by the Court. State v. Weaver, 2002 ND 4, ¶ 17, 638 N.W.2d 30 (citing State v. Erickstad, 2000 ND 202, ¶ 21, 620 N.W.2d 136). To evaluate whether there was an obvious error, the Court will "examine the entire record and the probable effect of the alleged error in light of all the evidence." Id. (citing Erickstad, at ¶ 22). "The burden is on the defendant to show the alleged error was prejudicial." Id. The Court has adopted the federal plain-error framework iterated in United States v. Olano, 507 U.S. 725 (1993), to determine whether an obvious error occurred. State v. Olander, 1998 ND 50, ¶ 13, 575 N.W.2d 658. To find obvious error under the Olano framework, the Court must first find (1) there was an error, (2) the error was obvious, and (3) the error affects substantial rights. Id. at ¶ 14, (quoting Olano, 507 U.S at 732–35). An obvious error is "a clear deviation from an applicable legal rule under current law." Id. (quoting Olano, 507 U.S at 734). The Court should only correct an obvious error "affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" Olano, 507 U.S. at 734, 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). Obvious errors affect substantial rights "when they are prejudicial or 'affect[] the outcome of the proceeding.'" State v. Dahl, 2010 ND 108, ¶ 18, 783 N.W.2d 41.

[¶ 46]The Defendant's sentence should be upheld because the district court's failure to reduce the Defendant's conviction to a class A misdemeanor was

not obvious error and did not affect the Defendant's substantial rights. The trial court did not clearly deviate from an applicable rule of law because N.D.C.C. § 12.1-06-01(3) places an affirmative burden on the Defendant to prove at sentencing he did not come dangerously close to committing the attempted crime. It does not place an affirmative responsibility on the district court to raise the issue or make any findings regarding whether the Defendant came "dangerously close" to commission of the crime. Additionally, the Defendant suffered no prejudice because the State believes the Defendant would not have been able to prove she did not come dangerously close to possessing methamphetamine.

[¶ 47] Although there is little case law to provide guidance on the definition of "dangerously close" under the State of New York's criminal law, to constitute an attempted crime, "[t]he defendant must have engaged in conduct that came 'dangerously near' commission of the completed crime." People v. Forsythe, 87 N.Y.S.2d 417, 419 (N.Y. App. Div. 2009) (quoting People v. Naradzay, 900 N.E.2d 924 (N.Y. 2008)). New York's attempt law states a suspect "who orders illegal narcotics from a supplier, admits a courier into his or her home, and examines the quality of the goods," has unquestionably come dangerously near to possessing the illegal narcotics. People v. Acosta, 80 N.Y.2d 665, 671 (N.Y. 2008). However, the New York courts have upheld convictions for attempting to criminally posses a controlled substance in cases where the defendant never handled the narcotics or refused to accept the narcotics. People v. Forsythe, 73 N.Y.S.2d 417, 419–20 (N.Y. App. Div. 2009); People v. Acosta, 602 N.Y.S.2d

845, 847 (N.Y. App. Div. 1993). But see New York v. Kassebaum, 744 N.E.2d 694, (N.Y. 2001); New York v. Acosta, 80 N.Y.2d 665, 671 (N.Y. 2008).

[¶ 48] In New York v. Warren, the court affirmed the dismissal of an indictment charging the defendants with attempted criminal possession of a controlled substance because the defendants had "not come very near to the accomplishment of the intended crime." 489 N.E.2d 240, 241–42 (N.Y. 1985) The defendants met a confidential informant at a hotel to pick up some cocaine they had agreed to purchase earlier. Id. At the hotel, the defendants did not have enough money to purchase the amount of cocaine they wanted, the informants did not have the amount of cocaine the defendants wanted, and the defendants were examining the cocaine to determine the "ratio of cocaine rock to loose powder" before effecting the transaction at a different time and place. Id. at 241. The court reasoned "several contingencies stood between the agreement in the hotel room and the contemplated purchase" preventing the proposed cocaine purchase from becoming dangerously close to its commission. Id. at 242.

[¶ 49] Contrarily, the court in People v. Acosta, upheld the defendant's conviction for attempted criminal possession of a controlled substance because the record demonstrated proof of the "defendant's clear desire to enter into such a large-scale drug transaction." 602 N.Y.S.2d 845, 847 (N.Y. App. Div. 1993). The court found the defendant's rejection of the cocaine because of its low quality eliminated any contingencies standing between the agreement and the completed purchase. Id. at 846–47. The court reasoned the defendant's clear intent to buy

drugs overrode that the transaction was "aborted only by a quality deficiency that he did not create." Id. at 847.

[¶ 50] More recently, in People v. Forsythe, the court held the defendant had come dangerously close to possessing cocaine because he had control over a package containing cocaine ultimately intercepted by police during a controlled delivery. 873 N.Y.S.2d 417, 419–20 (N.Y. App. Div. 2009) The defendant called United Parcel Service (UPS) to provide the correct address for the delivery of the package and went to the location where the package was going to be delivered. Id. at 419. The package also listed the defendant's cellular phone number. Id. The court reasoned the evidence established the defendant had intended to possess and sell the cocaine and was only prevented from doing so because the police had intercepted the package. Id. at 420.

[¶ 51] In the case at bar, the State urges the Court to affirm the Defendant's conviction as a class C felony because the Defendant has not proven by a preponderance of evidence the Defendant did not come dangerously close to possessing methamphetamine. Contrary to the several contingencies existing in Warren, the Defendant in the present case had completed every action necessary for her to possess methamphetamine: she had agreed to buy methamphetamine from the CI; she had driven from Jamestown to Fargo to the parking lot where the purchases would take place; she frisked the CI to ensure the CI was not wearing a wire; she gave the agreed upon twelve hundred ($1,200) dollars cash to the CI; and she waited for the CI to bring the methamphetamine to her. Just as the

defendant in Forsythe demonstrated a clear intent to possess cocaine, the Defendant in this case completed every necessary act required of her to complete the transaction, demonstrating she clearly intended to possess methamphetamine. The fact the CI did not have any methamphetamine was completely outside the Defendant's control and does not negate her clear intent to possess methamphetamine. Further, similar to how the Acosta defendant's clear intent to buy drugs overrode the "quality deficiency" outside of his control, the Defendant's clear intent to purchase methamphetamine overrode the quantity deficiency, the absence of any methamphetamine for the Defendant to purchase, outside of the Defendant's control. Consequently, the State believes the Defendant did come dangerously close to possessing methamphetamine.

[¶52] **CONCLUSION**

[¶53] In this case, the trial court correctly concluded the Defendant did not establish an entrapment defense. The trial court not addressing the issue of whether the act came "dangerously close" to the commission of the crime did not constitute clear error. The facts of this case established the Defendant did come "dangerously close" to the commission of the crime. For these reasons, the State respectfully requests the Court affirm the district court.

Respectfully submitted this _____ day of July 2011.

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[¶54] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on the 8th day of July, 2011, to: Robin L. Olson: robolson23@gmail.com

Tracy J. Peters