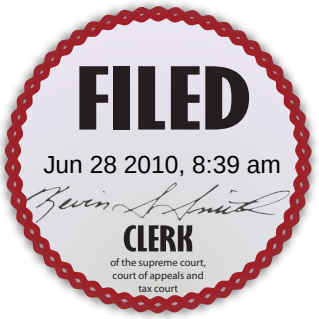

ATTORNEY FOR APPELLANT:

T. MICHAEL CARTER
Scottsburg, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JASON D. ARBUCKLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 72A01-0912-CR-618
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SCOTT CIRCUIT COURT
The Honorable Roger L. Duvall, Judge
Cause No. 72C01-0803-FA-12

June 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issue

Jason D. Arbuckle appeals his conviction for class A felony dealing in methamphetamine. The sole issue is whether the trial court erred in refusing to give Arbuckle's tendered instruction on the entrapment defense. We affirm.

Facts and Procedural History

On June 14, 2006, undercover Indiana State Police Detective Juli Schnell and a confidential informant ("C.I.") went to Arbuckle's Austin residence. When the two arrived in Detective Schnell's unmarked vehicle, they told Arbuckle that they were "looking." Tr. at 123. Arbuckle went inside and made a phone call. When he returned, he asked Detective Schnell and the C.I. how much they wanted to purchase, and the C.I. responded, an "8 ball." *Id*. at 124. After briefly reentering his residence, Arbuckle got into the vehicle with Detective Schnell and the C.I. and directed them to another residence. Once there, Arbuckle entered the residence, and the other two remained in the vehicle. A couple minutes later, Arbuckle returned to the vehicle and told the others it would be $275.00 for an "8 ball." *Id*. at 126. Detective Schnell confirmed her interest in making the purchase, counted out the money, and handed it to Arbuckle. Arbuckle went inside the residence, returned five minutes later, and handed Detective Schnell a crystal substance later confirmed to be 3.97 grams of crystal methamphetamine. Detective Schnell testified that Arbuckle indicated that "'it came from a rock and it was good,' referring to it not being cut or diluted with any other substance." *Id*. at 128.

On March 13, 2008, the State charged Arbuckle with class A felony dealing in more than three grams of methamphetamine. Arbuckle did not appear for the August 4, 2009 jury trial. The trial court refused his tendered instruction on the issue of entrapment, and the jury found him guilty as charged. On August 5, 2008, the trial court issued an arrest warrant. On November 3, 2009, the trial court sentenced Arbuckle to thirty years. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

Arbuckle contends that the trial court erred in refusing to give his tendered instruction on the issue of entrapment. At the outset, we note that the State has failed to file an appellee's brief. As such, we apply a less stringent standard of review whereby we may reverse if Arbuckle establishes prima facie error. *Willis v. State*, 907 N.E.2d 541, 544 (Ind. Ct. App. 2009). Prima facie error is "error at first sight, on first appearance, or on the face of it." *Id*. (citations and quotation marks omitted). This rule relieves us of the burden of controverting the appellant's arguments; however, it does not relieve us of our obligation to properly decide the law as applied to the facts of the case. *Id*. at 544-45.

When an appellant challenges a trial court's refusal to give a tendered jury instruction, we perform a three-part evaluation. *Walden v. State*, 895 N.E.2d 1182, 1186 (Ind. 2008). First, we determine whether the tendered instruction is a correct statement of the law. Second, we examine the record to determine whether there was evidence present to support the tendered instruction. Third, we determine whether the substance of the tendered instruction was covered by another instruction or instructions. *Id*. Errors in refusing to give

instructions are harmless where the conviction is clearly sustained by the evidence and the instruction would not likely have impacted the jury's verdict. *Atwood v. State*, 905 N.E.2d 479, 486 (Ind. Ct. App. 2009), *trans. denied*.

Indiana's entrapment statute provides:

> (a) It is a defense that:
>
> (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
>
> (2) the person was not predisposed to commit the offense.
>
> (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

Ind. Code § 35-41-3-9. Arbuckle's tendered instruction stated:

> The defense of entrapment is defined by law as follows:
>
> It is a defense that the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and the person was not predisposed to commit the offense.
>
> Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.
>
> The State has the burden of disproving this defense beyond a reasonable doubt.

Appellant's App. Vol. I at 70.

In *Scott v. State*, 772 N.E.2d 473 (Ind. Ct. App. 2002), *trans. denied*, we stated that "[o]nce the defendant has indicated an intent to rely on the affirmative defense of entrapment and has established government participation, the burden shifts to the State to show the defendant's predisposition to commit the crime beyond a reasonable doubt." *Id*. at 474-75. "[T]o successfully raise an entrapment defense, the defendant must first produce evidence of the government's involvement in the criminal activity and, if the State makes a prima facie

case of predisposition, then [the defendant] must also produce evidence of his lack of predisposition to commit the crime." *Id*. at 475.

> [T]he defense of entrapment turns upon the defendant's state of mind, or whether the criminal intent originated with the defendant. In other words, the question is whether criminal intent was deliberately implanted in the mind of an innocent person. It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.

Id. (citations and internal quotation marks omitted).

We conclude that the evidence in the record does not support the giving of the instruction. The evidence of police participation is undisputed. However, "[e]ven in the context of undisputed police participation in criminal activity, if evidence of the defendant's predisposition to commit the crime is presented, the defendant is not entitled to an instruction on the entrapment defense unless he presents evidence showing a lack of predisposition." *Id*. (citation and quotation marks omitted).

Here, the State presented evidence that Arbuckle was predisposed to commit the offense. Even though police initiated the contact, such contact merely provided an opportunity for Arbuckle to engage in activity with which he was familiar and to which he was predisposed. First, we note that Detective Schnell and the C.I. merely told Arbuckle that they were "looking." Tr. at 123. Arbuckle was obviously familiar with the terminology because he did not ask *what* they were looking for; instead, he asked *how much* they wanted to purchase. *Id*. at 126. Also, when they indicated that they wanted to purchase an "8 ball," he did not ask what they meant. Instead, he directed them to his source, quoted them a price for the "8 ball," and vouched for the drug's quality. *Id*. The lab report confirmed that the

amount of crystal meth he sold to Detective Schnell was 3.97 grams, just slightly above the amount of an "8 ball," which is approximately 1/8 ounce or 3.5 grams of meth. *Id*. at 124, 126, 141. In sum, Arbuckle knew what his buyers wanted, knew where to get it, and completed the transaction. Thus, police did not persuade him to engage in an activity to which he was not predisposed, and he did not demonstrate a lack of such predisposition. As such, he was not entitled to an instruction on the entrapment defense, and the trial court committed no error in refusing his tendered instruction. Accordingly, we affirm.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.