

APPENDIX

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DALIA A. DIPPOLITO,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D17-2486

[June 5, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Glenn D. Kelley, Judge; L.T. Case No. 502009CF009771AXXXMB.

Andrew B. Greenlee of Andrew B. Greenlee, P.A., Sanford, and Gregory C. Rosenfeld of the Law Offices of Greg Rosenfeld, P.A., West Palm Beach, for appellant.

Ashley B. Moody, Attorney General, Tallahassee, and Elba Caridad Martin, Assistant Attorney General, Tampa, for appellee.

ON MOTION FOR REHEARING AND REHEARING EN BANC

WARNER, J.

We deny the motion for rehearing and rehearing en banc, but we substitute our previous opinion with the following.

Dalia Dippolito appeals her conviction for solicitation to commit first-degree murder of her husband for which she was sentenced to sixteen years in prison. She raises three issues: 1) whether the trial court erred in allowing the State to present evidence of uncharged crimes; 2) whether the conduct of law enforcement constituted objective entrapment, which the court erred in refusing to submit to the jury; and 3) whether the court erred in allowing the jury to consider unsubstantiated bad acts evidence. As to the first issue, the presentation of the uncharged crime evidence occurred after the defendant opened the door to the evidence; thus, the court did not abuse its discretion in allowing the evidence. As to the

second issue, the issue of objective entrapment is a matter of law for the court and not the jury, and the court did not err in denying the appellant's claim of objective entrapment. As to the third issue, the bad act evidence was inextricably intertwined with other evidence and was necessary to show the context out of which the charged crime arose. We thus affirm as to all issues raised.

This is an appeal of the third trial of appellant. This court reversed the first trial based upon an error in jury selection. *See Dippolito v. State*, 143 So. 3d 1080 (Fla. 4th DCA 2014). The second trial resulted in a hung jury. As set forth in our former opinion, the basic facts of the charge are as follows:

In the late summer of 2009, appellant's lover approached the Boynton Beach Police Department and reported that appellant was planning to kill her husband. An investigation ensued, during which police videotaped incriminating meetings between appellant and her lover, as well as between appellant and a purported hit man, who was in reality an undercover officer. The hit man agreed to shoot and kill appellant's husband in their home and make the killing look like part of a burglary.

Subsequently, police staged a fake crime scene at appellant's home and informed her that her husband had been killed in the manner described by the hit man. Appellant's reaction was videotaped by the police and by the television show "Cops," which was then filming the Boynton Beach Police Department. Appellant was subsequently taken to the police station and interviewed. The police eventually told appellant that her husband was alive and revealed the hit man was an undercover officer. Appellant maintained her innocence.

She was charged with solicitation to commit first degree murder with a firearm.

Id. at 1081.

After the reversal of the first conviction in *Dippolito I*, the defense filed a motion to dismiss based on objective entrapment due to allegations of BBPD's misconduct in the investigation; claims of BBPD's failure to investigate her lover, who told the police of Dippolito's murder plan; an assertion that the lover did not wish to cooperate; and an allegation of

BBPD's failure to supervise the lover. The trial court conducted an evidentiary hearing and denied the motion to dismiss, holding that the conduct of the police did not amount to objective entrapment. Appellant filed a petition for writ of prohibition with this court, arguing that denial of dismissal was improper based upon objective entrapment. Neither in the trial court nor in this court did appellant argue that the issue was one for the jury. This court dismissed the petition.

Prior to the second trial, appellant moved in limine to prevent the State from introducing evidence that Dippolito had previously unsuccessfully attempted to poison her husband with antifreeze. The State stipulated that it would not admit evidence relating to the poisoning allegation. The trial court agreed, although noting that the ruling could change depending on the evidence presented at trial. At trial, the jury was deadlocked, and a mistrial was declared.

Prior to the third trial, appellant also moved the court for an order precluding the State from introducing evidence of collateral bad acts. She argued that the collateral bad acts were not "inextricably intertwined" with the charged offense because the State was previously able to present its case during the second trial without relying on the prior bad acts evidence. The trial court denied the motions.

At the third trial, the jury heard extensive evidence of appellant's conduct both before and after her lover approached the police to inform them of her plans to kill her husband. Much of it involved police-recorded conversations between appellant and her lover after the lover agreed to become an informant. When appellant called the lover as a witness in her case, the State sought, on cross-examination, to question him about appellant's prior admission of attempting to poison her husband. The court ruled the testimony was admissible for impeachment purposes of the lover because the defense had opened the door when the lover testified that he didn't believe Dippolito actually wanted to have her husband killed. The court allowed the State to ask the lover whether appellant had told him that she had previously tried to poison her husband using antifreeze. The lover responded that she had.

At the conclusion, despite the fact that the court had already held an evidentiary hearing and determined that there was no objective entrapment, appellant requested a jury instruction on objective entrapment, which required the jury to determine whether the police conduct was so egregious that it offended notions of justice and fairness. The court denied the instruction. The jury convicted her as charged, and

the court sentenced her to sixteen years in prison. She appeals her conviction.

In her first issue on appeal, Dippolito argues the court improperly allowed the State to introduce evidence that she told her lover that she had previously tried to poison her husband with antifreeze. Questions about the admissibility of evidence are within the discretion of the trial judge, as limited by the rules of evidence. *Nardone v. State*, 798 So. 2d 870, 874 (Fla. 4th DCA 2001). While she contends that this court found the testimony inadmissible in *Dippolito I*, we did not expressly decide that issue. There, the defense argued that the jury venire had been tainted because they had all heard one juror say that she had heard Dippolito had attempted to poison her husband. We ruled that the trial court erred by failing to strike the jury panel after hearing the allegation. *Dippolito I*, 143 So. 3d at 1085. We did not rule that the evidence could not be admitted under any circumstances.

When ruling on the pre-trial motion in limine regarding the poisoning, the court notified the parties that the ruling was subject to change if something occurred during the trial to cause the judge to rethink the earlier ruling. Something did occur during trial to change the ruling—the defense elicited testimony from the lover that he didn’t believe that appellant actually wanted to kill her husband. Defense counsel thus “opened the door” for impeachment of the lover with evidence that appellant had told him of prior attempts to kill her husband. As the court explained in *Ramirez v. State*, 739 So. 2d 568, 579 (Fla. 1999):

As an evidentiary principle, the concept of “opening the door” allows the admission of otherwise inadmissible testimony to “qualify, explain, or limit” testimony or evidence previously admitted. *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986); see *Huff v. State*, 495 So. 2d 145, 150 (Fla. 1986); *Blair v. State*, 406 So. 2d 1103, 1106 (Fla. 1981).

The concept of “opening the door” is “based on considerations of fairness and the truth-seeking function of a trial.” *Bozeman v. State*, 698 So. 2d 629, 631 (Fla. 4th DCA 1997).

Here, we conclude that the court did not abuse its discretion in admitting the evidence of appellant’s earlier attempt to poison her husband. That evidence was necessary to limit the lover’s testimony on direct. It also explains why the lover initially approached the police—because he did actually believe appellant was going to kill her husband.

As to her second issue, appellant contends that law enforcement's conduct in this case amounted to objective entrapment as a matter of law. She argues that law enforcement's treatment of her lover was outrageous conduct. She contends, as well, that the police participation in the "Cops" TV program constituted objective entrapment. The review of the denial of a motion to dismiss founded on objective entrapment is de novo. *Bist v. State*, 35 So. 3d 936, 939 (Fla. 5th DCA 2010).

In considering objective entrapment, courts look to the totality of the circumstances, focusing on "whether the government conduct 'so offends decency or a sense of justice that judicial power may not be exercised to obtain a conviction.'" *Hernandez v. State*, 17 So. 3d 748, 751 (Fla. 5th DCA 2009) (quoting *State v. Blanco*, 896 So. 2d 900, 901 (Fla. 4th DCA 2005)). The types of conduct which have led to a finding of objective entrapment are relatively limited. The illegal manufacturing of crack cocaine by police to be used in police-initiated sale transactions was found to be objective entrapment in *State v. Williams*, 623 So. 2d 462 (Fla. 1993). In *State v. Glosson*, 462 So. 2d 1082 (Fla. 1985), the Florida Supreme Court found that the police tactic of using a contingent fee arrangement for the testimony of an informant constituted a due process violation because it manufactured, rather than detected, crime. In *State v. Hunter*, 586 So. 2d 319 (Fla. 1991), the supreme court found objective entrapment where the informant's contract with police required him to obtain at least four kilograms of cocaine within a certain time period in order to reduce his sentence, thus providing an incentive for the informant to target otherwise innocent persons. In *Dial v. State*, 799 So. 2d 407, 410 (Fla. 4th DCA 2001), we held that an "informant's conduct . . . , targeting an innocent person under her supervision and exploiting her weaknesses without any efforts from law enforcement to avoid entrapment or monitor the informant's activities," constituted objective entrapment.

None of these circumstances appear in this case. Although appellant asserts that the police threatened the lover to gain his cooperation, the trial court found that he was not threatened by police. It was the lover who first approached the police with his concern that appellant would kill her husband, not the other way around. The lover was not attempting to reduce his own exposure to a criminal sentence, nor was he being paid by law enforcement. And during cross-examination, the lover admitted that he was not actually threatened with prosecution.

Appellant also asserts that the failure to supervise the lover, who then exerted substantial pressure on appellant, constituted objective entrapment. Failure to supervise a CI will not support dismissal unless

the lack of supervision results in unscrupulous conduct by the informant. *Bist*, 35 So. 3d at 941. Without more, this failure does not rise to the level of a due process violation. See *State v. Figueroa*, 761 So. 2d 1252, 1255 (Fla. 3d DCA 2000). The mere fact that the lover made repeated phone calls to appellant without the police monitoring them is insufficient to show entrapment.

With respect to the “Cops” television filming, the police did not involve the show in the surveillance or investigation of appellant until after appellant had already taken all the steps to solicit the murder of her husband. It was only at the point that she was being arrested, after the crime was complete, that the TV program filmed the arrest. As the crime of solicitation to commit murder was completed before “Cops” was involved, the agreement between the police and the show with respect to the filming did not constitute a due process violation.

Relatedly, appellant contends that the court erred in refusing to submit her objective entrapment defense to the jury. The appellant had already moved to dismiss based upon objective entrapment, and the trial court held an evidentiary hearing and denied the motion based upon the court’s thorough review of the evidence.

Objective entrapment is a matter of law for the court to decide. See *Cruz v. State*, 465 So. 2d 516, 521 (Fla. 1985). Appellant points to *Delice v. State*, 878 So. 2d 465 (Fla. 4th DCA 2004), for the proposition that the defense should be submitted to the jury, but *Delice* does not go that far. In *Delice*, the defendant claimed that a confidential informant raped her, causing her to fear the CI and making her susceptible to the CI’s inducements. *Id.* at 467. The opinion states, “With respect to objective entrapment, we find Delice’s allegation of rape to be unsubstantiated and believe this to be a jury question.” *Id.* at 468. At the most, this would permit a trial court to submit discrete factual disputes to the jury, but the ultimate decision of whether the conduct of law enforcement constitutes objective entrapment remains for the court, not a jury, to decide. Moreover, there is no indication in the opinion that the court had already determined the factual issues and denied the objective entrapment claim on its merits prior to trial, as occurred in this case.

The supreme court has clearly stated, both in *Cruz* and again in *Munoz v. State*, 629 So. 2d 90 (Fla. 1993), that objective entrapment is a question of law for the court. In *Munoz*, the court again explained that conduct of law enforcement which violates due process can constitute entrapment, which is a decision made by a judge not a jury, because it is an affront to

the judicial system, regardless of its implications to the individual defendant. Objective entrapment does not involve elements of a crime but focuses on the due process rights of all citizens to be free of egregious police conduct. “While we must not tie law enforcement's hands in combatting crime, there are instances where law enforcement's conduct cannot be countenanced and the courts will not permit the government to invoke the judicial process to obtain a conviction.” *Id.* at 98 (quoting *State v. Williams*, 623 So.2d 462, 465 (Fla. 1993)). “The principle of due process imposes upon the courts ‘the responsibility to conduct “an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend [the] canons of decency and fairness” ’” *Soohoo v. State*, 737 So. 2d 1108, 1110-11 (Fla. 4th DCA 1999) (quoting *Williams*, 623 So. 2d at 465). Even if there were disputed issues of fact, the trial court resolved those issues on the motion to dismiss filed by the appellant and determined that law enforcement’s conduct was not so outrageous as to offend due process principles. *See Blanco*, 896 So. 2d at 902 (reversing a trial court’s dismissal of charges on objective entrapment grounds where there was a disputed issue of fact between the defendant and the State, and noting that even if the defendant’s factual allegations were assumed as true, the law enforcement’s conduct was not so egregious as to require dismissal of the charges).

The United States Supreme Court has held that the Fifth and Sixth Amendments to the Constitution require that all elements of a crime must be submitted to the jury for determination, but for other procedures, including affirmative defenses, the Constitution does not require a jury determination. *See United States v. Gaudin*, 515 U.S. 506, 511 (1995); *see State v. Ellis*, 723 So. 2d 187, 189-90 (Fla. 1998). Assuming that objective entrapment is an affirmative defense, it clearly does not involve the determination of an essential element of the crimes with which appellant was charged. Therefore, there is no right to a jury determination of the issue.

The matter of objective entrapment is a matter of law for the court, and the court determined the issue without assistance from the jury. We find no mandatory requirement that the issue be submitted to the jury for resolution. While we would not preclude a trial court, in its discretion, from submitting discrete factual disputes to a jury in the court’s determination of the due process issue of objective entrapment, we hold that there is no constitutional obligation to submit the claim to the jury.

Finally, appellant claims that the court allowed into evidence several collateral crimes which were not inextricably intertwined with the

solicitation to commit murder. These included: 1) theft of money from her husband which was allegedly earmarked for restitution in a criminal case against the husband; 2) that she attempted to hire another individual to kill her husband; 3) that she illegally planted drugs in her husband's car to cause him to violate probation; 4) an attempted theft of a gun from her lover; 5) attempting to defraud her husband out of the title to his home; and 6) her relationship with another lover and various texts between them, some of which discuss her efforts to get rid of her husband.

“The admissibility of collateral crime evidence is within the discretion of the trial court, and the trial court's ruling shall not be disturbed upon review absent an abuse of that discretion.” *Hodges v. State*, 885 So. 2d 338, 357 (Fla. 2004). “[C]ollateral crimes evidence is ‘inextricably intertwined’ if the evidence is necessary to (1) adequately describe the deed; (2) provide an intelligent account of the crime(s) charged; (3) establish the entire context out of which the charged crime(s) arose; or (4) adequately describe the events leading up to the charged crime(s).” *Ballard v. State*, 66 So. 3d 912, 918 (Fla. 2011).

The court did not abuse its discretion in admitting this evidence. Without reference to these other crimes, it would have been impossible to give a complete or intelligent account of the criminal episode and how it developed over time. The text messages were entered into evidence to show that Dippolito had an ongoing plot, first to have her husband's probation revoked in order to obtain his assets. And later, when she failed to get his probation revoked, she plotted to murder him. The evidence was relevant and established the entire context out of which the charged crimes arose.

For the foregoing reasons, we affirm appellant's conviction and sentence.

CIKLIN and LEVINE, JJ., concur.

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 4, 2019

CASE NO.: SC19-1139

Lower Tribunal No(s).:

4D17-2486;

502009CF009771AXXXMB

DALIA A. DIPPOLITO

vs. STATE OF FLORIDA

Petitioner(s)

Respondent(s)

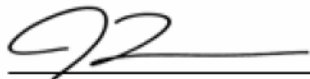
This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, C.J., and LABARGA, LAWSON, LAGOA, and LUCK, JJ., concur.

A True Copy

Test:



John A. Tomasino

Clerk, Supreme Court



db

Served:

GREGORY C. ROSENFELD

ANDREW B. GREENLEE

ELBA CARIDAD MARTIN-SCHOMAKER

HON. LONN WEISSBLUM, CLERK

HON. GLENN DAVID KELLEY, JUDGE

HON. SHARON REPAK BOCK, CLERK

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2009CF009771 AXX

OBTS NO.: _____

Dalia Dippolito
DEFENDANT

SENTENCE

(As to Count(s) 1)

FILED
Circuit Criminal Department
JUL 21 2017
SHARON R. BOCK
Clerk & Comptroller
Palm Beach County

The Defendant, being personally before this Court, accompanied by the Defendant's attorney of record, _____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why Defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of \$ _____ pursuant to § _____, Florida Statutes, plus all costs and additional charges as outlined in the Order assessing additional charges, costs and fines as set forth in a separate order entered herein.

The Defendant is hereby committed to the custody of the:

- ☒ Department of Corrections
☐ Sheriff of Palm Beach County, Florida
☐ Department of Corrections as a youthful offender

for a term of 10 years. It is further ordered that the Defendant shall be allowed a total of 163 days as credit for time incarcerated prior to imposition of this sentence. It is further ordered that the composite term of all sentences imposed for the counts specified in the order shall run ☐ consecutive to ☐ concurrent with (check one) the following:

- ☐ Any active sentence being served
☐ Specific sentences: _____

- ☐ The instant sentence is based upon the Court having previously placed the Defendant on probation and having subsequently revoked the Defendant's probation for violation(s) of condition(s) _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Palm Beach County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of the Judgment and Sentence, and any other documents specified by Florida Statute. Additionally, pursuant to §947.16(4), Florida Statutes, the Court retains jurisdiction over the Defendant.

- [] The Sentencing Court objects to the Defendant being placed into the Youthful Offender Basic Training Program pursuant to Florida Statute §958.045.
- [] Pursuant to §322.055, 322.056, 322.26, 322.274, Florida Statutes, The Department of Highway Safety and Motor Vehicles is directed to revoke the Defendant's privilege to drive. The Clerk of the Court is ordered to report the conviction and revocation to the Department of Highway Safety and Motor Vehicles.

DONE and **ORDERED** in open court in Palm Beach County, Florida this 21 day
of July, 2017.



CIRCUIT JUDGE

IN THE CIRCUIT COURT, FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 2009CF009771AMB

DIV: W

OBTS NUMBER:

STATE OF FLORIDA

v.

DALIA A DIPPOLITO,

W/F,

10/18/1982, [REDACTED]

- ☐ PROBATION VIOLATOR
☐ COMMUNITY CONTROL VIOLATOR
☐ RETRIAL
☐ RESENTENCE

JUDGMENT

The above defendant, being personally before this Court represented by GREG ROSENFELD ESQ & BRIAN CLAYPOOL,
ESQ. (attorney)

| | | |
|---|---|--|
| <input checked="" type="checkbox"/> Having been tried and found guilty of the following crime(s): | <input type="checkbox"/> Having entered a plea of guilty to the following crime(s): | <input type="checkbox"/> Having entered a plea of nolo contendere to the following crime(s): |
|---|---|--|

| COUNT | CRIME | OFFENSE STATUTE NUMBER(S) | DEGREE |
|-------|---|---|--------|
| 1 | Solicitation to Commit First Degree Murder with a Firearm | 777.04(2) and 782.04(1)(a)1 and 782.04(1)(a)(2) | 1F |
| | | | |
| | | | |

☒ and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☒ and being a qualified offender pursuant to s. 943.325, the Defendant shall be required to submit DNA samples as required by law.

☐ and good cause being shown: IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

SENTENCE

STAYED

- ☐ The Court hereby stays and withholds imposition of sentence as to count(s) and places the Defendant on
☐ probation and/or ☐ Community Control under the supervision of the Dept. Of Corrections
(conditions of probation set forth in separate order).

SENTENCE

DEFERRED

- ☐ The Court hereby defers imposition of sentence until

The Defendant in Open Court was advised of his right to appeal from the Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

DONE AND ORDERED in Open Court at Palm Beach County, Florida, this 22 day of June, 2017.


CIRCUIT COURT JUDGE

Feb 2012

1062
003812

App. 12

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 09CF009771AMB DIV "W"

STATE OF FLORIDA

vs.

DALIA A DIPPOLITO,

Defendant.

_____ /

VERDICT

WE, THE JURY, FIND as follows:

As to Count I, we find the Defendant

✓ Guilty of SOLICIATION TO COMMIT FIRST DEGREE MURDER,
as charged in the Information.

_____ Not Guilty.

SO SAY WE ALL, this 16th day of June 2017, in West Palm Beach,
Palm Beach County, Florida.


JURY FOREPERSON SIGNATURE

Thomas Gaines
PRINT NAME

FILED

Circuit Criminal Department

JUN 16 2017

SHARON R. BOCK
Clerk & Comptroller
Palm Beach County

003811

App. 13

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,)
)
vs.)
)
DALIA DIPPOLITO,)
)
Defendant.) Case No: 2009CF009771AMB

JURY TRIAL

PRESIDING: THE HONORABLE GLENN KELLEY

APPEARANCES:

ON BEHALF OF THE STATE:

DAVE ARONBERG, ESQUIRE
State Attorney
401 North Dixie Highway
West Palm Beach, Florida 33401
By: CRAIG WILLIAMS, ESQUIRE AND
LAURA LAURIE, ESQUIRE
Assistant State Attorneys

ON BEHALF OF THE DEFENDANT:

GREG ROSENFELD, ESQUIRE
515 North Flagler Drive
Suite P-300
West Palm Beach, Florida 33401

BRIAN CLAYPOOL, ESQUIRE
4 East Holly Street
Suite 201
Pasadena, California 91103

Friday, June 9th, 2017
Courtroom 11H
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401
9:54 o'clock, a.m. - 3:53 o'clock, p.m.

2284

JAMES A. GEE, Certified Electronic Transcriber

App. 14

1 THE COURT: I'm sure you did, Mr.

2 Rosenfeld; you renew all motions.

3 MR. ROSENFELD: And the one thing I think I
4 did not renew but I'm not sure is I know -- I
5 did both motions to dismiss but that was our
6 request, to present an objective entrapment
7 affirmative defense; I mean if I had not --

8 THE COURT: Right. Well, I think
9 technically you could probably request at the
10 end of the case as you did before to preserve
11 it, an instruction on objective entrapment; I
12 think probably you should do that if that's
13 what you're planning to ask for.

14 MR. ROSENFELD: Yes, I plan on bringing a
15 JOA also --

16 THE COURT: Yeah, so I think you should
17 plan to do that because that's a request for
18 jury instruction and I think that probably
19 needs to be done during the course of the
20 trial; motions to suppress, any substantive
21 motions that I have previously ruled upon, are
22 preserved and do not have to be renewed, but
23 that would be a request for a specific
24 instruction in this trial so I think you should
25 renew that and give me the jury instruction

1 again if that's what you're going to ask for.

2 MR. ROSENFELD: I will, Judge.

3 THE COURT: I think that's important for
4 the appellate record.

5 MR. ROSENFELD: But at this time is it
6 denied?

7 THE COURT: The motion to suppress?

8 MR. ROSENFELD: No, I the guess motion to
9 present a defense -- present that defense.

10 THE COURT: Well, it is, but I would renew
11 it again; I mean --

12 MR. ROSENFELD: Oh, no, I made --

13 THE COURT: -- I've already made my
14 position on objective entrapment clear so yeah,
15 if you're renewing your request to present an
16 objective entrapment defense to the jury then
17 yes, that's denied; I'm just saying to preserve
18 your appellate record you should ask for that
19 jury instruction again. I don't think my
20 ruling will be any different but then it's
21 preserved; you've asked for the instruction,
22 they will see the instruction you have asked
23 for, and I think it's preserved then in terms
24 of instructing the jury on the law.

25 MR. ROSENFELD: Thank you, Judge.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,)
)
vs.)
)
DALIA DIPPOLITO,)
)
Defendant.) Case No: 2009CF009771AMB

JURY TRIAL

PRESIDING: THE HONORABLE GLENN KELLEY

APPEARANCES:

ON BEHALF OF THE STATE:

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By: CRAIG WILLIAMS, ESQUIRE AND
LAURA LAURIE, ESQUIRE
Assistant State Attorneys

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BRIAN CLAYPOOL, ESQUIRE
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Suite 201
Pasadena, California 91103

Tuesday, June 13th, 2017
Courtroom 11H
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401
10:02 o'clock, a.m. - 5:00 o'clock, p.m.

2785

JAMES A. GEE, Certified Electronic Transcriber

App. 17

1 We're getting a little better; we're getting a
2 little closer to that 9:45. We do appreciate
3 your patience with us.

4 Is the state ready to call any
5 additional witnesses?

6 MS. LAURIE: Your Honor, the state would
7 rest at this time.

8 THE COURT: The state rests.

9 All right, the state rests. I have to
10 send you right back in for one minute before we
11 proceed so I apologize for bringing you out.
12 The state has now rested their case so I'm
13 going to send you back into the jury room for
14 just one moment and we'll call you back out.

15 All right, Counsel, you may be seated.

16 Mr. Rosenfeld, defense motions?

17 MR. ROSENFELD: Yes, at this time defense
18 moves for a judgment of acquittal. The state
19 has not before -- the prima facie case or
20 competent evidence to prove solicitation to
21 commit first-degree murder with a firearm.
22 Specifically, Judge, I would point to the
23 incredible testimony of the state's witnesses;
24 Officer Moreno's inability to remember pretty
25 much anything; and we do not believe that the

1 state has put forth evidence showing that Ms.
2 Dippolito had the requisite mens rea to commit
3 the crime. Now in regard to objective
4 entrapment, I believe the state has not
5 disproved the affirmative defense of objective
6 entrapment. Your Honor and I have gone back
7 and forth about whether or not that is an
8 affirmative defense; while I recognize that
9 there is a plethora of case law in Florida
10 recognizing subjective entrapment as an
11 affirmative defense in Florida and objective
12 entrapment as a due process issue to be decided
13 by the court, defense is not aware of any case
14 that says objective entrapment cannot be an
15 affirmative defense. In fact, there's Campbell
16 and Delice, Delice out of the Fourth District
17 Court of Appeal, which held that objective
18 entrapment is an affirmative defense.

19 THE COURT: No, it didn't hold that.

20 MR. ROSENFELD: It says --

21 THE COURT: It did -- it said that was a
22 fact issue but it didn't hold that it was an
23 affirmative defense; you're going a little far,
24 Mr. Rosenfeld.

25 MR. ROSENFELD: I think that that was their

1 third ruling they relied on; there was three
2 issues they addressed. They did not reverse on
3 that issue but they did find that the issues of
4 objective entrapment and subjective entrapment
5 should be heard by the jury when there is a
6 mixed issue of law and fact. And just to
7 compare that to other states such as Iowa,
8 where objective entrapment is both a question
9 of law and an issue of fact, when the facts are
10 in dispute it has to be determined by the trial
11 court whereas when there are disputed issues of
12 fact it's to be determined as an affirmative
13 defense by the trier of fact, so with that we
14 would argue the state has put forth no evidence
15 to disprove outrageous police misconduct.

16 THE COURT: Okay. At this point it's only
17 the prima facie case; I'm going to deny the
18 argument -- the motion for judgment of
19 acquittal; they've made a prima facie case of
20 solicitation to commit first-degree murder, and
21 I've held and will continue to hold that
22 objective entrapment is a due process violation
23 which means by definition and by Supreme Court
24 precedent is a question for the court to
25 decide, not the jury. Are you ready to

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: 09-CF-009771 AMB

| | |
|---------------------|---|
| STATE OF FLORIDA, |) |
| |) |
| vs. |) |
| |) |
| DALIA A. DIPPOLITO, |) |
| |) |
| Defendant. |) |

JURY TRIAL (CONTINUED)
(Pages 3677 - 3925)

PRESIDING: HONORABLE GLENN KELLEY

Friday, June 16, 2017
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401
10:31 - 6:19 o'clock, p.m.

KAREN BERGSTROM, OFFICIAL TRANSCRIPTIONIST
Page 3677

1 to take us a couple of minutes to do that.

2 I'm hoping to do that relatively quickly,
3 so I'm going to keep you in the jury room while we
4 do that. So we'll be bringing you out in just a
5 couple of minutes. We'll get through these issues as
6 quick as we can.

7 So I apologize for bringing you out and
8 sending you right back in.

9 (Whereupon, the jury left the courtroom.)

10 THE COURT: All right. Counsel, you may be
11 seated.

12 Mr. Rosenfeld, do you want to go ahead and
13 do your renewed motion for judgment of acquittal?

14 MR. ROSENFELD: Yes, Your Honor.

15 At this point Defense would renew its
16 motion for judgment of acquittal under the second
17 standard, no reasonable juror.

18 And it's two parts, Your Honor. First,
19 regarding intent, we believe the State has not
20 established intent. No reasonable juror could find
21 that Ms. Dippolito did intend to approve this crime.
22 And for several reasons.

23 First, following Mr. Shihadeh's testimony,
24 and then laughing at him after she allegedly
25 committed this crime, that goes against intent.

1 Secondly, allowing Ms. Dippolito to go
2 home night after night after night.

3 Third, the testimony that after she
4 allegedly committed this crime for two nights in a
5 row she's permitted to go home and they do nothing
6 to prevent her from seeing Mr. Dippolito or anything
7 else, putting no surveillance on him.

8 And I think the facts and the incredible
9 testimony put forth by both Officer Moreno,
10 Stephanie Slater -- well, mostly Officer Moreno --
11 indicates that there's not sufficient evidence to
12 establish intent, for a reasonable juror to
13 establish intent beyond a reasonable doubt.

14 Secondly, we believe they could not
15 disprove objective entrapment.

16 Now, you know, I stand firm on the fact
17 that that is an affirmative defense in Florida. I
18 recognize Your Honor's position and respect it.
19 However, while there is a plethora of case law
20 indicating that it is an issue of law, and
21 subjective entrapment is an issue of fact, I am yet
22 to find a single case in the State of Florida saying
23 that it cannot be an affirmative defense.

24 THE COURT: Or that it can.

25 MR. ROSENFELD: Correct -- well, no, incorrect.

1 THE COURT: Well, no, you're going to get --
2 you're going to cite to two cases in dicta where
3 they talk about --

4 MR. ROSENFELD: No, I wouldn't say it's dicta,
5 and this is why.

6 There was three issues in *Delease*
7 (phonetic) that were decided by the Court. It was
8 reversed on one of those issues, but they addressed
9 all three issues. And the third issue -- and I -- I
10 think this is where we disagree. And I have been
11 through this time and time again reading the case
12 and I don't think it's dicta -- is when they talk
13 about the objective entrapment argument and that
14 should be an issue for the trier of fact when there
15 are factual issues in dispute, they actually -- I
16 mean, they make a ruling based on that. Obviously,
17 the case isn't reversed on that ground. But I think
18 they do establish a subtle principle of law there.

19 Now, I understand Your Honor's position.
20 And I think, you know, in this case it is a fine
21 line. But in a situation like that, where the Fourth
22 has addressed at least in some capacity the issue,
23 this Court is bound by that. And they are bound by
24 the Fourth.

25 And I'd argue that in light of that, it is

1 the same standard as Iowa and a few other states
2 cited in the motion where it's both a pretrial issue
3 when there are no disputed issues of fact, and an
4 issue for the finder of fact when there are disputed
5 issues.

6 And in this case, it goes without saying,
7 from the pretrial motion to dismiss, that there are
8 disputed issues. I mean, Your Honor did acknowledge
9 in -- in your order that there were disputed issues.
10 I mean, I think we're not going to disagree on that
11 point.

12 But we'd rest on that, Judge. And move for
13 a judgment of acquittal on those two grounds.

14 THE COURT: Okay. Brief response by the State?

15 MR. WILLIAMS: Judge, we're going to rest on the
16 evidence presented.

17 THE COURT: I can't hear you.

18 MR. WILLIAMS: We're resting on the evidence
19 presented, sir.

20 THE COURT: All right.

21 Okay. The arguments you made with respect
22 to intent are going to make fine points in closing
23 argument, but I think we have a jury question on the
24 issue of intent.

25 Objective entrapment, you know, I've made

1 my ruling on that. If the Fourth, in my view, in my
2 humble view, wants to make new law on that, they
3 can. This could be a test case for that. I don't
4 know whether they would address it.

5 And again, it's only relevant if there's a
6 conviction. If there's no conviction, this is no
7 issue. And if it's a hung jury, you guys can find
8 another judge to try the case again because I'm out.

9 But in any event, with regard to objective
10 entrapment, my analysis remains the same.

11 First of all, entrapment in the State of
12 Florida is initially controlled by statute. The
13 Legislature has actually defined what entrapment is.

14 After the Legislature passed that statute
15 our Supreme Court came in and said that there's a
16 limited exception because they -- before that, my
17 understanding is, is that there was a concept of
18 objective entrapment which could -- might be
19 submitted to a jury. But I don't think it's quite
20 what you proposed.

21 But after that statute, it was posted in
22 terms of entrapment, that was supposed to define the
23 law of entrapment in the State of Florida.

24 The Supreme Court came in and said there
25 was a limited exception to that, which is the

1 concept of objective entrapment. And if you look at
2 the Supreme Court precedent which establishes it, it
3 clearly says the reason we can create this
4 exception, because the Legislature has said
5 otherwise -- the reason we can create this exception
6 is because we can rely on the Constitution. And we
7 can rely on the Constitution because we can call it
8 a due process violation -- I'm paraphrasing. This
9 isn't exactly what they said.

10 But they basically found that objective
11 entrapment nevertheless existed in the State of
12 Florida because it would be a due process violation.
13 And a Court could determine a due process violation,
14 determine based on police conduct, that it was so
15 outrageous that concepts of due process would
16 prevent the case from going forward, and deny the
17 State the right to even prosecute.

18 And that's -- that's the core of objective
19 entrapment, they get denied -- the remedy is, the
20 Court hears it and says you can't even go forward.

21 To recognize the objective entrapment
22 defense, as you've proposed it -- and maybe the
23 Fourth will, I don't know. Like I said, this could
24 be a test case -- would be to suggest that in every
25 criminal case a criminal Defendant, without raising

1 subjective entrapment, can basically say, well, you
2 know, the police acted outrageously here, let's get
3 an objective -- an objective entrapment instruction,
4 and place that issue in every criminal case before a
5 jury.

6 I don't believe that is either the intent
7 or the holding of the Supreme Court. And I do
8 recognize the statement that was made by the Fourth.
9 I can just tell you that many times -- because I've
10 sat there. You have to be careful with your words.
11 Sometimes you put something in an opinion which
12 people later run with. And that really isn't what
13 they're trying to say.

14 So again, this may be a new issue. You may
15 be able to create new law in the State of Florida,
16 at least from my perspective. But I think the
17 Supreme Court precedent in the state, construing the
18 statute, construing objective entrapment as a due
19 process violation, that it's clearly an issue for
20 the Court and not the jury.

21 That's my analysis. Now, if I'm wrong --
22 you and I have agreed to disagree on this issue all
23 the way through. And if I'm wrong, the Fourth has --
24 you know, they will reverse me like they'll reverse
25 anyone else. So if that's the case, they'll reverse

1 me if it becomes an issue.

2 So that's my position on that, that
3 objective entrapment is not for the jury. Subjective
4 entrapment is. So I'm going to deny your motion for
5 judgment of acquittal on that ground also.

6 MR. ROSENFELD: Well, I think while we're --
7 you've denied both. And I think while we're
8 addressing this point, quickly we might as well
9 just -- or I might as well add two arguments to
10 permit it for purposes of the -- or I guess to argue
11 for my requested jury instruction. We're already in
12 the middle of the discussion, so --

13 THE COURT: You might as well.

14 MR. ROSENFELD: Why I reraise it -- and I think
15 the last two arguments I'd make is -- and I believe,
16 without having the motion in front of me, it was --
17 *Ruiz* (phonetic) was the case, the first case to
18 address subjective entrapment when they -- when
19 Florida adopted the statutory subjective entrapment.

20 And I might be wrong on the name of the
21 case, but that sounds somewhat familiar.

22 And *Ruiz*, and so did, you know, the other
23 states that have adopted my analysis -- and there
24 are three different positions that states have
25 adopted throughout the country, my analysis being

1 one of them -- they stress the importance in these
2 states of placing a check on police misconduct. And
3 that check extends well beyond just the judge, also
4 the jury, you know, as the fact finders.

5 Now, also, if you look at case law in
6 Florida regarding other issues -- let's say C-4
7 motions -- when there are factual disputes, it is an
8 issue of fact for the jury.

9 Now, by way of example -- and, you know, I
10 agree there is a difference here, but there's also a
11 similarity. When it comes to a Stand Your Ground
12 motion -- which is statutory, and I recognize
13 that -- it's an issue of law pretrial.

14 We have a second opportunity to argue that
15 to the fact finder.

16 THE COURT: But it's --

17 MR. ROSENFELD: And I know, one's
18 Constitutional, one's statutory.

19 THE COURT: It's totally different.

20 The right of self-defense has existed for
21 years. Before there was a Stand Your Ground statute,
22 there was the right to raise with a jury self-
23 defense. It was always a jury question, self-
24 defense.

25 Stand Your Ground is a statutory -- it is

1 not a Constitutional principle. That's why if you
2 testify at a Stand Your Ground hearing, that
3 testimony can be used against you at a trial.
4 Because you're not protecting a Constitutional
5 right, it's a statutory immunity that's been created
6 by the Legislature.

7 MR. ROSENFELD: No, I -- as I said, I recognize
8 that distinction exists.

9 What I'm saying is, it's not an anomaly
10 for Defendants to be able to argue something
11 pretrial, for a judge to make a pretrial
12 determination as to bar prosecution, and then for
13 Defendants to be able to argue an affirmative
14 defense.

15 THE COURT: No, the --

16 MR. ROSENFELD: Even though it -- even though it
17 stems from different grounds. And I recognize
18 that --

19 THE COURT: To make your argument for you, but I
20 still don't think it applies --

21 MR. ROSENFELD: Sure.

22 THE COURT: But to make your argument for you,
23 on a motion to suppress a statement of a Defendant
24 for violation of due process, Miranda or not
25 voluntary, that's a situation where you're correct,

1 I can deny a motion to suppress but the jury still
2 gets to decide whether it was -- whether it was
3 coerced or voluntary.

4 I understand that. I just don't -- I just
5 don't think those principles apply there. That's all
6 I'm saying.

7 MR. ROSENFELD: Okay. And I -- like I said, I'll
8 rest on the -- when there's a mixed issue of law and
9 fact, it is an issue for the fact finder.

10 And there is case law on, like I said, C-4
11 motions. And I put those in my -- in the motion
12 provided to the State and the Court.

13 THE COURT: Okay. So basically what you're
14 addressing is the jury instruction argument too.

15 MR. ROSENFELD: Yes.

16 And I'm renewing -- so basically I'm
17 moving for a special jury instruction. You already
18 denied the objective entrapment JOA.

19 THE COURT: Right.

20 MR. ROSENFELD: And I am renewing my motion
21 for -- my motion to dismiss based on objective
22 entrapment.

23 THE COURT: Okay. So I'm going to deny both
24 those requests. You can file though your -- make
25 sure you file your requested jury instruction on

1 objective entrapment with the Clerk so that the
2 Fourth understands what I denied.

3 MR. ROSENFELD: Yeah.

4 The request is filed. And I'll give you a
5 copy of --

6 THE COURT: It's up -- I'm just saying, just
7 make sure --

8 MR. ROSENFELD: Yes, Judge.

9 THE COURT: -- you've got your record preserved.

10 MR. ROSENFELD: And we would also -- the last
11 motion we would renew is our motion to dismiss based
12 on lost or unpreserved evidence. I think in light of
13 Mr. Shihadeh's testimony, Captain Bonafair --
14 Mohamed Shihadeh has been consistent, in my opinion,
15 about him being wired. And the fact that he came out
16 and they had critical information pertaining to --
17 or not critical, but specific information pertaining
18 to what happened inside of Chili's indicates and
19 proves that there was evidence. In this case, that
20 they knew that Ms. Dippolito ordered a meal to go
21 for Mike Dippolito. And --

22 THE COURT: Let me -- because -- let me tell you
23 how I feel about that.

24 The State's going to need to get up here
25 in a minute because this is going to affect the jury

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

Case No.: 2009CF009771AMB

Division: W

vs.

DALIA A. DIPPOLITO,

Defendant.

_____ /

ORDER DENYING MOTION TO DISMISS

This matter came before the Court on Defendant Dalia A. Dippolito's ("Defendant") Motion to Dismiss Case (DE #758), filed November 17, 2015. An evidentiary hearing was conducted on the Defendant's Motion on January 19, 2016 and on February 23, 2016. The Court has heard the evidence presented, reviewed the submissions of the parties, and heard the argument of counsel. Upon consideration, the Court makes the legal and factual findings that follow.

The Defendant is charged with a single count of solicitation to commit first degree murder. The charges arise out of an undercover operation conducted by the Boynton Beach Police Department between July 31, 2009 and August 5, 2009.

Alleged Facts

On July 31, 2009, Mohamed Shihadeh contacted the Boynton Beach Police Department and reported that he had a friend who wanted to kill her husband. Mr. Shihadeh was a friend, or acquaintance, of the Defendant. Mr. Shihadeh and the Defendant were, at one time, involved in an intimate relationship.

The police met with Mr. Shihadeh and solicited his assistance as a confidential informant. Mr. Shihadeh spoke and met with the Defendant. Some of these encounters were recorded and some were not recorded. The State alleges that during these encounters the Defendant repeated her desire to have her husband killed and, in essence, solicited Mr. Shihadeh to assist her. This solicitation included giving Mr. Shihadeh \$1,200.00 in cash to hire a “hit man.”

On August 3, 2009, the Defendant was contacted by an undercover police officer posing as a hit man. The undercover officer spoke with the Defendant and arranged a meeting. The meeting occurred between the undercover officer and the Defendant later that day. The entire encounter was video recorded. The State alleges that during the meeting with the undercover officer the Defendant solicited the murder of her then husband, Michael Dippolito.¹

The undercover officer contacted the Defendant again on August 4, 2009 and told her to leave her home the next day by 6:00 a.m. The Defendant complied with this request and left her home by 6:00 a.m. on August 5, 2009. Later that day, the Defendant was called to her home where the police had staged a fake crime scene. The Defendant was informed that her husband was killed. Her reaction to the news that her husband was murdered was video recorded. The Defendant was then escorted to the Boynton Beach Police Department and placed under arrest for solicitation to commit first degree murder.

¹ In the probable cause affidavit, the police allege that the Defendant stated that she would be very happy if her husband was killed and that she was 5000 percent sure that she wanted it (the murder) done.

Objective Entrapment

The Defendant seeks to dismiss this case based on objective entrapment or “outrageous government conduct.” Objective entrapment implicates notions of due process. Objective entrapment focuses on the conduct of law enforcement and not on the defendant’s subjective perception of the actions of law enforcement. *State v. Blanco*, 896 So. 2d 900, 902 (Fla. 4th DCA 2009).

Objective entrapment requires “conduct of law enforcement agents [that] is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *Tercero v. State*, 963 So. 2d 878, 883 (Fla. 4th DCA 2007) (quoting *State v. Glosson*, 462 So. 2d 1082, 1084 (Fla.1985)). The Court looks to the totality of the circumstances to determine “whether the government conduct ‘so offends decency or a sense of justice that judicial power may not be exercised to obtain a conviction’.” *Hernandez v. State*, 17 So. 3d 748, 751 (Fla. 5th DCA 2009) (quoting *State v. Blanco*, 896 So. 2d 900, 901 (Fla. 4th DCA 2005)).

Application of objective entrapment to any case involves a balancing of competing interests. The Court must weigh the rights of the defendant against the government’s legitimate need to combat crime. *Munoz v. State*, 629 So. 2d 90, 98 (Fla. 1993).

Analysis

There are several general themes raised by the Defendant which, while sensational, lack any probative value when assessing whether *specific* action by the police violated concepts of due process. The Defendant’s motion is replete with accusations that the Boynton Beach Police Department is incompetent and lacks training.

The Defendant even describes the Department as a “cesspool of incompetency and lawless behavior.”

Certainly there are specific actions by the Boynton Beach Police Department which must be evaluated, and questioned, to determine if traditional concepts of due process have been violated. However, the generalized theme repeated by the Defendant that the Boynton Beach Police Department essentially acts in bad faith is, candidly, overblown.

Another general theme advanced by the Defendant is that the police manufactured her alleged crime so that they could appear on the television show *COPS*. There is no credible evidence to support this accusation. The police did not seek out Mr. Shihadeh to create a story or television script. Mr. Shihadeh contacted the police to report that the Defendant wanted to kill her husband. It is Mr. Shihadeh’s report to the police that initiated the investigation, not the presence of a television crew.

Moreover, the *COPS*’ production crew was not directly involved in this case until after the alleged solicitation to commit murder had occurred. The only portion of the investigation actually filmed by *COPS* was the fake crime scene and Mr. Dipollito’s reaction to the news that his wife allegedly hired someone to kill him.

The Court does acknowledge that, while the alleged crime was not manufactured for *COPS*, the presence of a television crew no doubt caused the Boynton Beach Police Department to act, in certain respects, in a manner which is not consistent with good police practices.

The staged murder scene was of little value to the investigation.² The crime of solicitation, if it occurred, was complete when the Defendant asked the undercover police officer to assist in the murder of her husband. No further action would be required at that point to charge the Defendant with the crime of solicitation to commit first degree murder. It could certainly be inferred that the staged crime scene was for the benefit of television.

Taking any action in a criminal investigation for the benefit a television show, or for any third party, cannot be condoned. The business of law enforcement is enforcement of the laws, not the production of theater. However, the staging of the murder scene, after the alleged crime occurred, does not rise to the level of outrageous government conduct which implicates notions of due process.

Likewise, the release of videos to “*You Tube*” during a pending investigation cannot be condoned. This is not consistent with good police practices, but again does not support dismissal of the State’s case for outrageous conduct. If anything, the releasing of videos to the public, at any stage of the case, makes it more difficult to select a jury that will not be influenced by pretrial publicity.³ Candidly, this difficulty is currently being exacerbated by the Defendant herself through press conferences and television appearances in advance of trial.

² It cannot be said that the faked crime scene was of no value to the investigation. The Defendant’s reaction could theoretically be used to show consciousness of guilt or could assist in obtaining a confession. This would all depend on how the Defendant reacted when she was told her husband was murdered.

³ The podcast featuring Public Information Officer Slater and Sergeant Ranzie would fall into the same category as the released *You Tube* video. The difficulty caused by such activity is the potential impact on seating a jury not influenced by pretrial publicity. All of the public coverage of this case makes the task of seating a jury more difficult. However, a jury can be seated and the podcast does not support dismissal of the case.

Aside from the general themes advanced by the Defendant, there is specific conduct which must be assessed to determine if the actions of the Boynton Beach Police Department warrant a dismissal of the case. The Defendant's motion focuses heavily on the interaction between the Boynton Beach Police Department and confidential informant Mohamed Shihadeh.

The misuse of confidential informants by law enforcement can support dismissal of a criminal case based on objective entrapment. *State v. Glosson*, 462 So. 2d 1082, 1085 (Fla. 1985) (providing informants with a financial stake through contingent fee arrangement violates due process); *State v. Hunter*, 586 So. 2d 319, 320 (Fla. 1991) (requiring informant to obtain at least four kilograms of cocaine within a fixed time violates due process). In most cases where objective entrapment has been found the confidential informant has been given a financial incentive to facilitate arrests or has made threats or promises to targeted suspects.

The Defendant has raised a myriad of claims relating to Mr. Shihadeh. The significant claims can be summarized as follows:

- The Boynton Beach Police Department did not investigate Mr. Shihadeh to determine his reliability before allowing him to act as a confidential informant;
- Mr. Shihadeh did not want to be involved with the investigation and was coerced or forced to cooperate;
- Mr. Shihadeh was not supervised and was allowed to have contact with the Defendant without a recording of their conversations; and

- Mr. Shihadeh threatened the Defendant to continue with their “plan” after she expressed that she was no longer interested in moving forward with the plan.

There are additional allegations concerning Mr. Shihadeh which the Court has considered and do not merit discussion. The Court will address only those allegations which could support a colorable claim of objective entrapment.

Failure to Investigate

The Defendant asserts that the police did not sufficiently investigate Mr. Shihadeh before using him as a confidential informant. This is of no moment under the facts of this case. Mr. Shihadeh was not an informant the police intended to use over a course of time in multiple cases like an informant drug buyer. Mr. Shihadeh came forward with a report about a specific person and specific crime and the police followed up. The entire investigation from first report to arrest occurred over a 6 day period.

Moreover, the reliability of Mr. Shihadeh’s report to the police was almost immediately confirmed in the first recorded controlled call with the Defendant. Sergeant Ranzie, while stating that the reliability of confidential informants should be verified, testified that Mr. Shihadeh’s reliability was confirmed with the first call to the Defendant. Under the totality of the circumstances, the lack of a background investigation of Mr. Shihadeh does not begin to support a claim of outrageous government conduct.

Lack of Desire to Cooperate and Coercion

Mr. Shihadeh testified that he wanted to remain anonymous and did not want to get involved in the investigation or in the subsequent sting operation. He also said that he did not want anything to happen to the Defendant. These facts alone are not of any

particular significance. Mr. Shihadeh's desire to stay on the sidelines, without more, does not support a claim of objective entrapment. The salient issue is to what extent was Mr. Shihadeh coerced, threatened or compelled to participate in the investigation.

There is no doubt that that the police applied pressure to Mr. Shihadeh to assist in the investigation that he started by reporting the Defendant's desire to kill her husband. The question is, did the tactics employed by the police to gain cooperation "so offend decency or a sense of justice that judicial power may not be exercised to obtain a conviction." *Blanco, id* at 901.

In response to several leading questions, Mr. Shihadeh testified that he felt pressured and that he was threatened with prosecution if he did not cooperate. However, it became clear on cross examination of Mr. Shihadeh that he was never really threatened with prosecution.

Mr. Shihadeh testified that what was actually said to him was that if anything happened to Mr. Dipollito that it would "fall back on him." He did not recall anyone actually using the word "prosecute." Moreover, Mr. Shihadeh spoke to his personal attorney, Ian Goldstein, Esq., concerning whether he needed to cooperate. Mr. Shihadeh testified that with respect to the "pressure" being applied by the police that Mr. Goldstein told him "the same thing" he was told by the police and that he needed to cooperate. He never told Mr. Goldstein, his attorney, that the Boynton Beach Police Department was threatening to prosecute him.

The evidence supports the conclusion that Mr. Shihadeh was essentially told that if something happened to the Defendant's husband he would be, or would feel, responsible. What was being conveyed was a moral responsibility, not a threat of legal

action. Such moral pressure to help prevent a potential murder does not offend decency or a sense of justice.

On the issue of coercion, the Court has considered the Defendant's assertions that a three hour meeting between the police and Mr. Shihadeh was not recorded and that he felt rushed to sign the confidential informant agreement. The lack of a recording does not establish outrageous police conduct. Moreover, Mr. Shihadeh was given an opportunity to call his attorney, Mr. Goldstein, before signing the agreement. Although he did not reach his attorney until after the agreement was signed, Mr. Shihadeh did speak with his attorney later and he was told that he was doing the right thing in cooperating with the investigation. Moreover, he did in the end read and sign the agreement.

There is no doubt that Mr. Shihadeh would have simply preferred to report his concerns about the Defendant to the police and leave. Certainly Mr. Shihadeh did not welcome the attention this case brought and he was a reluctant participant in the investigation. Police action, and not general reluctance, is the relevant issue. Under the totality of the circumstances, there is nothing about Mr. Shihadeh's treatment by the Boynton Beach Police that would justify dismissal of the case.⁴

The Court is also cognizant of the Defendant's argument that the policies of the Boynton Beach Police Department support terminating Mr. Shihadeh as an informant because he did not want to cooperate. The Defendant points to Department guidelines on

⁴ There were other issues raised by the Defendant concerning what Mr. Shihadeh knew, or what he was told, which are not significant. For example, Mr. Shihadeh testified that he did not know that the police planned to prosecute the Defendant. Mr. Shihadeh's lack of knowledge concerning the plans of law enforcement to prosecute the Defendant is not relevant.

informants which provide that informants will be “deactivated” when the informant “is no longer willing to cooperate with the Department.”

There is some question as to whether Mr. Shihadeh was actually “unwilling” to cooperate or was merely reluctant to cooperate. Nevertheless, assuming the Mr. Shihadeh was unwilling to cooperate, the relevant question for purposes of the motion before the Court is whether the failure to “deactivate” Mr. Shihadeh amounts to outrageous government conduct.⁵ In assessing this issue, context is important.

Most cases involving the use of confidential informants are drug cases. An informant is retained to make purchases of a controlled substance from a targeted suspect. This was not a drug case or a typical informant case. Mr. Shihadeh reported to law enforcement that the Defendant wanted to kill her husband. This report was proven to be reliable after the first controlled telephone call with the Defendant.

Under these circumstances, where law enforcement is trying to prevent a potential murder, the failure of the police to “deactivate” Mr. Shihadeh because he no longer wanted to cooperate was not outrageous. It was not even unreasonable. The police had reason to believe that someone was going to be killed. Mr. Shihadeh was the potential key to preventing a murder and the failure to terminate Mr. Shihadeh as an informant under these circumstance is not outrageous government conduct.

⁵ Objective entrapment is not established by a failure to follow any particular policy or guideline. Objective entrapment requires the Court to determine whether the conduct itself was outrageous.

Failure to Supervise and Threats to the Defendant

The Court next considers the Defendant's claim that Mr. Shihadeh was not properly supervised and the claim that Mr. Shihadeh threatened the Defendant. These claims are considered together because they are interrelated.

Failure to supervise a confidential informant will not support dismissal of a case unless the lack of supervision results in unscrupulous conduct by the informant. *Bist v. State*, 35 So. 3d 936, 941 (Fla. 5th DCA 2010). The Defendant's failure to supervise claim arises primarily from the Defendant's assertion that there are numerous telephone calls between Mr. Shihadeh and the Defendant that were not recorded.

Unmonitored telephone calls to a targeted suspect, standing alone, will not support dismissal of a case for outrageous government conduct. *Cline v. State*, 958 So. 2d 961, 964 (Fla. 4th DCA 2007); *Quesada v. State*, 707 So. 2d 808 (Fla. 4th DCA 1998) (twenty to thirty unmonitored calls not objective entrapment). In those limited circumstances where unmonitored contact between an informant and a suspect has resulted in a finding of objective entrapment, the informant either threatened the targeted suspect or made promises to the suspect. *See e.g., Nadeau v. State*, 683 So. 2d 504 (Fla. 4th DCA 1995) (informant threats against suspect and his family).

In addition to unrecorded telephone calls, the Defendant alleges that a meeting between Mr. Shihadeh and the Defendant was not recorded. The Defendant alleges that, during this meeting, she tried to back out of her plan and that Mr. Shihadeh threatened and coerced her to continue.

The allegation that she was threatened by Mr. Shihadeh is the most significant issue raised by the Defendant's motion to dismiss. Unmonitored telephone calls *coupled*

with threats by an informant could support dismissal of this case for outrageous government conduct. *Nadeau, id.* Likewise, a threat made at Chili's by Mr. Shihadeh which forced the Defendant to continue with the plan would support a conclusion that the police had lost control of Mr. Shihadeh. Therefore, the Court must make a factual finding with respect to whether the Defendant was threatened.

Mr. Shihadeh testified clearly that he never threatened the Defendant. He also testified that the Defendant never changed her mind or her plans. The Defendant testified that Mr. Shihadeh threatened her at Chili's. She said that Mr. Shihadeh lifted up his shirt and showed her a gun and threatened her and her family. She also testified that she did not want to go forward with her plan (or as she described it – "their acting project"). By testifying to these threats, the Defendant placed her credibility on these assertions at issue.

The Court has considered the Defendant's testimony with regard to alleged threats and does not find it to be credible. The scenario described by the Defendant in Chili's is not logical. Mr. Shihadeh had no financial, or other, cognizable interest in the Defendant's plan. Moreover, all parties concede that Mr. Shihadeh was sent into the Chili's as part of the investigation. It defies logic that the police would send him into the restaurant with a gun.⁶ The Defendant's behavior with the undercover officer immediately following the encounter in Chili's also does not support the allegation that she was just threatened by Mr. Shihadeh.

Likewise, the Court does not find credible the Defendant's assertion that, during unrecorded telephone calls, she was threatened by Mr. Shihadeh and that she tried to back

⁶ In fact, Mr. Shihadeh testified that the police removed his gun from his car before this meeting took place.

out of her plan. Again, there is no true incentive for such behavior by Mr. Shihadeh. The recorded telephone calls also do not support this allegation.

The Court limits its credibility determination to the specific issues presented by the Defendant's motion – i.e. was the Defendant threatened and/or did the Defendant try to back out of the plan. The Court makes no findings with regard to whether the Defendant's version of the "plan" itself was credible. In other words, it is for the jury to determine whether the Defendant was simply involved in an acting project or whether the Defendant solicited the murder of her husband.

Additional Issues Raised By the Defendant

While the primarily focus of the Defendant's motion relates to Mr. Shihadeh, the Defendant raises a number of additional issues which the Court must consider. The lack of a recording of the encounter at Chili's between Mr. Shihadeh and the Defendant is raised independently as evidence of outrageous government conduct.

There is no doubt that good police practice would dictate that this encounter should be recorded. The recording would be evidence of what occurred. However, the issue before the Court is whether the lack of a recording supports dismissal of this case for outrageous government conduct. It does not.

The evidence relating to the recording, or lack thereof, of the Chili's encounter is to some extent incomplete. Mr. Shihadeh testified that he was wired when he entered the Chili's. Testimony from Detective Ranzie establishes that the failure to record the encounter was based on equipment malfunction.

The testimony of Mr. Shihadeh and of the police with respect to equipment malfunction could be, but is not necessarily, inconsistent. No evidence was offered as to

when the malfunction was discovered. It is possible that Mr. Shihadeh was wired when he entered the restaurant, but the equipment was not working. If this is the case, there is nothing inconsistent about the testimony. If he was never wired because of the malfunction, there would be a conflict in the testimony. The evidence presented at the hearing was inconclusive and the Court cannot determine based on the evidence whether there is indeed a conflict in the evidence.

Conflict or not, the Court can determine if the absence of a recording itself supports a finding of outrageous government conduct. It does not. The lack of a recording of the encounter at Chili's will provide the defense with fodder for cross-examination of State witnesses. Certainly the jurors can draw any inferences from the lack of a recording that they deem appropriate. However, the mere lack of a recording of this encounter does not support dismissal of the case at this stage of the proceedings.

One of the grounds alleged by the Defendant to request time to present additional evidence after the close of the hearing on February 23 relates to the unrecorded meeting between Mr. Shihadeh and the Defendant. Additional evidence is not needed on the Motion to Dismiss because, as already discussed, the mere failure to record the meeting does not support dismissal for of the case.

There is one circumstance where lack of a recording of the encounter at Chili's could violate due process and could support dismissal of the case. If a recording was made, and the Boynton Beach Police Department destroyed or lost an *existing* recording, then the Defendant would have a claim for lost or destroyed evidence under *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), *State v. Sobel*, 363 So.

2d 324 (Fla.1978), *Kelley v. State*, 486 So. 2d 578 (Fla.1986), and their progeny. However, there is no evidence that a recording existed at one time and was later lost or destroyed. Here, apparently, the recording was never made.

If the Defendant believes, in good faith, that she can allege, and ultimately prove, that a recording *existed* at one time and was destroyed, then the Defendant can file a separate motion based on the destruction of evidence and the Court will consider whatever evidence the Defendant wishes to present consistent with *Arizona v. Youngblood* and cases referenced above.

The Defendant makes several additional allegations concerning an alleged failure to timely administer a *Miranda* warning and concerning her lack of consent to be filmed by *COPS*. Lack of a *Miranda* warning would give rise to a motion to suppress any statement made by the Defendant and would not result in a dismissal of the case for outrageous government conduct. If the Defendant believes her rights under *Miranda* were violated, she can file a motion to suppress any statements that she made as a result of the violation of her rights.

The lack of consent to be filmed by *COPS* is another of the grounds advanced by the Defendant to reopen the evidence in this case. Additional evidence on this issue is not required because the Court accepts as true for purposes of the Motion to Dismiss that Sergeant Sheridan forged her signature on a consent form. The forgery gives rise to criminal and civil remedies, but cannot be used to dismiss the case for objective entrapment. This occurred after the investigation was complete and is largely a collateral matter.

Finally the Court will address briefly issues raised by the Defendant with respect to Sergeant Sheridan. The Defendant's motion is replete with references to alleged nefarious activity by Sergeant Sheridan. Indeed, the alleged need to now call Sergeant Sheridan after the close of the evidence is urged as a basis to reopen the hearing on the Defendant's Motion to Dismiss.

The stated basis for now needing to call Sergeant Sheridan would have no impact on the resolution of the Motion to Dismiss. Defendant alleges that testimony concerning the forgery of her name is required and that additional evidence relating to the investigation of Sergeant Sheridan is likewise required.

The Court has already considered the impact of the consent form for *COPS*. The Court accepts that the form was forged by Sergeant Sheridan. Drawing all necessary inferences from this fact, the Court does not find that this would support dismissal of the case.

With regard to the internal affairs investigation, the Defendant has proffered nothing from or about this investigation that bears on resolution of the matter now before the Court. The Court has heard sufficient evidence to determine whether the conduct was so outrageous that due process principles bar the government from proceeding.

Conclusion

Summary dismissal of a case for objective entrapment is an extreme remedy which must be employed with caution. There are portions of the investigation by the Boynton Beach Police Department which are open to legitimate criticism. The police's shortcomings can be exploited at trial to suggest and argue reasonable doubt. However, based on the totality of the circumstances, the actions of the police here are not so

outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

Based on the foregoing, it is hereby,

ORDERED AND ADJUDGED that Defendant Dalia A. Dippolito's Motion to Dismiss Case is DENIED.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida this 2nd day of March, 2016.



JUDGE GLENN D. KELLEY
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION "W"

CASE NO: 2009CF009771AMB

STATE OF FLORIDA

vs.

DALIA DIPPOLITO,
Defendant

**MOTION TO PERMIT THE DEFENDANT TO ARGUE OBJECT ENTRAPMENT AS
AN AFFIRMATIVE DEFENSE AND REQUEST FOR SPECIAL FOR JURY
INSTRUCTION**

Pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, article I, sections 9, 16, 17, 21, and 22 of the Florida Constitution, *In re Oliver*, 333 U.S. 257 (1948) and its progeny, *Washington v. Texas*, 388 U.S. 14 (1967) and its progeny, *Chambers v. Mississippi*, 410 U.S. 284 (1973) and its progeny, *Davis v. Alaska*, 415 U.S. 308 (1974) and its progeny, *California v. Trombetta*, 467 U.S. 479 (1984) and its progeny, and Florida Rule of Criminal Procedure 3.390(c), Defendant Dalia Dippolito, through undersigned counsel, respectfully moves this Honorable Court to permit her to argue objective entrapment as an affirmative defense. In addition, the Defendant respectfully requests that this Court instruct the jury on objective entrapment as an affirmative defense. This Court should grant this Motion because the due process, compulsory process, and confrontation clauses of the state and federal constitutions guarantee Ms. Dippolito a meaningful right to present a complete defense.

Summary of the Argument

Florida recognizes both objective and subjective entrapment. Objective entrapment occurs where the behavior of law enforcement is so reprehensible that it amounts to a violation

of due process rights under article I, section 9, of the Florida Constitution. Objective entrapment is generally an issue of law for the trial court to determine whether the State should be barred from prosecuting a defendant on account of egregious police misconduct. *State v. Williams*, 623 So. 2d 462, 467 (Fla. 1993); *Munoz v. State*, 629 So. 2d 90, 98 (Fla. 1993).

Subjective entrapment is a statutorily created affirmative defense. *Munoz*, 629 So. 2d at 98. Under the subjective entrapment test, the jury evaluates whether law enforcement induced the accused, and whether the accused was predisposed to committing the crime. *Id.* at 99. Subjective entrapment is always a factual dispute to be resolved by the jury.

While Florida courts have routinely addressed objective entrapment as an issue of law to be decided by the court, and subjective entrapment as an issue of fact to be decided by the trier of fact, defense counsel is unaware of any law that prohibits defense counsel from arguing objective entrapment as an affirmative defense. To the contrary, both the First and the Fourth District Court of Appeal have held that objective entrapment is a question for the jury where there is a factual dispute. *Clayton v. State*, 191 So. 3d 990, 991 (Fla. 1st DCA 2016); *Delice v. State*, 878 So. 2d 465, 467 (Fla. 4th DCA 2004). Thus, where the objective entrapment claim rests on disputed facts, the claim **must** be decided by the jury in its role as finder-of-fact.

In this regard, objective entrapment is analogous to immunity under the Stand Your Ground law. The only difference is that Stand Your Ground immunity is statutory in nature, while the immunity in cases of objective entrapment arises under the due process clause of the Florida Constitution. If immunity from prosecution may be conferred by statute, it follows *a fortiori* that immunity can flow from a protection enshrined in the Florida Constitution. Indeed, when the legislature sought to abolish objective entrapment, the Florida Supreme Court refused to recede from its prior precedent, because objective entrapment “involves the due process clause

of article I, section 9, of the Florida Constitution” and could not be abridged by statute. *Munoz*, 629 So. 2d at 91. More importantly, if a court does not grant Stand Your Ground immunity due to a factual dispute, a defendant is still entitled to litigate the issue as an affirmative defense to the jury. Similarly, if a court does not grant objective entrapment immunity due to a factual dispute, a defendant is still entitled to litigate the issue as an affirmative defense to the jury.

If this court was correct, and the outrageous conduct of BBPD did not amount to objective entrapment as a matter of law, and due process did not prohibit her prosecution, then she should be able to present the affirmative defense of objective entrapment just as a defendant who is not entitled to statutory immunity under the Stand Your Ground law is able to present the affirmative defense of self-defense.

Thus, the Court should permit Ms. Dippolito to interpose objective entrapment as an affirmative defense for two reasons: (1) the defense is a mixed question of law and fact that must be decided by the jury; and (2) the State successfully argued in the Fourth District Court of Appeal that Ms. Dippolito’s objective entrapment defense was an affirmative defense that turned on disputed issues of fact. Accordingly, this Court should permit Ms. Dippolito to raise objective entrapment as an affirmative defense and instruct the jury on this defense.

Facts

Ms. Dippolito raised objective entrapment in a pretrial motion to dismiss filed before this Court and argued that the totality of BBPD’s outrageous misconduct during the investigation of their murder-for-hire plot constituted objective entrapment as a matter of law. This Court denied the motion.

In the Order Denying the Motion to Dismiss, this Court relied on a number of specific findings of fact, which included:

1. There is no credible evidence to support the allegation that police manufactured Ms. Dippolito's alleged crime so that they could appear on the television show COPS. Order Denying Motion to Dismiss at 4.
2. The police did not seek out Mr. Shihadeh to create a story or television script. *Id.* at 4.
3. Mr. Shihadeh contacted the police to report that the Defendant wanted to kill her husband. *Id.* at 4.
4. It was Mr. Shihadeh's report to the police that initiated the investigation, not the presence of a television crew. *Id.* at 4.
5. The COPS' production crew was not directly involved in this case until after the alleged solicitation to commit murder had occurred. *Id.* at 4.
6. Mr. Shihadeh came forward with a report about a specific person and specific crime and the police followed up. *Id.* at 7.
7. The police had reason to believe that someone was going to be killed. *Id.* at 10.
8. Mr. Shihadeh was never really threatened with prosecution. *Id.* at 8-9.
9. Mr. Shihadeh never threatened Ms. Dippolito during unrecorded phone calls. *Id.* at 12.
10. Mr. Shihadeh never threatened Ms. Dippolito during their meeting at Chili's. *Id.* at 12-13.
11. The failure to record the Chili's encounter was based on equipment malfunction, and does not support the conclusion that law enforcement destroyed evidence. *Id.* at 13.

Based on these findings, the Court concluded that Ms. Dippolito failed to establish that the actions of law enforcement were not so outrageous that due process principles would absolutely

bar the government from invoking the judicial process to obtain a conviction. *Id.* at 15-16. The Court noted that summary dismissal of a case for objective entrapment is an “extreme remedy which must be employed with caution.” *Id.* at 16. Nevertheless, the Court observed that the police’s “shortcomings can be exploited at trial to suggest and argue reasonable doubt.” *Id.* at 16.

Ms. Dippolito filed a Petition for Writ of Prohibition in the Fourth District Court of Appeal seeking immediate appellate review of that decision. Ms. Dippolito argued that the following facts supported her claim of objective entrapment:

1. Mr. Shihadeh initially approached law enforcement because he wanted to help Ms. Dippolito who was suffering under the stress of a physically abusive relationship.
2. Knowing that the COPS television program would soon be filming their department, BBPD decided to manufacture a murder-for-hire plot by coercing Shihadeh to serve as a confidential informant against Ms. Dippolito and by falsely informing him that signing a confidential informant packet would allow him to remain anonymous.
3. BBPD declined to deactivate him when he repeatedly told officers he did not want to participate in the investigation, called him ten times a day, and threatened him with prosecution if he did not continue to act as a confidential informant.
4. BBPD failed to preserve and/or destroyed the initial two to three hour interview with Shihadeh, in which he testified that he initially told law enforcement that Ms. Dippolito was the victim of domestic abuse, rather than a criminal.
5. BBPD failed to preserve and/or destroyed the wiretap evidence from Chili’s, where Ms. Dippolito testified that Shihadeh threatened her with a weapon to force her to follow through on their plan.

6. BBPD failed to record and/or destroyed phone calls¹ between Ms. Dippolito and Mr. Shihadeh, which Ms. Dippolito averred contained evidence that she intended to back out of the endeavor, but was forced to continue by Shihadeh, who threatened her with violence.
7. Stephanie Slater rushed back from the fake crime scene to release the YouTube videos of Ms. Dippolito before she was even charged with a crime.
8. Sergeant Sheridan obtained Ms. Dippolito's consent to appear on COPS by claiming it was a Miranda waiver form.
9. BBPD did not believe Shihadeh's story when he first told it, finding the whole thing laughable, but it nevertheless chose to launch a murder-for-hire investigation into the victim of domestic abuse, rather than calling her or helping her, as Mr. Shihadeh requested when he initially sought their assistance.

See Petition for Writ of Prohibition, *Dippolito v. State*, Case No. 16-1113 (Fla. 4th DCA 2016).

In its Response to Petition for Writ of Prohibition, the State argued that prohibition was unavailable because, "Unlike Stand Your Ground, entrapment is a judicially created affirmative defense." Response at 27. In addition, the State argued that prohibition was not an available remedy because Ms. Dippolito's claim of objective entrapment turned on "disputed issues of fact." Response at 28. The State further urged the Fourth District to deny the petition on the grounds this Court's findings of fact should not be disturbed. Response at 30. The State prevailed on those arguments, and the Fourth District summarily dismissed the petition without written opinion. *See* Order, *State v. Dippolito*, Case No. 4D16-1113 (Fla. 4th DCA 2016).

¹ Ms. Dippolito averred that there were over 500 unrecorded phone calls, based on her mistaken belief that Mr. Shihadeh's phone records were her own. Ms. Dippolito now concedes that, while a number of phone calls between her and the confidential informant went unrecorded, that number is far less than 500.

The case proceeded to trial. While the trial has not yet concluded, Ms. Dippolito has already established a factual predicate in support of her claim of objective entrapment. Mr. Shihadeh testified that he first approached BBPD because he wanted to help Ms. Dippolito, who, he testified, was the victim of domestic violence. Mr. Shihadeh testified that Ms. Dippolito's husband, Mike Dippolito, was prone to fits of rage resulting from his steroid use. Mr. Shihadeh testified that he did not want to even come into the BBPD police station, but felt pressured to do so. He testified that he could have gone to another police station that was closer to his location, but was instructed not to by BBPD officers.

Mr. Shihadeh testified that when he arrived at the police station, law enforcement immediately took his keys—before he even had the chance to give his statement—under the false pretense that they wanted to move his car. Law enforcement then planted hidden cameras in his car without his knowledge or consent. Law enforcement also cracked jokes during his initial statement, which lasted several hours but was not recorded.

Mr. Shihadeh testified that law enforcement placed an artificial deadline on the conclusion of the investigation, at one point instructing him that it had to be completed within 72 hours. Mr. Shihadeh testified that he was given virtually no time to review the confidential informant packet, which he was falsely told was designed to preserve his anonymity. He felt betrayed by law enforcement when he learned the truth. Mr. Shihadeh also testified that he repeatedly told law enforcement that he did not wish to serve as a confidential informant and that he felt he was “forced” to wear a wire. Mr. Shihadeh also testified that he was threatened with prosecution.

Law enforcement told Mr. Shihadeh what to say to Ms. Dippolito—how much money to request, where to meet, etc. Shihadeh testified that Detective Moreno called him at odd hours of

the night—two o'clock, three o'clock, four o'clock in the morning—to pressure him. This testimony conflicted with the testimony of Detective Moreno, who claimed that he could not control Mr. Shihadeh because he had to leave work every day at 5:00. Mr. Shihadeh also testified that he was not given a recording device for his phone and not all of his phone conversations with Ms. Dippolito were recorded.

Critically, Mr. Shihadeh also offered new testimony at trial regarding the Chili's episode. He testified that he was "100% sure" he was wired at Chili's. He knew this because he had to take his shirt off to allow law enforcement to place the wire on his body. He also confirmed that the wire was working because law enforcement knew what Ms. Dippolito ordered for her husband at Chili's. Law enforcement also joked that this was Mike Dippolito's "last supper." Mr. Shihadeh testified, after he left Chili's, he went to another location where BBPD had to physically remove the wire. These memories seem far too distinct and clearly-recalled to be fabrications. And, unlike law enforcement, which had a motive to claim that Shihadeh was not wired and no recordings were destroyed, Mr. Shihadeh had no motive to fabricate his testimony.

The testimony adduced at trial, if believed by the jury, would conflict in a number of ways with the findings of fact on which this Court relied in denying the Motion to Dismiss. Specifically, the jury could find that:

1. Mr. Shihadeh first approached BBPD to report domestic violence, and not to report a murder for hire plot;
2. BBPD tricked Mr. Shihadeh into cooperating and threatened Mr. Shihadeh with prosecution if he did not go along with its sting operation;
3. BBPD manufactured a murder-for-hire plot instead of investigating a complaint of domestic abuse;

4. BBPD did so because it was influenced by the presence of COPS, which explains why it planted cameras in Shihadeh's car before he had ever formally given a statement, and why BBPD created an artificial 72-hour deadline for the completion of the investigation;
5. BBPD destroyed the evidence at Chili's because it contained exculpatory conversations between Ms. Dippolito and Mr. Shihadeh;
6. Mr. Shihadeh coerced Ms. Dippolito to participate during the unrecorded phone conversations; and
7. BBPD never believed that Ms. Dippolito was actually going to kill her husband (as evidenced by its jokes and failure to conduct surveillance on Mike Dippolito), but it still chose to manufacture the murder-for-hire plot instead of investigating the domestic abuse.

Ms. Dippolito submits that she has a due process right to have the jury, and not this Court, decide whether law enforcement committed these acts of misconduct that are central to her objective entrapment defense. Ms. Dippolito further submits that the fundamental principles of due process require that her objective entrapment defense, which presents a mixed question of fact and law, be decided by the jury at the conclusion of her trial.

Argument

This Court should permit Ms. Dippolito to present her affirmative defense of objective entrapment to the jury. First, her defense turns on disputed issues of fact, and it is beyond dispute that it is the role of the jury to resolve mixed questions of law and fact at trial. Second, the State prevailed on its argument that before the Fourth District Court of Appeal that objective entrapment is an affirmative defense that turned on disputed issues of fact. Therefore, in light of

Ms. Dippolito's due process right to present her theory of defense to the jury, this Court must permit her to raise objective entrapment as an affirmative defense.

1. Ms. Dippolito's defense turns on disputed issues of fact that must be resolved by the jury.

Objective entrapment occurs when "egregious" law enforcement conduct offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" *Bist v. State*, 35 So. 3d 936, 939 (Fla. 5th DCA 2010) (quoting *Rochin v. California*, 342 U.S. 165, 169 (1952)); *see also State v. Glosson*, 462 So. 2d 1082 (Fla. 1985); *Cruz v. State*, 465 So. 2d 516 (Fla. 1985). The defense is one of constitutional dimension, which finds its roots in the Due Process clause. *Id.*

Ordinarily objective entrapment is raised prior to trial in a motion to dismiss. *See, e.g., Clayton v. State*, 191 So. 3d 990, 991 (Fla. 1st DCA 2016). However, it is "premature" to decide an "objective entrapment defense on a motion to dismiss before unsettled questions about how law enforcement conducted the operation" are "settled by a factfinder." *Id.* at 991 (citing *Delice v. State*, 878 So. 2d 465, 468 (Fla. 4th DCA 2004)). In the pretrial proceedings on a motion to dismiss, trial courts are "obliged to view the facts in the light most favorable to the State." *Id.* (citing *Sexton v. State*, 898 So. 2d 1187, 1188 (Fla. 1st DCA 2005)).

By contrast, when a case proceeds to trial, the disputed issues of fact must be resolved by the jury. *Delice*, 878 So. 2d at 468. In *Delice*, the defendant proceeded to trial on the theories of both subjective and objective entrapment. The objective entrapment defense arose out the defendant's claim that law enforcement's confidential informant raped her in a hotel room, which subsequently caused her to fear the confidential informant and rendered her particularly susceptible to inducement to commit the drug trafficking offense. *Id.* at 467. The defendant

moved for judgment of acquittal at trial based on objective and subjective entrapment. *Id.* at 468. The trial court denied the motion.

On appeal, the Fourth District rejected the argument that the trial court erred when it denied the motion for judgment of acquittal. *Id.* It specifically ruled that, “[w]ith respect to objective entrapment, we find Delice’s allegation of rape to be unsubstantiated and believe this to be a jury question.” *Id.* Thus, having found that the dispute of fact rendered the objective entrapment defense to be a jury question, the Fourth District Court of Appeal affirmed the ruling of the lower court in this respect, though it reversed on other grounds. *Id.* Critically, the Fourth District remanded the case for retrial, where it held that the defendant is “free to again assert these arguments.” *Id.*

In light of *Clayton* and *Delice*, the prevailing rule under Florida law is clear. Where an objective entrapment claim rests on undisputed facts, the question is appropriate for the trial court to decide as a matter of law. Where, however, the objective entrapment claim rests on disputed facts, that claim must be decided by the jury in its role as finder-of-fact.

This rule is in accordance with the prevailing rule in a number of other jurisdictions that likewise have concluded that objective entrapment is an affirmative defense that may be presented to the jury where it rests on disputed issues of fact. *See, e.g., State v. Barraza*, 591 P.2d 947 (Cal. 1979); *State v. Bacon*, 319 A.2d 636 (N.H. 1974); *State v. Mullen*, 216 N.W. 2d 375, 382 (Iowa 1974); *State v. Pfister*, 264 N.W. 2d 694 (N.D. 1978).

It is also consistent with precedent from the United States Supreme Court, which has held that a defendant has a due process right to a jury decide mixed questions of law and fact. *United States v. Gaudin*, 515 U.S. 506 (1995) (finding that question of “materiality” is a mixed question of law and fact, which must be submitted for resolution by the jury). In *Gaudin*, the Government

claimed that the issue of the “materiality” was an issue of law that was inappropriate for resolution by a finder of fact. *Id.* at 511-12.

The Supreme Court roundly rejected that logic, concluding instead that the question of materiality was a “mixed question of law and fact,” that has typically been resolved by juries. *Id.* at 512. The *Gaudin* Court concluded that removing that question from the province of the jury would deprive a criminal defendant of due process of law and violate the right to trial by jury, a right “designed ‘to guard against a spirit of oppression and tyranny on the part of rulers,’ [that] was ‘from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.’” *Id.* at 510-11 (quoting 2 J. Story, Commentaries on the Constitution of the United States 541, n. 2 (4th ed. 1873)).

Like materiality, objective entrapment in this case is a mixed question of law and fact, which *first* requires the jury to determine whether law enforcement actually committed the acts of misconduct at issue, and *second* requires the jury to evaluate whether that misconduct is so egregious that it offends “those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.” *Bist*, 35 So. 3d at 939. Given proper instruction, the jury is capable, and indeed required under the binding precedent of *Delice* to resolve this issue at trial.

2. The State prevailed on its argument that objective entrapment was an affirmative defense that turns on disputed issues of fact and should not now be heard to argue to the contrary.

Having prevailed on its argument in the Fourth District Court of Appeal that Ms. Dippolito’s claim of objective entrapment was an affirmative defense that turns on disputed issues of fact, the State should be judicially estopped from arguing that objective entrapment is unavailable as an affirmative defense at trial. Judicial estoppel is an equitable doctrine “used to prevent

litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings” where doing so would make “a mockery of justice.” *Blumberg v. USAA Casualty Insurance Co.*, 790 So .2d 1061 (Fla. 2001). Once a party prevails on a given issue, it cannot change position in future proceedings: “This calculated change of position, in response to the ‘exigencies of the moment,’ is precisely what the doctrine of judicial estoppel seeks to avoid.” *Baloco v. Drummond Co., Inc.*, 767 F. 3d 1229, 1245 (11th Cir. 2014) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)).

Here, the State successfully argued that objective entrapment was an affirmative defense, the resolution of which was inappropriate prior to trial because it turned on disputed issues of fact. The State, having prevailed on this argument in the Fourth District Court of Appeal, should not now be heard to argue to the contrary in this Court. It is important to note, in this regard, that the State’s position actually mirrors the position the Fourth District adopted in *Delice*.

It is perhaps not surprising, given the holdings of *Delice* and *Clayton*, that the State prevailed on its argument in the appellate court. What would be surprising, and quite disturbing, would be for the State to reverse its position, due to the exigencies of the moment, and oppose Ms. Dippolito’s request to charge the jury with the ultimate decision on whether she prevails on her affirmative defense of objective entrapment.

Based on the foregoing, Ms. Dippolito requests that this Court provide the jury with a special jury instruction on objective entrapment as follows:

OBJECTIVE ENTRAPMENT

An issue in this case is whether the Boynton Beach Police Department’s conduct constituted objective entrapment. It is a defense to the offense with which Dalia Dippolito is charged if, under the totality of the circumstances, Boynton Beach Police Department’s conduct was so egregious that it offended those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.

In deciding whether the police's actions constituted egregious police misconduct, you must judge the "totality of the circumstances," and not each individual act in isolation.

When determining whether conduct constituted egregious police misconduct, you must limit your consideration to the conduct of law enforcement, and you may not consider the effect of the officer's conduct on the defendant, the defendant's subjective perception on the situation, and the defendant's apparent lack of predisposition to commit the offense.

The defendant does not have to prove that the police's actions constituted egregious police misconduct. The State has the burden of proving beyond a reasonable doubt that the police's behavior was not egregious police misconduct.

If, in your consideration of the issue of objective entrapment, you have a reasonable doubt on the question of whether the police's actions constituted egregious police misconduct, you should find the defendant not guilty.

I. CONCLUSION

"[A]pproval of the standard jury instructions [by the Florida Supreme Court] does not relieve the trial judge of his [or her] responsibility of correctly charging the jury." *Yohn v. State*, 476 So. 2d 123, 126 (Fla. 1985) (holding standard instruction on insanity was incorrect); *see also State v. Montgomery*, 39 So. 3d 252 (Fla. 2010) (holding standard instruction on attempted manslaughter was incorrect). "[I]nstructions promulgated by a Supreme Court Committee on Standard Jury Instructions, whether criminal or civil, are merely the work product of a conscientious committee and not immutable postulates from Olympus. Committees, after all, sometimes construct camels rather than race horses." *Harvey v. State*, 448 So. 2d 578 (Fla. 5th DCA 1984).

Recognizing this, the Florida Rules of Criminal Procedure provide a party with the opportunity to request modifications, additions, and deletions to the "Standard" instructions. Fla. R. Crim. P. 3.390(c). A request for a special instruction must show that: (1) the requested instruction is "supported by the evidence"; (2) the standard instruction does "not adequately cover" the issue; and (3) the special instruction is "a correct statement of the law and not

misleading or confusing.” *Durousseau v. State*, 55 So. 3d 543, 556 (Fla. 2010); *Wheeler v. State*, 4 So. 3d 599, 605 (Fla. 2009).

Even though there is no standard jury instruction on objective entrapment, Ms. Dippolito respectfully requests that this Court instruct the jury in accordance with her proposed instruction on objective entrapment and provide any further and additional relief it deems warranted.

WHEREFORE, for the foregoing reasons and for any other reasons that may appear to the Honorable Court, Ms. Dippolito respectfully requests that this Court grant this Motion, permit the Defendant to argue objective entrapment as an affirmative defense, and provide the jury with the proposed special jury instruction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by e-file to Laura Laurie, Assistant State Attorney, and Craig Williams, Assistant State Attorney, on this 15th day of June, 2017.

/s/ Greg Rosenfeld
Greg Rosenfeld, Esq.
Law Offices of Greg Rosenfeld, P.A.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION "W"

CASE NO: 2009CF009771AMB

STATE OF FLORIDA

vs.

DALIA DIPPOLITO,
Defendant

_____ /

REQUEST FOR SPECIAL VERDICT FORM WITH INTERROGATORIES
REGARDING OBJECTIVE ENTRAPMENT

Pursuant to Florida Rule of Criminal Procedure 3.390(c), Defendant Dalia Dippolito, through undersigned counsel, respectfully moves this Honorable Court to give the attached verdict form with interrogatories if this Court denies the request for the special jury instruction regarding objective entrapment:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished in Court to
Craig Williams, Assistant State Attorney, on this 15th day of June, 2017.

/s/ Greg Rosenfeld
Greg Rosenfeld, Esq.
Law Offices of Greg Rosenfeld, P.A.

VERDICT FORM

We, the jury, return the following verdict:

- 1. As to Count I, Solicitation to Commit Murder with a Firearm, as charged in the information, we find the Defendant**

GUILTY _____

NOT GUILTY _____

- 2. As to Solicitation to Commit Murder, a lesser-included offense, we find the Defendant**

GUILTY _____

NOT GUILTY _____

If your answer to question 1 and question 2 is NOT GUILTY, please proceed no further except to sign and date this verdict form and return it to the courtroom. If your answer to question 1 or question 2 is GUILTY, please answer all remaining questions as directed below.

- 1. Did Mohamed Shihadeh initially approach the Boynton Beach Police Department because he wanted to get Dalia Dippolito help regarding domestic violence, and not because he wanted to report a murder-for-hire plot?**

YES _____

NO _____

- 2. Did the Boynton Beach Police Department trick and/or coerce Mohamed Shihadeh into agreeing to become a confidential informant?**

YES _____

NO _____

- 3. Did the Bonyton Beach Police Department threaten Mohamed Shihadeh with prosecution to ensure his cooperation with its investigation?**

YES _____

NO _____

4. Did the Bonyton Beach Police Department impose a 72-hour deadline within which Mohamed Shihadeh had to secure Dalia Dippolito's participation in its sting operation?

YES _____ NO _____

5. Did the Boynton Beach Police Department force Mohamed Shihadeh to wear a wire during the course of the investigation?

YES _____ NO _____

6. Did the Boynton Beach Police Department plant surveillance cameras in Mohamed Shihadeh's car without his knowledge or consent?

YES _____ NO _____

7. Did the Boynton Beach Police Department intentionally destroy a recording of the conversation between Mohamed Shihadeh and Dalia Dippolito at the Chili's restaurant?

YES _____ NO _____

8. Did the Boynton Beach Police Department force Mohamed Shihadeh to wear a wire during the course of the investigation?

YES _____ NO _____

SO SAY WE ALL, this _____ day of _____, 2016

FOREPERSON

AUTHORITY FOR USE OF SPECIAL VERDICT FORM:

United States v. Lew, 980 F. 2d 855, 856 (2d Cir. 1992) (affirming use of special verdict form in entrapment trial).

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION "W"

CASE NO: 2009CF009771AMB

STATE OF FLORIDA

vs.

DALIA DIPPOLITO,
Defendant

**REQUEST FOR SPECIAL FOR JURY INSTRUCTION REGARDING OBJECTIVE
ENTRAPMENT**

Pursuant to Florida Rule of Criminal Procedure 3.390(c), Defendant Dalia Dippolito, through undersigned counsel, respectfully moves this Honorable Court to give the following jury instruction:

Instruction Requested: An issue in this case is whether the Boynton Beach Police Department's conduct constituted objective entrapment. It is a defense to the offense with which Dalia Dippolito is charged if, under the totality of the circumstances, Boynton Beach Police Department's conduct was so egregious that it offended those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.

In deciding whether the police's actions constituted egregious police misconduct, you must judge the "totality of the circumstances," and not each individual act in isolation.

When determining whether conduct constituted egregious police misconduct, you must limit your consideration to the conduct of law enforcement, and you may not consider the effect of the officer's conduct on the defendant, the defendant's subjective perception on the situation, and the defendant's apparent lack of predisposition to commit the offense.

The defendant does not have to prove that the police's actions constituted egregious police misconduct. The State has the burden of proving beyond a reasonable doubt that the police's behavior was not egregious police misconduct.

If, in your consideration of the issue of objective entrapment, you have a reasonable doubt on the question of whether the police's actions constituted egregious police misconduct, you should find the defendant not guilty.

Authority: *Bist v. State*, 35 So. 3d 936, 939 (Fla. 5th DCA 2010) (objective entrapment “requires reviewing the totality of the circumstances ‘in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses’”) (quoting *Rochin v. California*, 342 U.S. 165, 169 (1952)); *see also State v. Murphy*, 124 So. 3d 323 (Fla. 1st DCA 2013) (applying same test); *Clayton v. State*, 191 So. 3d 990, 991 (Fla. 1st DCA 2016); *Delice v. State*, 878 So. 2d 465, 468 (Fla. 4th DCA 2004)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by e-file to Laura Laurie, Assistant State Attorney, and Craig Williams, Assistant State Attorney, on this 15th day of June, 2017.

/s/ Greg Rosenfeld
Greg Rosenfeld, Esq.
Law Offices of Greg Rosenfeld, P.A.