

ENTRAPMENT

PENAL LAW 40.05 (Effective September 1, 1967)

If the affirmative defense of entrapment is applicable, omit the final two paragraphs of the instructions of the crime charged, and substitute the following:

If you find that the People have not proven beyond a reasonable doubt any one of those elements, you must find the defendant not guilty of *(specify)* as charged in the _____ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt each of the elements, you must consider the affirmative defense of entrapment that the defendant has raised.

Under our law, it is an affirmative defense that the defendant engaged in the prohibited conduct because:

(1) he/she was induced or encouraged to do so by a public servant, [or by a person acting in cooperation with a public servant,] who was seeking to obtain evidence against him/her for the purpose of criminal prosecution, and

(2) the methods used to obtain the evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it.

Inducement or encouragement to commit an offense means active inducement or encouragement of a person who is not predisposed to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.¹

[Note: Add where appropriate:

In determining whether the defendant was not otherwise disposed to commit the offense, you may consider his/her criminal conviction(s) [or criminal conduct]. The fact that the defendant has a criminal conviction [or has engaged in criminal conduct], however, does not require you to find that he/she was predisposed to commit the crime. It is simply one of the factors that you may take into account in making that determination.^{2]}

[Note: Add where appropriate:

In determining whether the defendant was not otherwise disposed to commit the offense, you may consider that he/she has no criminal history. The fact that the defendant has no criminal history, however, does not require you to find that he/she was not predisposed to commit the crime. It is simply one of the factors that you may take into account in making that determination.^{3]}

Under our law, the defendant has the burden of proving this affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you must consider any relevant evidence presented at this trial from any source.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and the convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

Therefore, if you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven beyond a reasonable doubt each of the elements of (*specify*), you

must find the defendant guilty of (*specify*) as charged in the _____ count.

On the other hand, if you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of (*specify*) as charged in the _____ count.

1. Penal Law § 40.05

2. See *People v. Calvano*, 30 N.Y.2d 199, 203-204 (1972); *People v Thomas*, 175 A.D.2d 717 (1st Dept. 1991); *People v Byrd*, 155 A.D.2d 350 (1st Dept. 1989).

3. *Id.*