ENTRAPMENT IN NORTH CAROLINA
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This paper is not intended to be an original work of the author, and the author claims no credit for its contents. Instead, this paper is intended to be primarily a compilation of quotes and passages taken from reported cases on this topic (primarily from North Carolina), and the paper is intended to be used as a quick reference as to the state of the law on this topic. This author also referenced John Rubin's *The Entrapment Defense in North Carolina*, 2001 (UNC School of Government; www.sog.unc.edu) in preparing this compilation.

WHAT IS ENTRAPMENT?

State v. Redmon, 164 N.C. App. 658, 662, 596 S.E.2d 854, 858 (2004)

"The law ... forbids convictions that rest upon entrapment." *United States v. Jimenez Recio*, 537 U.S. 270, 276, 123 S.Ct. 819, 823, 154 L.Ed.2d 744, 750 (2003) (citing *Jacobson v. United States*, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992)). "Entrapment is a complete defense to the crime charged." *State v. Branham*, 153 N.C.App. 91, 100-01, 569 S.E.2d 24, 29 (2002).

State v. Beam, 201 N.C. App. 643, 651, 688 S.E.2d 40, 45-46 (2010)

It is the general rule that where the criminal intent and design originates in the mind of one other than the defendant, and the defendant is, by persuasion, trickery or fraud, incited and induced to commit the crime charged in order to prosecute him for it, when he would not have committed the crime, except for such incitements and inducements, these circumstances constitute entrapment and a valid defense. *State v. Stanley*, 288 N.C. 19, 28, 215 S.E.2d 589, 595 (1975) (citations omitted).

State v. Morse, 194 N.C. App. 685, 689-90, 671 S.E.2d 538, 542 (2009)

"Entrapment is a complete defense to the crime charged." *State v. Branham*, 153 N.C.App. 91, 99–100, 569 S.E.2d 24, 29 (2002). In general:

> [t]he defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 749–50 (1978); *see also* State v. Redmon, 164 N.C.App. 658, 662, 596 S.E.2d 854, 858 (2004). We note that this is a two-step test and the absence of one element does not afford the defendant the luxury of availing himself of the affirmative defense of entrapment. *See* State v. Hageman, 307 N.C. 1, 28, 296 S.E.2d 433, 449 (1982).

State v. Hageman, 307 N.C. 1, 29, 296 S.E.2d 433, 449 (1982)

A leading case in the development of the defense is Butts v. United States, 273 F. 35 (8th Cir. 1921), where the court held:

> The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.

273 F. at 38.

"The fact that governmental officials merely afford opportunities or facilities for the commission of the offense is, standing alone, not enough to give rise to the defense of entrapment." *Id.* at 30, 296 S.E.2d at 449 (citing Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932)).

State v. Beam, 201 N.C. App. 643, 651, 688 S.E.2d 40, 46 (2010

If the evidence raises the issue of entrapment, it is ordinarily a question of fact for the jury, but the **trial court can find entrapment as a matter of law** when the undisputed testimony and required inferences compel a finding that defendant was induced by the government officials into an action for which he was not predisposed to take. *State v. Stanley*, 288 N.C. At 30, 215 S.E.2d at 597.

State v. Morse, 194 N.C. App. 685, 690, 671 S.E.2d 538, 542 (2009)

In State v. Luster, 306 N.C. 566, 295 S.E.2d 421 (1982) (Exum, J., dissenting), our Supreme Court noted that, "the essence of entrapment, then, is the inducement by law enforcement officers or their agents of a person to commit a crime when, but for the inducement, that person would not have committed the crime." *Id.* at 587, 295 S.E.2d at 433. A clear distinction is to be drawn between inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution of a crime of his own conception. *See* State v. Salame, 24 N.C.App. 1, 6–7, 210 S.E.2d 77, 81 (1974) (citing Burnette, 242 N.C. at 169, 87 S.E.2d at 194), *cert. denied*, 286 N.C. 419, 211 S.E.2d 800 (1975). The determinant is the point of origin of the criminal intent. *See id.* at 7, 210 S.E.2d at 81. Because of its significance in determining the origin of the criminal intent, "when the defense of entrapment is raised, defendant's predisposition to commit the crime becomes the central inquiry." *Id.* at 10,

210 S.E.2d at 83. *See also* United States v. Russell, 411 U.S. 423, 436, 93 S.Ct. 1637, 1645, 36 L.Ed.2d 366, 376 (1973) (holding that a finding of predisposition is fatal to defendant's claim of entrapment).

KEY FACTORS

These are but some of the key factors that our courts have discussed. The weight of these is considered both by the court during the Burden of Production analysis, and then by the jury, if applicable, during the Burden of Proof consideration during jury deliberations.

NOT ENTRAPMENT

Mere solicitation - State v. Martin, 77 N.C. App. 61, 65, 334 S.E.2d 459, 462 (1985)

Allowing completion of crime – State v. Burnette, 242 N.C. 164, 170, 87 S.E.2d 191, 195 (1955); State v. Hughes, 208 N.C. 542, 181 S.E. 737; State v. Adams, 115 N.C. 775, 20 S.E. 722

Ready compliance by defendant - State v. Hageman, 307 N.C. 1, 29, 296 S.E.2d 433, 449 (1982); State v. Duncan, 75 N.C.App. 38, 330 S.E.2d 481, *disc. review denied,* 314 N.C. 544, 335 S.E.2d 317 (1985); State v. Beam, 201 N.C. App. 643, 652, 688 S.E.2d 40, 46 (2010)

Setting a trap - State v. Salisbury Ice & Fuel Co., 166 N.C. 366, 81 S.E. 737, 739, 52 L.R.A.,N.S., 216: State v. Smith, 152 N.C. 798, 67 S.E. 508, 30 L.R.A.,N.S., 946; State v. Burnette, 242 N.C. 164, 170, 87 S.E.2d 191, 195 (1955)

Affording opportunity or providing facilities - State v. Duncan, 75 N.C.App. 38, 330 S.E.2d 481, *disc. review denied*, 314 N.C. 544, 335 S.E.2d 317 (1985); State v. Walker, N.C. 510, 246 S.E.2d 748 (1978); State v. Booker, 33 N.C.App. 223, 234 S.E.2d 417 (1977); Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413.

Providing facilities - State v. Hughes, 208 N.C. 542, 181 S.E. 737; State v. Adams, 115 N.C. 775, 20 S.E. 722; State v. Burnette, 242 N.C. 164, 170, 87 S.E.2d 191, 195 (1955)

ENTRAPMENT INSTRUCTION ALLOWED

State v. Sanders, 95 N.C. App. 56, 60, 381 S.E.2d 827, 830 (1989) Defendant gave uncontradicted testimony that McNair (State's agent) persuaded him to participate in a scheme to sell a substance which they would represent to be cocaine, and since defendant and Drayton both testified that McNair initiated the discussion of this scheme there was also evidence that the criminal design originated in the mind of McNair rather than in defendant's mind.

Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) The United States Supreme Court focused on the number of meetings and conversations between defendant and the informant, and the fact that the government informant **formed a bond** with defendant and **acted upon defendant's sympathy**.

State v. Blackwell, 67 N.C.App. 432, 313 S.E.2d 797 (1984) – Agent provided defendant with **gifts** and **promises of a job**.

State v. Jamerson, 64 N.C.App. 301, 307 S.E.2d 436 (1983) – After defendant repeatedly rejected requests to purchase drugs for informant and agent, agent finally convinced defendant to purchase drugs for agent by providing money and **convincing defendant that the agent was an addict and was desperate**.

State v. Grier, 51 N.C.App. 209, 275 S.E.2d 560 (1981), - Agent visited unemployed defendant at her home frequently, brought her food, beer and cigarettes, and gave her money to fix her car and repair her leaky basement. The agent also drove the defendant to make each of the drug purchases. The Court held that the **agent had ingratiated himself** with the defendant in order to induce her to purchase drugs for him.

State v. Stanley, 288 N.C. 19, 32-33, 215 S.E.2d 589, 597-98 (1975). 28 year old police officer posing as an army sergeant ingratiated himself into the confidence and affection of the sixteen- or seventeen-year-old defendant for the purpose of using him to find and buy drugs. Officer sought defendant's companionship, continually called defendant's home, and allowed defendant to drive his automobiles. During this time he assured defendant's troubled parents that he would 'look after their son.' After establishing the **relationship of a 'big brother' with defendant**, the police officer **'**got him to make more than one drug buy for me.' The Court also found that the defendant's prior conviction of possession of marijuana did not indicate a predisposition to commit the crime in this case.

State v. Redmon, 164 N.C. App. 658, 664, 596 S.E.2d 854, 859 (2004). Regarding inducement, evidence was presented from which the jury could find that: (1) in response to an anonymous call, [officer] went to the apartment complex to check on the circumstances of a man reportedly sleeping in a truck; (2) when [officer] woke up defendant he immediately observed obvious signs that defendant was impaired; (3) when questioned, defendant told [officer] he had been drinking, and explained that he was just waiting for his girlfriend to get home; (4) defendant fully cooperated with [officer] requests; (5) [officer] **told defendant he could not wait in the parking lot and directed him to "move along";** (6) after [officer] drove out of the parking lot, he stayed in the general area of the apartment complex; (7) a few minutes later, when defendant left the apartment parking lot, [officer] patrol vehicle was hiding out of sight with its lights off, at the intersection next to the apartments; and (8) as soon as defendant started driving, [officer] pulled him over and approached defendant's truck carrying an Alcosensor device. We find this sufficient evidence of inducement to commit the offense of DWI to entitle defendant to an instruction on entrapment

State v. Foster, 162 N.C. App. 665, 672, 592 S.E.2d 259, 264-65 review allowed, writ allowed, 358 N.C. 378, 597 S.E.2d 768 (2004) and aff'd, ordered not precedential, 359 N.C. 179, 604 S.E.2d 913 (2004). "[A]cts of **persuasion, trickery or fraud** carried out by law enforcement officers or their agents to induce [him] to commit [the] crime[s]." Evidence was sufficient to allow jury to decide whether officers tricked a defendant into buying 1 ounce, instead of 5 grams, of cocaine.

GOVERNMENT AGENTS

State v. Luster, 306 N.C. 566, 295 S.E.2d 421 (1982) (Exum, J., dissenting)

"the essence of entrapment, then, is the inducement by law enforcement officers **or their agents** of a person to commit a crime when, but for the inducement, that person would not have committed the crime."

…

We find the phrase **"unwitting agent" to be a contradiction in terms**. An agent is "(a) person authorized by another to act for him." Black's Law Dictionary 59 (rev. 5th ed. 1979). **An agency relationship must be created by mutual agreement**. It cannot be created by one party *in invitum.* Johnson v. Orrell, 231 N.C. 197, 56 S.E.2d 414 (1949). If the existence of an alleged agency relationship is unknown to the "agent," the "agent's" authority is without scope or definition-a situation which invites abuse and far-reaching legal ramifications. **Thus, where the government denies that the entrapper is, in fact, its agent, the defendant is required to produce substantial credible evidence of an agency relationship.** State v. Yost, 9 N.C.App. 671, 177 S.E.2d 320. This he failed to do. Defendant offered no evidence at trial other than that Burnette, acting on the suggestion of law enforcement officers, encouraged others to sell stolen goods to the officers. The evidence before us shows that Burnette was acting solely with the objective of furthering his own economic interests. In short, Burnette needed an accomplice and the defendant was induced, as a willing candidate, to act in that capacity
(emphasis added)

State v. Barr, 721 S.E.2d 395, 405 (N.C. Ct. App. 2012)

In this case, Defendant contends that Granados, a licensed and "authorized RAC–F title clerk[,]" was a government official for purposes of the entrapment by estoppel defense and jury instruction. Granados was an employee of the Lexington Agency, not the State of North Carolina, and the Lexington Agency was a private contractor. **We agree with the federal line of cases aligned with the *Tallmadge* dissenting opinion, which reason that "a federal license ... does not transform private licensees into government officials**[,]" United States v. Billue, 994 F.2d 1562, 1569 (11th Cir.1993), and "[because] [w]e do not have before us the situation where a government official, such as a judge, a prosecuting attorney, an ATF official, or a probation officer, [made a representation][,] ... we cannot agree that ... [a] license ... is sufficient to transform [the licensee] into government officials[.]" United States v. Austin, 915 F.2d 363, 367 (8th Cir.1990).[3] We do not believe that Granados' capacity as a licensed RAC–F title clerk was sufficient to establish that Granados was a government official.
(emphasis added)

NOTICE TO STATE

N.C. Gen. Stat. Ann. § 15A-905

…

c) Notice of Defenses, Expert Witnesses, and Witness Lists.--If the court grants any relief sought by the defendant under G.S. 15A-903, or if disclosure is voluntarily made by the State pursuant to G.S. 15A-902(a), the court must, upon motion of the State, order the defendant to:

(1) Give notice to the State of the intent to offer at trial a defense of alibi, duress, **entrapment**, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication. Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4, or such other later time as set by the court.

…

b. As to only the defenses of duress, entrapment, insanity, automatism, or involuntary intoxication, **notice by the defendant shall contain specific information as to the nature and extent of the defense.**

BURDEN OF PRODUCTION ON DEFENDANT

State v. Morse, 194 N.C. App. 685, 692, 671 S.E.2d 538, 543 (2009)

"…the burden of production for the defense of entrapment lies with the defendant. "In the absence of evidence tending to show *both* inducement by government agents *and* that the intention to commit the crime originated not in the mind of the defendant, but with the law enforcement officers, the question of entrapment has not been sufficiently raised to permit its submission to the jury." *Walker*, 295 N.C. at 513, 246 S.E.2d at 750. Where a defendant has not met this initial burden of production, the State need not present any evidence regarding predisposition. *See Cook*, 263 N.C. at 733, 140 S.E.2d at 308.

State v. Redmon, 164 N.C. App. 658, 662, 596 S.E.2d 854, 858 (2004)

To be entitled to an instruction on entrapment, the defendant must produce "some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955) (citation omitted). The issue in this case is whether defendant met the burden of production of "some credible evidence" that his driving while impaired was the result of entrapment. "This burden acts as a screening device. It serves to prevent the defendant from obtaining instructions on defenses supported by mere conjecture or speculation but is not intended to be so rigorous as to keep the jury from receiving instructions on and deciding defenses for which supporting evidence exists." John Rubin, *The Entrapment Defense In North Carolina*, § 6.2(b) (Institute of Government, University of North Carolina at Chapel Hill, 2001).

State v. Morse, 194 N.C. App. 685, 690, 671 S.E.2d 538, 542 (2009)

To be entitled to an instruction on entrapment, the defendant must produce "*some credible evidence* tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955) (emphasis added). In determining whether a defendant is entitled to a jury instruction on entrapment, the **trial court must view the evidence in the light most favorable to the defendant**. *See State v. Jamerson*, 64 N.C.App. 301, 303, 307 S.E.2d 436, 437 (1983). "The instruction should be given **even where the [S]tate's evidence conflicts with defendant's**." *Id.* (citations omitted) (emphasis added)

State v. Adams, 721 S.E.2d 391, 394 (N.C. Ct. App. 2012)

Entrapment " 'is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials.' " *Id.* (citation omitted); *see also Luster,* 306 N.C. at 579, 295 S.E.2d at 428 ("When a defendant's predisposition to commit the crime charged is demonstrated, the defense of entrapment is not available to him."). The burden to prove a lack of predisposition remains with the defendant and is not shifted to the prosecution. *Hageman,* 307 N.C. at 28, 296 S.E.2d at 448. "Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime." *Id.* at 31, 296 S.E.2d at 450.

BURDEN OF PROOF ON DEFENDANT

Burden of proof is on the defendant to prove both prongs: 1) inducement by the government, **and** 2) lack of predisposition by the defendant.

Burden of proof is "proof to the jury's satisfaction." This is a burden not greater than, nor significantly less than proof by a **preponderance of the evidence**. State v. Hankerson, 288 N.C. 632, 648, 220 S.E.2d 575, 587 (1975); State v. Payne, 337 N.C. 505, 532, 448 S.E.2d 93, 109 (1994).

State v. Hageman, 307 N.C. 1, 27-28, 296 S.E.2d 433, 448-49 (1982)

Entrapment is an affirmative defense, and the burden of proof lies with defendant.

…

The rule in some federal courts is that once the defendant produces evidence that he has been induced to commit a crime, the burden shifts to the prosecution to show beyond a reasonable doubt that the defendant was predisposed to engage in the crime charged. *United States v. Berger, supra.* Others simply state the rule as being that once the defense of entrapment is raised, the government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped…**However, in this State, we have traditionally placed the burden of production and persuasion on defendants who seek to avail themselves of affirmative defenses.** State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976); *State v. Clark,* 301 N.C. 176, 270 S.E.2d 425 (1980), insanity*;* State v. Cook, 263 N.C. 730, 140 S.E.2d 305 (1965); State v. Wilkins, 34 N.C.App. 392, 238 S.E.2d 659, *disc. review denied,* 294 N.C. 187, 241 S.E.2d 516 (1977); State v. Braun, 31 N.C.App. 101, 228 S.E.2d 466, *disc. review denied, appeal dismissed,* 291 N.C. 449, 230 S.E.2d 766 (1976), entrapment. **We reaffirm our Court's holdings that the defendant has the burden to prove the defense of entrapment to the satisfaction of the jury. Once defendant presented evidence of entrapment, the burden did not shift to the prosecution to prove predisposition beyond a reasonable doubt.** The instructions given were proper…
(numerous citations omitted) (emphasis added)

ENTRAPMENT BY ESTOPPEL

State v. Barr, 721 S.E.2d 395, 404-05 (N.C. Ct. App. 2012)

This Court recently addressed entrapment by estoppel in *State v. Pope*, —N.C.App. —– –, ——, 713 S.E.2d 537, 541, *disc. review denied*, — N.C. ——, 718 S.E.2d 393 (2011), stating that "[a] criminal defendant may assert an entrapment-by-estoppel defense when the government affirmatively assures him that certain conduct is lawful, the defendant thereafter engages in the conduct in reasonable reliance on those assurances, and a criminal prosecution based upon the conduct ensues."[2] *Id.* (quotation omitted). "In order to assert an entrapment-by-estoppel defense, [the defendant] must do more than merely show that the government made vague or even contradictory statements. Rather, he must demonstrate that there was active misleading in the sense that the government actually told him that the proscribed conduct was permissible." *Id.* (quotation omitted).

SENTENCING ENTRAPMENT

State v. Foster, 162 N.C. App. 665, 671-72, 592 S.E.2d 259, 264-65 review allowed, writ allowed, 358 N.C. 378, 597 S.E.2d 768 (2004) and aff'd, ordered not precedential, 359 N.C. 179, 604 S.E.2d 913 (2004)

In the case *sub judice,* defendant argues he was entrapped into committing the offenses of trafficking in cocaine and possession with intent to manufacture, sell or deliver cocaine, as opposed to the offense of simple possession he intended to commit, and as a result was subjected to an enhanced criminal penalty. Entrapment affecting the severity of the punishment imposed for a criminal act has been recognized by other states and in federal court. *See United States v. Si,* 343 F.3d 1116, 1128 (9th Cir.2003) ("[s]entencing entrapment occurs when a defendant is predisposed to commit a lesser crime, but is entrapped into committing a more significant crime that is subject to more severe punishment because of government conduct"); *Leech v. State,* 66 P.3d 987, 990 (Okla.Crim.App.2003) (holding that "[a] defendant who intended to possess small amounts of an illegal drug could be entrapped by officers into possessing a trafficking quantity or even a quantity sufficient to support a charge of intent to distribute"). **Recognition of sentencing entrapment as a form of entrapment under North Carolina law is consistent with the definition of entrapment adopted in this State**. *See* 2 N.C.P.I.-Crim. 309.10 (2001) (elements of the defense in this case require that "the criminal intent to commit [trafficking in cocaine and possession with intent to manufacture, sell or deliver cocaine] did not originate in the mind of the defendant" and "persuasion or trickery [was used] to cause the defendant to commit [*these*] crime[s] which he was not otherwise willing to do").

Defendant did not deny having committed the essential elements of trafficking in cocaine and only asserts that he lacked the requisite intent to commit either of the charges against him. The evidence presented by defendant at trial, viewed in the light most favorable to him, indicates that defendant was merely a user, not a dealer, and that the 31 October 2001 purchase was only the second time in defendant's adult life that he had procured drugs.[2] In addition, defendant testified the amount previously purchased was restricted to 5 grams for $500.00. As this testimony, which went unchallenged by the State, served to show that defendant was not predisposed to trafficking in cocaine or possession with intent to manufacture, sell or deliver

cocaine, he was not foreclosed from receiving an entrapment instruction if the evidence further established "acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce [him] to commit [the] crime[s]." *Walker,* 295 N.C. at 513, 246 S.E.2d at 750. (emphasis added)

INCONSISTENT DEFENSES

State v. Neville, 302 N.C 623, 276 S.E.2d 373 (**1981**)

"…North Carolina follows the majority rule which precludes the assertion of the defense of entrapment when the defendant denies one of the essential elements of the offense charged. See State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971) (subsequent history omitted); State v. Boles, 246 N.C. 83, 97 S.E.2d 476 (1957); Annot., 61 A.L.R.2d 677 (1958). He further recognizes that the rationale of that rule "is that the law will not countenance a claim that defendant did not commit the offense and a claim that he was entrapped into the commission of the very offense which he denied committing." State v. Neville, 49 N.C.App. at --, 272 S.E.2d at 166.

…

We are not inadvertent to the cases which apparently allow a defendant to raise an entrapment defense even while denying the commission of the offense charged. Our review of these cases, however, reveals that they deal with the situation where either the State's own evidence raises an inference of entrapment, State v. Knight, 230 S.E.2d 732 (W.Va.1976), or the defendant denies the intent required for the commission of the offense. United States v. Demma, 523 F.2d 981 (9th Cir. 1975). In the former instance, the submission of the defense is obviously proper; in the latter instance, the entrapment defense is not inconsistent with the defense of lack of mental state since the defense of entrapment itself is an assertion that it was the will of the government, and not of the defendant, which spawned the commission of the offense. McCarroll v. State, 294 Ala. 87, 312 So.2d 382 (1975)…"

State v. Luster, 306 N.C. 566, 581, 295 S.E.2d 421, 430 (1982) FN 4

We do not reach the question of whether defendant could properly raise the defense of entrapment under his plea of not guilty and upon his denial that he knew the vehicle was stolen. **In North Carolina a defendant may properly raise the defense of entrapment under a plea of not guilty. But the defense is not available if the criminal act itself is denied.** State v. Neville, 302 N.C. 623, 276 S.E.2d 373 (1981). *See* 21 Am.Jur.2d, Criminal Law, § 208 (1981); Annot., 5 A.L.R. 4th 1128 (1981). This Court has ruled that allowing a defendant to deny participation in a criminal *act* while claiming he was entrapped into committing the offense would be inconsistent, and has distinguished between denying *acts* and denying *intent,* which would not be inconsistent with entrapment.
(emphasis added)

HOWEVER

Mathews v. United States, 485 U.S. 58 (**1988**)

In federal cases, the defendant can raise an entrapment defense AND raise contrary positions/defenses, including denying the acts comprising the crimes charged.

HOWEVER

State v. Sanders, 95 N.C. App. 56, 61, 381 S.E.2d 827, 830 (1989)

A defendant also must admit to having committed the acts underlying the offense with which he is charged in order to receive an entrapment instruction. Our Supreme Court has held that when a defendant "denies the commission of the acts underlying the offense charged, he cannot raise the inconsistent defense of entrapment." *State v. Neville*, 302 N.C. 623, 626, 276 S.E.2d 373, 375 (1981).

PLEASE NOTE that this author could find no North Carolina cases that have considered *Mathews* in the context of the embezzlement / inconsistent defenses issue. NOTE that Sanders was decided after Mathews.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

...

(b) Other crimes, wrongs, or acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as…**the absence of…entrapment**…"

Rule 403 still applies

Hearsay rules unchanged

Defendant can probably introduce *prior good acts* to prove absence of predisposition.
United States v. Thomas, 134 F.3d 975 (9th Cir. 1998)

N.C.P.I.-Crim. 309.10

ENTRAPMENT

The defendant has raised the defense of entrapment. Entrapment occurs when a person acting on behalf of a governmental agency induces the defendant to commit a crime not contemplated by the defendant for the purpose of instituting a criminal charge against him. Entrapment is a complete defense to the crime charged.

The burden of proving entrapment is upon the defendant. However, the defendant is not required to prove entrapment beyond a reasonable doubt, but only to your satisfaction. For you to find that the defendant was entrapped, you must be satisfied of three things:

First, that the criminal intent to commit (*name crime*) did not originate in the mind of the defendant.

Second, that the defendant was induced by another person to act. Merely providing an opportunity to commit (*name crime*) by a person would not be sufficient inducement. It must appear that that person used persuasion or trickery to cause the defendant to commit this crime which he was not otherwise willing to do.

And Third, that this person acted on behalf of a governmental agency.

If you are satisfied from the evidence that the criminal intent did not originate in the mind of the defendant and that another person induced the defendant by persuasion or trickery to commit (*name crime*), which he was not otherwise willing to do, and that person acted on behalf of a governmental agency, then you must return a verdict of not guilty.