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1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3           Plaintiff-Appellant,

4 v.

**NO. 32,983**

5 **DAVID BELKNAP,**

6           Defendant-Appellee.

7 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

8 **James Waylon Counts, District Judge**

9 Hector H. Balderas, Attorney General

10 James W. Grayson, Assistant Attorney General

11 Santa Fe, NM

12 for Appellant

13 Jorge A. Alvarado, Chief Public Defender

14 Allison H. Jaramillo, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellee

17   **MEMORANDUM OPINION**

18 **VANZI, Judge.**

1 {1} The State appeals from the district court’s grant of a motion to dismiss in favor  
2 of Defendant David Belknap, who was charged with two counts of distributing  
3 marijuana, contrary to NMSA 1978, Section 30-31-22(A)(1)(a) (2011). The district  
4 court granted the motion on the sole basis of normative objective entrapment. The  
5 State raises two issues on appeal: (1) it was error to decide an uncorroborated,  
6 factually contested entrapment defense in favor of Defendant as a matter of law; and  
7 (2) if normative entrapment could have been decided as a matter of law, it should have  
8 been decided in favor of the State. Defendant counters that there was no error below  
9 and, alternatively, that since the facts also meet the elements of subjective entrapment,  
10 we can affirm according to the “right for any reason” doctrine. *See State v. Allen*,  
11 2014-NMCA-111, ¶ 6, 336 P.3d 1007 (internal quotation marks and citation omitted),  
12 *cert. denied*, 2014-NMCERT-010, 339 P.3d 425. We reverse.

### 13 **BACKGROUND**

14 {2} At the hearing on his motion to dismiss for entrapment, Defendant described  
15 the series of events that led him to sell marijuana on two occasions to Marc Brusuelas,  
16 a narcotics agent working undercover for the Otero County Sheriff’s Office.  
17 Defendant testified that in the month leading up to the transactions, he received  
18 numerous, persistent phone calls, text messages, and a voice message from Martín  
19 Sanchez, who was his high school classmate and former co-worker. In these  
20 communications, Sanchez, who was working as a confidential informant for Agent

1 Brusuelas and the Sheriff's Office, repeatedly asked Defendant if he could get him  
2 any marijuana, though Defendant testified that he was only personally using  
3 marijuana, was not dealing it, and had never sold drugs to Sanchez in the past.  
4 Defendant mostly avoided Sanchez's calls, but over time the communications became  
5 more urgent, and Sanchez grew increasingly angry. On one occasion, he called  
6 Defendant from an unknown number and asked for marijuana, saying that his cousin  
7 had back pain and was "hurting real bad," which appealed to Defendant's sympathies  
8 as a victim of chronic pain himself. But, despite this plea, Defendant steadfastly  
9 refused to get involved.

10 {3} On October 17, 2011, Sanchez showed up at Defendant's home unannounced,  
11 which was intimidating to Defendant, who knew of Sanchez's reputation as "a mean  
12 person," who "likes to retaliate," slashes people's tires, burns people's houses down,  
13 and has physically assaulted people in the past. In the wake of this visit, Defendant  
14 "finally caved into [Sanchez's] pressure" and agreed to sell him marijuana. Defendant  
15 testified that he agreed to sell the drugs in order to stop the harassment from Sanchez  
16 and because he felt both intimidated by and sorry for Sanchez's cousin. In the  
17 following days, Sanchez and his "cousin," who was actually Agent Brusuelas working  
18 undercover, bought \$100 and \$60 worth of marijuana from Defendant in two  
19 transactions.

1 {4} The State's case sought to undermine any notion that Defendant was an  
2 innocent citizen, only coerced into selling drugs out of fear and sympathy. The State's  
3 only witness, Agent Brusuelas, had no direct knowledge of the nature of the  
4 communications between Defendant and Sanchez, but he testified that Defendant's  
5 demeanor during both transactions was "pretty relaxed, pretty comfortable with  
6 [Brusuelas's] presence" and that Defendant's conduct was consistent with that of a  
7 drug dealer and not a person operating out of fear. The State also played an audio  
8 recording of the second transaction, during which Defendant can be heard inducing  
9 Agent Brusuelas to purchase a larger quantity of marijuana:

10 **Defendant:** You just needed sixty, right?

11 **Brusuelas:** [Sanchez] says a forty?

12 . . . .

13 **Defendant:** You get a better deal. . . you get a half gram for free,  
14 instead of just buying it by the gram.

15 **Brusuelas:** Alright.

16 **Defendant:** You want it for sixty then?

17 **Brusuelas:** Yeah, sure. I'll take what you got.

18 **Defendant:** Yea cause this gets you three and a half grams and a forty  
19 just gets you two, you know what I mean. You get like an  
20 extra half gram for free.



1 **Overview of Entrapment**

2 {6} New Mexico recognizes subjective and objective forms of entrapment. *State v.*  
3 *Vallejos*, 1997-NMSC-040, ¶ 10, 123 N.M. 739, 945 P.2d 957. The subjective defense  
4 is available “when the criminal design originates with the officials of the government,  
5 and they implant in the mind of an innocent person the disposition to commit the  
6 alleged offense and induce its commission in order that they may prosecute.” *Id.* ¶ 5  
7 (internal quotation marks and citation omitted). The defense is not available if the  
8 defendant was already disposed to commit the crime. *Id.* Thus, under the subjective  
9 standard, “the focal issue is the intent or predisposition of the defendant to commit the  
10 crime.” *Id.* (internal quotation marks and citation omitted).

11 {7} The broader, objective defense, can be demonstrated in two ways, one factual  
12 and one normative:

13 [I]f a jury finds as a matter of fact that police conduct created a  
14 substantial risk that an ordinary person not predisposed to commit a  
15 particular crime would have been caused to commit that crime, *or* if the  
16 trial court rules as a matter of law that police conduct exceeded the  
17 standards of proper investigation, then criminal charges should be  
18 dismissed.

19 *Id.* ¶ 11. While factual entrapment focuses on “the likely effect of police conduct on  
20 a hypothetical person not predisposed to commit the crime[,]” the focus of the  
21 normative inquiry is on the standards of proper investigative conduct, particularly

1 prohibiting investigative activity that employs unconscionable methods or advances  
2 illegitimate purposes. *Id.* ¶¶ 12, 16-18. Thus, under the normative component,  
3 the district court must carefully scrutinize both the methods and purposes  
4 of police conduct to determine whether police tactics offend our notions  
5 of fundamental fairness, or are so outrageous that due process principles  
6 would absolutely bar the government from invoking judicial processes  
7 to obtain a conviction.

8 *State v. Shirley*, 2007-NMCA-137, ¶ 17, 142 N.M. 765, 170 P.3d 1003 (alteration,  
9 internal quotation marks, and citation omitted). In this case, the district court  
10 dismissed the charges against Defendant on the ground that “the police conduct  
11 exceeded the standards of proper investigation”—a finding of normative objective  
12 entrapment as a matter of law. Since there was no evidence presented that the police  
13 advanced an illegitimate purpose, we construe the district court’s order as a finding  
14 of unconscionable methods.

15 {8} *Vallejos* provides a list of helpful “indicia of unconscionability[,]” which, in  
16 relevant part, includes

17 an extreme plea of desperate illness, an appeal based primarily on  
18 sympathy or friendship, persistent solicitation to overcome a defendant’s  
19 demonstrated hesitancy, the use of . . . physical or psychological  
20 coercion to induce the commission of a crime, . . . unjustified intrusion  
21 into citizens’ privacy and autonomy, . . . excessive involvement by the  
22 police in creating the crime, [and] the manufacture of a crime from  
23 whole cloth[.]

24 1997-NMSC-040, ¶ 18 (alteration, internal quotation marks, and citations omitted).

25 A finding of normative entrapment is “an extreme remedy for extreme government

1 behavior.” *Id.* ¶ 20. “[T]he question whether a given undercover operation is poor  
2 police strategy or a misguided waste of taxpayer money is beyond the scope of the  
3 inquiry.” *Id.* ¶ 21 (internal quotation marks and citation omitted). On appeal, we  
4 review de novo the application of normative standards of objective entrapment. *In re*  
5 *Alberto L.*, 2002-NMCA-107, ¶ 15, 133 N.M. 1, 57 P.3d 555.

### 6 **Credibility Issues and Factual Disputes**

7 {9} While “the determination of the proper standards of police investigation is a  
8 question of law and policy to be decided by the courts in the first instance[.]” our  
9 Supreme Court has stated that “the jury may resolve factual disputes where credibility  
10 is an issue or where there is conflicting evidence pertaining to what events transpired.”  
11 *Vallejos*, 1997-NMSC-040, ¶¶ 16, 20 (alteration, internal quotation marks, and  
12 citation omitted); *see also* UJI 14-5161 NMRA committee commentary (“Ordinarily,  
13 the judge decides the issue whether the alleged conduct, if it occurred, was acceptable  
14 as a matter of law, leaving for the jury the issue of whether this misconduct did  
15 occur.”). In *Shirley*, we applied this language to uphold the lower court’s denial of a  
16 motion to dismiss for objective entrapment because the defense hinged entirely on the  
17 defendant’s credibility. 2007-NMCA-137, ¶¶ 21, 30. We cited “our general  
18 understanding that the jury determines the credibility of witnesses” and rejected the  
19 notion that a defendant’s uncorroborated testimony must be believed. *Id.* ¶¶ 28-29. We  
20 specifically declined to adopt “the per se rule,” established in *United States v. Bueno*,



1 447 F.2d 903, 906 (5th Cir. 1971), which would have required the State to call its  
2 confidential informant to the stand to directly contradict the defendant’s version of  
3 events in order to survive a motion to dismiss for entrapment as a matter of law.  
4 *Shirley*, 2007-NMCA-137, ¶¶ 25-26, 28.

5 {10} In this case, as in *Shirley*, Defendant presented uncorroborated testimony that  
6 the police exceeded the standards of proper investigation. As in *Shirley*, “[w]here a  
7 defendant’s claim of entrapment is uncorroborated, the question of [a d]efendant’s  
8 credibility is best left to the jury to decide.” *Id.* ¶ 30. We do not opine as to whether  
9 a district court must be automatically reversed on appeal for weighing credibility and  
10 granting a defendant’s motion on a factually contested entrapment defense as a matter  
11 of law, or, as the States calls it, “invad[ing] the province of the jury.” *See Vallejos*,  
12 1997-NMSC-040, ¶ 20 (“[T]he jury *may* resolve factual disputes.” (emphasis added)).  
13 Instead, we conclude only that the district court erred when it found that “[t]he State  
14 presented no evidence which called Defendant’s credibility into question, nor which  
15 disputed any of Defendant’s assertions[,]” and then ruled as a matter of law on that  
16 basis. The credibility of Defendant’s uncorroborated testimony was necessarily in  
17 question according to *Shirley*. Against Defendant’s version of events, including his  
18 testimony that he was harassed by Sanchez, that he was not a drug dealer, that he was  
19 operating out of fear of both Sanchez and Agent Brusuelas, and that he sought to  
20 violate the law to the minimum extent possible, the State presented testimony that

1 Defendant seemed “pretty relaxed, pretty comfortable” selling drugs. The State’s  
2 corroborating audio recording evinced Defendant attempting to negotiate higher  
3 quantity sales and the future sales of superior product to the purportedly intimidating  
4 Agent Brusuelas. This evidence plainly contradicts the thrust of Defendant’s  
5 entrapment claim—that Sanchez and Brusuelas exceeded the bounds of proper  
6 investigation by continually harassing and intimidating Defendant into breaking the  
7 law. Thus the only apparent explanation for the district court’s finding that the State  
8 did not challenge Defendant’s credibility or create any factual dispute is that the court  
9 implicitly faulted the State for not calling Sanchez to testify. In other words, it applied  
10 the “per se” rule from *Bueno* that we rejected in *Shirley*, 2007-NMCA-137, ¶ 28. It did  
11 so in error.

### 12 **Sufficiency of the Evidence for an Entrapment Instruction**

13 {11} The State argues that Defendant should not get a jury instruction on normative  
14 entrapment absent additional proof on remand. *See Vallejos*, 1997-NMSC-040, ¶ 34  
15 (stating that the instruction should be given “assuming the production of sufficient  
16 evidence to support the defense”). We disagree. Viewing the evidence in the light  
17 most favorable to Defendant, the police manufactured a crime “from whole cloth”  
18 contrary to *Vallejos*. *Id.* ¶ 18 (internal quotation marks and citation omitted).  
19 Defendant’s testimony, if credited, establishes that the police used a confidential  
20 informant with a reputation for retaliation and violence to persistently and angrily

1 harass Defendant over the course of a month by calling him “over and over and over  
2 again,” sending him unsolicited text messages from unknown phone numbers, and,  
3 when these efforts failed, showing up at his home unannounced and uninvited. The  
4 harassment continued despite Defendant’s steadfast refusal to engage in the sale of  
5 marijuana. The State argues that “ ‘[p]estering’ does not rise to the level of  
6 entrapment,” but our Supreme Court has specifically cited “persistent solicitation to  
7 overcome a defendant’s demonstrated hesitancy” as an example of an unconscionable  
8 method. *Id.* While credibility issues require reversal of the district court’s decision to  
9 grant Defendant’s motion as a matter of law, we find sufficient evidence to support  
10 a normative entrapment instruction (UJI 14-5161) for the jury. *See Vallejos*, 1997-  
11 NMSC-040, ¶ 34

## 12 **Subjective Entrapment**

13 {12} The parties’ final dispute is whether we can affirm the district court’s ruling as  
14 a matter of law on the alternative basis of subjective entrapment. Although the issue  
15 of subjective entrapment was neither argued nor considered at the evidentiary hearing,  
16 “we will uphold the decision of a district court if it is right for any reason.” *Allen*,  
17 2014-NMCA-111, ¶ 6 (internal quotation marks and citation omitted).

18 {13} The trier of fact typically determines whether subjective entrapment has  
19 occurred by considering whether the defendant was already predisposed to commit the  
20 crime. *State v. Fiechter*, 1976-NMSC-006, ¶ 11, 89 N.M. 74, 547 P.2d 557; *Alberto*

1 L., 2002-NMCA-107, ¶ 8. In *State v. Schaublin*, we stated that “[u]nder rare  
2 circumstances, the issue of subjective entrapment may be resolved as a matter of law,  
3 in which instance, the fact-finder would not consider the defendant’s predisposition.”  
4 2015-NMCA-024, ¶ 12, 344 P.3d 1074, *cert. denied*, 2015-NMCERT-002, 346 P.3d  
5 370. Despite this language, we can locate no New Mexico case that has actually  
6 applied the doctrine as a matter of law, and Defendant fails to explain why this case,  
7 which involves disputed facts, involves the “rare circumstances” alluded to in  
8 *Schaublin*. This is not an appropriate situation to rule on subjective entrapment as a  
9 matter of law, *see Sherman v. United States*, 356 U.S. 369, 373 (1958) (ruling on the  
10 issue as a matter of law only because the Court was “not choosing between conflicting  
11 witnesses, nor judging credibility”), particularly on appeal via application of the right  
12 for any reason doctrine, *see State v. Wilson*, 1998-NMCA-084, ¶ 17, 125 N.M. 390,  
13 962 P.2d 636 (“Appellate courts usually apply the right for any reason basis of  
14 affirmance to strictly legal questions.”). Defendant’s testimony that he was not already  
15 disposed to deal drugs when the investigation began is in doubt. Accordingly, the  
16 issue of subjective entrapment, like the issue of objective entrapment, is for the jury  
17 in this case.

18 **CONCLUSION**

1 {14} The decision of the district court is reversed and remanded for proceedings  
2 consistent with this Opinion.

3 {15} **IT IS SO ORDERED.**

4 \_\_\_\_\_  
5 **LINDA M. VANZI, Judge**

6 **WE CONCUR:**

7 \_\_\_\_\_  
8 **JAMES J. WECHSLER, Judge**

9 \_\_\_\_\_  
10 **MICHAEL D. BUSTAMANTE, Judge**