

CHAPTER 9: EXCUSES

INTRODUCTION

Excuses, like justifications, are defenses to crime. In excuses, the defendants admit most or all of the elements of the crime but argue that because of their personal characteristics or some other factor, they are not responsible or blameworthy and should not be convicted.

In the Texas Penal Code (TPC) excuses can be either ordinary defenses (burden of proof on State to disprove defense) or affirmative defenses (defendant must prove by preponderance of the evidence). Excuses are found in ch. 8 of the TPC which can be found at <http://www.capitol.state.tx.us/statutes/pe.toc.htm>

TPC ch . 8 recognizes seven “General Defenses” or excuses.

- Sec. 8.01. insanity
- Sec. 8.02. mistake of fact
- Sec. 8.03. mistake of law
- Sec. 8.04. intoxication
- Sec. 8.05. duress
- Sec. 8.06. entrapment
- Sec. 8.07. age affecting criminal responsibility

In addition, this chapter. will discuss involuntary intoxication resulting in insanity, diminished capacity, and competency to stand trial.

INSANITY

According to the TPC:

§ 8.01. INSANITY. (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.

(b) The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

For most of its history Texas used the classic M’Naghten test. The Texas insanity defense is still very similar to that test, and is a cognitive test focusing on what the defendant “knew.” From 1974 to 1983 the test also included a volitional or “irresistible impulse” component.

The statute does not define any of the terms in the phrase “did not know that his conduct was wrong.” Does “wrong” mean unlawful? Or, does it mean immoral or unethical? Further, whose standards apply? The Texas CCA partially answered this question in *Bigby v. State* 892 S.W.2d 864 (Tex.Crim.App. 1994). Bigby had a long history of mental illness and

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killed his friend, Mike Trekell, and his friend's sixteen month-old son, Jayson, sometime after 6:00 p.m. on December 23, 1987. On December 26th appellant was apprehended at a motel in Tarrant County. Acting on information of appellant's whereabouts, the police dispatched a S.W.A.T. team and a negotiator to the motel. The negotiator, Detective Ansley, contacted appellant through the door of appellant's room. Eventually, appellant cracked the door, and the two spoke. Appellant said to the detective, "I know I am guilty and so do you." Detective Ansley, unsure if he had heard appellant correctly, asked appellant to repeat the statement. Appellant did. After further negotiations, appellant surrendered and was arrested. Subsequent to his arrest, appellant confessed:

For the past 14 months I have felt that Mike [Trekell] has been conspiring against me and trying to discredit me concerning a lawsuit I have against Frito Lay. I had been thinking about getting back at him for a while and it has been on my mind when I--and it was on my mind when I came to his house that night. While Mike was fixing the steaks I went over by him, and the next thing I knew I shot Mike with a Ruger .357 Magnum, with 158 grain silver tips. When I shot Mike he was sitting at the kitchen table. He never saw the gun and didn't know I was going to shoot him.

I don't know why, but after I shot Mike I took some cellophane from the refrigerator and went into Jayson's room. I wrapped the cellophane around Jayson's head and suffocated him. I then filled the sink up with water and placed Jayson face down into the water. I just left him there. I then left the trailer and got into my car and drove around for a while. I threw *876 the cellophane out but I am not sure where. After I got to the motel room I couldn't sleep. I took a lot of medication trying to force sleep on myself. I was disturbed and kept thinking about what I had done to the baby. It bothered me a lot. I regret killing the baby but not the other. I thought the police would come in the apartment and shoot me.

There is no disagreement by the parties at trial that appellant was suffering from a delusion concerning his former employer, Frito Lay, and its worker's compensation insurance company. The nature and effects of this delusion and whether appellant knew his conduct on Christmas was wrong were contested issues in the trial.

In 1985, appellant began working for the Frito Lay Company. He assisted in the maintenance of their fleet of delivery trucks. After a year on the job appellant injured his back. Because of the incapacitating effects of the injury, he filed a worker's compensation claim with Frito Lay. This claim eventually erupted into a lawsuit between the parties.

Appellant became convinced that Frito Lay and its worker's compensation insurance company were conspiring against him to prevent any collection on his claim. Appellant believed that he had gathered enough data on the insurance company to have the company suspended from operating in Texas, and as a result, the insurance company was prepared to "take him out." The number of "conspirators" grew slowly eventually including some close friends and family members. The defensive theory of insanity was that appellant killed Trekell to protect himself from these conspirators.

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As time progressed after his accident so did appellant's paranoia. Appellant informed his father, a former postal worker, that the conspirators were trying to kill him by infusing through the air conditioning vent of his apartment a poisonous "green gas." He also told his father that his apartment was "bugged," or electronically monitored. His father testified that the alleged recording device was actually a connecting block for a modular telephone. 892 S.W.2d at 874

The CCA upheld the conviction and death sentence. The test is not whether the defendant knew or felt the act was wrong, or whether the defendant knew the act was illegal. The test is whether the defendant knew that it was wrong under society's standards. The CCA wrote:

Several expert witnesses testified appellant knew his conduct was illegal, however, these experts contended that appellant did not know the act was "morally" wrong. In other words, appellant believed that regardless of society's views about this illegal act and his understanding it was illegal, under his "moral" code it was permissible. This focus upon appellant's morality is misplaced. The question of insanity should focus on whether a defendant understood the nature and quality of his action and whether it was an act he ought to do. Zimmerman v. State, 85 Tex.Cr.R. 630, 215 S.W. 101, 105 (1919) (on rehearing). By accepting and acknowledging his action was "illegal" by societal standards, he understood that others believed his conduct was "wrong." 892 S.W.2d at 878.

If a person is found not guilty by reason of insanity, they may be committed to a mental institution if they meet the legal criteria for commitment for mental illness and the requirements of the Texas Code of Criminal Procedure. These procedures are treated in Texas Code of Criminal Procedure ch. 46C which is available at

<http://www.capitol.state.tx.us/statutes/cr.toc.htm>

Competency to Stand Trial

Mentally ill defendants may raise both insanity defense and incompetence to stand trial issues. These two issues are, however, different in at least two respects. First, insanity focuses on mental condition at the time of the offense. Competency to stand trial focuses on mental condition after the offense and at trial. Further, the tests for these two rules are different. The Texas test is similar to that in other states and provides:

Art. 46B.003. INCOMPETENCY; PRESUMPTIONS. (a) A person is incompetent to stand trial if the person does not have:

(1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or

(2) a rational as well as factual understanding of the proceedings against the person.

(b) A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.

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This doctrine is different from the insanity defense. The defendant here, is not claiming entitlement to a verdict of not guilty by reason of insanity. The defendant is arguing that because of mental disease or defect he or she did not have the required *mens rea*. The State must prove culpability beyond a reasonable doubt, and evidence on diminished capacity or responsibility may prevent the state from meeting its burden of proof on this issue. Admission of such evidence could result in an acquittal or conviction of a less serious offense (*e.g.*, conviction of manslaughter rather than murder). Such evidence is allowed in some jurisdictions but not in others. The primary barrier seems to be judicial skepticism about the reliability of psychological or psychiatric testimony.

The CCA has danced around the issue of whether such evidence is admissible. In *Jackson v. State* 160 S.W. 3d 568 (Tex.Crim.App. 2005) the CCA stated that this appeal “does not really present us with a reason to determine whether the doctrine of diminished capacity exists in Texas because the evidence of mental illness in this case does not negate *mens rea*.” 160 S.W.3d at 572

However, later in the opinion the CCA appears to leave the door open for such evidence.

The court of appeals correctly stated that Texas does not recognize diminished capacity as an affirmative defense *i.e.*, a lesser form of the defense of insanity. In contrast, the diminished-capacity doctrine at issue in this case is simply a failure-of-proof defense in which the defendant claims that the State failed to prove that the defendant had the required state of mind at the time of the offense. To counter the State's evidence of the defendant's state of mind, the defense wishes to present evidence that the defendant has mental or physical impairments or abnormalities and that some of his abilities are lessened in comparison to someone without such problems. As with the other elements of the offense, relevant evidence may be presented which the jury may consider to negate the *mens rea* element. And, this evidence may sometimes include evidence of a defendant's history of mental illness. Texas Code of Criminal Procedure Art. 38.36(a) states that:

In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

However, this evidence must still meet the admissibility requirements of Rule of Evidence 403. In *Smith v. State*, 5 S.W.3d 673 (Tex.Crim.App.1999), we stated that evidence admissible under Article 38.36(a) may be excluded under Rule 403 if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Tex.R. Evid. 403. Even if evidence is relevant to an element of the offense, the trial court still must determine whether the evidence is admissible. Therefore, the trial judge has discretion to determine whether evidence of mental illness may be presented to negate the element of *mens rea*, or whether the evidence should be excluded on special grounds. If such evidence is admitted,

the trial judge additionally has the discretion to determine whether the evidence supports a lesser-included-offense instruction. 160 S.W.3d at 573-74.

INTOXICATION

Although the term intoxication is usually associated with the ingestion of alcohol, the term includes any drug or substance with similar effects. When discussing intoxication defenses, a distinction must be drawn between voluntary intoxication and involuntary intoxication.

Voluntary intoxication is not a defense in Texas (sec. 8.04) or probably in any state. However, evidence of intoxication may be admitted at sentencing under sec. 8.04 (b).

Involuntary intoxication is not itself a defense in Texas. However, involuntary intoxication that results in insanity (sec. 8.01) is a defense. In *Torres v. State*, 585 S.W.2d 746 (Tex.Crim.App. 1979) there was evidence that an accomplice slipped some Thorazine tablets in her drink without her knowledge. The trial judge refused to instruct the jury on involuntary intoxication. Torres was convicted and appealed. The CCA wrote:

In the present case, there is evidence that the appellant did not know that any intoxicant was included in the preparation she drank. Although she voluntarily drank the preparation, unless she knew it contained the drug her actions were not a volitional consumption of the intoxicant. See, *State v. Rice*, 379 A.2d 140 (Me.1977). We find the evidence was sufficient to show involuntary consumption of the intoxicant under Hanks [v. State].

This conclusion leaves us with two issues. First, does the defense of involuntary intoxication exist in this jurisdiction, and second, did the evidence entered at trial raise this defense and entitle appellant to a defensive charge.

As can be drawn from Hanks v. State, supra, no prior case in this jurisdiction has spoken directly to the issue of involuntary intoxication. Of the two Texas cases cited, only one sheds any light on the issue.

In Colbath v. State, supra, the question presented involved voluntary intoxication. The Court discussed the common law basis for the rule that intoxication is no defense to criminal responsibility, and cited authority setting out two exceptions to this rule. One of these exceptions was involuntary intoxication resulting from "drugs administered by an unskillful physician." 4 Tex.App. at 78. From this exception the law of involuntary intoxication has evolved. See, *City of Minneapolis v. Altimus*, supra.

In some jurisdictions the defense of involuntary intoxication is provided for by statute. *State v. Palacio*, 221 Kan. 394, 559 P.2d 804 (1977); *Staples v. State*, 74 Wis.2d 13, 245 N.W.2d 679 (1976). No statute in this jurisdiction is directly controlling.

V.T.C.A. Penal Code, Sec. 8.04, provides that voluntary intoxication is no defense to the commission of crime. Section 8.04, supra, does provide that the temporary insanity caused by

intoxication can be evidence in mitigation of punishment, and if raised, the court must charge the jury on this law. This statute does not speak to involuntary intoxication.

The common law disfavor with the defense of intoxication is that it would allow a person to avoid criminal responsibility because of his voluntary act in rendering himself of unsound mind. See, *Burrows v. State*, supra; *Colbath v. State*, supra; *Carter v. State*, supra. This consideration does not exist when the intoxication is not self-induced.

V.T.C.A. Penal Code, Sec. 8.01 [as it existed in 1979], relieves a person of criminal culpability if as the result of mental disease or defect he "did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of law." It would be inconsistent to deny this defense to a person who loses his ability to conform his conduct or perceive its culpability because of involuntary intoxication. We find that the defense of involuntary intoxication is well founded in the common law and implicit in our statutory scheme.

We also note that other jurisdictions have recognized this defense without specific statutory guidance. *State v. Rice*, supra; *City of Minneapolis v. Altimus*, supra; *State v. Mriglot*, 15 Wash.App. 446, 550 P.2d 17 (1977); *People v. Murray*, 247 Cal.App.2d 730, 56 Cal.Rptr. 21 (1967); *Easter v. District of Columbia*, 209 A.2d 625 (D.C.Ct.App.1965); *Burrows v. State*, supra. These jurisdictions do differ, however, on the applicable test to determine if the defendant's mental state was such as to avoid culpability for his acts.

The jurisdictions most recently reviewing the question of involuntary intoxication have held that the test used for insanity is also applicable to involuntary intoxication. *City of Minneapolis v. Altimus*, supra; *State v. Mriglot*, supra; *People v. Murray*, supra. We agree. We perceive of no reason to stray from the test already codified as the level of mental dysfunction necessary to relieve a defendant from the criminal consequences of his acts. See, Sec. 8.01, supra. 585 S.W.2d at 748-49.

The CCA occluded that involuntary intoxication resulting in insanity was an affirmative defense and that the defendant would have to establish two facts:(1) the defendant exercised no independent judgment or volition in taking the intoxicant; and (2) as a result of the intoxication, the accused met the statutory requirements for the insanity defense.

INFANCY/AGE

Texas, like most states, does not follow the common-law rules on age (see the discussion of "Infancy" in your text). Like all states, Texas has created a juvenile justice system to deal with young offenders. In general, to be eligible for juvenile court, the person must have been at least 10 but under the age of 17 at the time of the offense. Children under 10 are not subject to juvenile court jurisdiction and even if authorized by law, it is unlikely that a prosecutor would bring charges against a child 9 or younger.

For certain serious offenses, some juveniles who might otherwise be tried in juvenile court can be transferred or waived to adult criminal court for trial. This is a complex topic and TPC sections must be read in conjunction with the Texas Family Code.

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There are two separate issues. One is whether the acts are a crime for a person of this age. Second, is, if the acts are crimes, will the person be tried in juvenile or adult court. Only a small segment of this issue will be treated here.

Under TPC 8.07, the general rule is that no person may be prosecuted or convicted for any offense committed while they were age 15 or under. There are a number of exceptions (sec. 8.07 (a)), and five of these are presented below

- (1) perjury and aggravated perjury when it appears by proof that the person had sufficient discretion to understand the nature and obligation of an oath;
- (2) a violation of a penal statute cognizable under Chapter 729, Transportation Code, except for conduct for which the person convicted may be sentenced to imprisonment or confinement in jail;
- (3) a violation of a motor vehicle traffic ordinance of an incorporated city or town in this state;
- (4) a misdemeanor punishable by fine only other than public intoxication;
- (5) a violation of a penal ordinance of a political subdivision;

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Duress was a defense at common law and was included in the Model Penal Code. The TPC version is as follows:

- § 8.05. DURESS. (a) It is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another.
- (b) In a prosecution for an offense that does not constitute a felony, it is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by force or threat of force.
- (c) Compulsion within the meaning of this section exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure.
- (d) The defense provided by this section is unavailable if the actor intentionally, knowingly, or recklessly placed himself in a situation in which it was probable that he would be subjected to compulsion.
- (e) It is no defense that a person acted at the command or persuasion of his spouse, unless he acted under compulsion that would establish a defense under this section.

Note that there are different standards for felonies and misdemeanors. Unlike some states, the statute does not exclude murders.

MISTAKE OF FACT

The Model Penal Code recognized a mistake of fact defense, and Texas enacted a similar version.

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§ 8.02. MISTAKE OF FACT. (a) It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.

(b) Although an actor's mistake of fact may constitute a defense to the offense charged, he may nevertheless be convicted of any lesser included offense of which he would be guilty if the fact were as he believed.

Reasonable belief is defined in sec. 1.07 (42): "Reasonable belief means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." This is an objective standard, but the defendant must also subjectively have the mistaken belief.

This defense is frequently raised when the *mens rea* is knowingly. Defendants argue that because of a mistake of fact, they did not "know" the required fact or circumstance. An example would be if a defendant testified that he believed the items he purchased were legally obtained by seller, it would negate negating one element of the offense of theft by receiving stolen property, i.e., that he obtained items knowing they were stolen. *Willis v. State* 790 S.W.2d 307, (Tex.Crim.App. 1990)

MISTAKE OF LAW

The general rule is that ignorance of the law or a mistake of law is not a defense. The Model Penal Code and the law of Texas and most states recognize a few exceptions. The TPC provides:

§ 8.03. MISTAKE OF LAW. (a) It is no defense to prosecution that the actor was ignorant of the provisions of any law after the law has taken effect.

(b) It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:

(1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

(2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

(c) Although an actor's mistake of law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the law were as he believed.

Note that reliance on bad advice given by one's attorney is not a defense. The defense is limited to the sources described in (b)(1), (2) and (3).

ENTRAPMENT

§ 8.06. ENTRAPMENT. (a) It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other

means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(b) In this section "law enforcement agent" includes personnel of the state and local law enforcement agencies as well as of the United States and any person acting in accordance with instructions from such agents.

As discussed in your text, there are two competing theories of the entrapment defense, the objective and subjective. For years Texas courts assumed this statute utilized only the objective approach. Later, in attempting to determine which theory applied to sec. 8.06, The CCA discussed the history and theory of entrapment in *England v. State*, 887 S.W.2d 902, 907-08.

The entrapment doctrine is a uniquely American phenomenon, unknown to the common law. For all practical purposes, it had its genesis in *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). There the United States Supreme Court held as a matter of statutory construction that a penal provision could not be read to authorize prosecution for an offense that was "the product of the creative activity of" law enforcement itself. *Id.*, at 451, 53 S.Ct. at 216, 77 L.Ed. at 422. As a corollary of this holding the Court observed that the prosecution could escape the harsh remedy of acquittal if it could show that the accused had been predisposed to commit the offense, such that the conduct of law enforcement could not be said to have implanted the criminal impulse in the mind of the accused. *Id.* In a concurring opinion, Justice Roberts grounded the doctrine not on principles of statutory construction, but upon what he perceived to be the inherent authority of a court to preserve "the purity of its own temple" by denying a forum to prosecute the product of police misconduct. *Id.*, at 457, 53 S.Ct. at 218, 77 L.Ed. at 425. He opined:

"The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy."

Id., at 459, 53 S.Ct. at 219, 77 L.Ed. at 426. Thus were born the competing views of entrapment that have since come to be described as the "subjective" and "objective" tests, respectively. In *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958), the Supreme Court adhered to the earlier subjective test of Sorrells, Justice Frankfurter concurred in the result, but called for a re-examination of the underlying principle behind the entrapment doctrine, embracing Justice Roberts' view in Sorrells that the subjective test unjustifiably shifts the focus of inquiry away from an objective scrutiny of the conduct of law enforcement agents, asking instead whether the target of their conduct was nevertheless predisposed to commit the crime. Moreover,

"in proof of such a predisposition evidence has often been admitted to show the defendant's reputation, criminal activities, and prior disposition. The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal

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record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged."

It is possible to make rational policy arguments in support of either a subjective or an objective test for entrapment; indeed, it can be rationally argued that a mixed subjective/objective test is best, or that the doctrine should be abandoned altogether. See R. Park, *The Entrapment Controversy*, 60 *Minn.L.Rev.* 163 (1976). When this Court first judicially recognized the doctrine of entrapment *per se*, it adopted a subjective test. *Cooper v. State*, 162 *Tex.Cr.* 624, 288 *S.W.2d* 762 (1956). With the advent of the 1974 Penal Code, the doctrine was codified for the first time in Texas. The Legislature was called upon to make a policy decision.

In England, the State argued

that in § 8.06(a) the Legislature actually enacted a mixed subjective/objective test for entrapment. Requiring an accused to show he was induced in fact would indeed re-inject a subjective element into the test. To be sure, an accused would still be required to prove under § 8.06(a) that the conduct of the police was such as to induce a hypothetical person of ordinary lawabiding nature to commit the crime. To this extent the provision remains partly "objective." In every case, however, the State would be allowed to respond with evidence that the accused was predisposed to commit the crime, to rebut the inference that because the police used tactics that might persuade an otherwise lawabiding hypothetical person to commit the crime, the accused was in fact so induced. This construction would allow not just evidence of extraneous transactions between the accused and the law enforcement agents involved in the charged offense, as Justice Wilson and the State both contend, but also evidence of any similar extraneous misconduct that was relevant to show the accused needed no persuasion to commit such an offense, and therefore was not actually induced to do so. In this way two major goals of a purely objective test would be frustrated at once. First, police misconduct--persuasion of such a nature as to cause ordinarily lawabiding persons to commit a crime-- would go unchecked because in the particular instance it might be inferred, because of the predisposition of the accused, that the improper persuasion was not the real impetus for the offense. Second, potentially confusing and prejudicial evidence of extraneous misconduct would be admissible to show predisposition, something that advocates of an objective test for entrapment have decried from the start. 887 *S.W.2d* at 909-10

The CCA agreed with the State. In reaching its decision that sec. 8.06 contained both an objective and subjective test the court conducted a lengthy examination of the history of the statute. It pointed to two key parts of the statute. The language "he was induced to do so" suggests a subjective element. The language "by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense" suggests an objective test. The importance of the subjective element is that it allows the prosecution to introduce evidence of prior similar crimes to prove that the defendant was predisposed to commit the crime, and thus was not "induced" by the government. In *England* the contested evidence was testimony about prior sales of controlled substances by England. This evidence would strengthen the prosecution's case and would not be admissible under a solely objective test.

In concluding that there was both a subjective and objective element, the CCA stated:

There is nothing inherently absurd about requiring that an accused who claims entrapment show both that he was in fact induced, and that the conduct that induced him was such as to induce an ordinarily lawabiding person of average resistance. Such a dual requirement would reflect, on the one hand, a policy decision that the extreme remedy of acquittal should be reserved only for police persuasion that is a but/for cause of an offense. On the other hand, the Legislature might also justifiably have believed that persuasion sufficient to actually induce an accused ought not to result in his acquittal-- is not, indeed, improper--unless it would also have induced an ordinarily lawabiding person of average resistance. By incorporating both a subjective and an objective component into the test for entrapment, the Legislature could thus narrow application of the doctrine at both ends. Other jurisdictions have adopted similarly mixed tests for entrapment. E.g., *State v. Rockholt*, supra; *Baca v. State*, 106 N.M. 338, 742 P.2d 1043 (1987); cf. *Cruz v. State*, 465 So.2d 516 (Fla.1985) (Court judicially fashions mixed test, later supplanted by statutory subjective test, see *Munoz v. State*, supra). It has also been endorsed as a viable alternative by at least one prominent commentator in the field. *The Entrapment Controversy*, supra, at 273; see also P. Markus, *The Entrapment Defense* § 5.04 (1989), at 180-84. It would hardly seem absurd, therefore, to construe § 8.06 to embrace a subjective/objective test for entrapment.

Judged by its plain language, that is precisely what § 8.06 does. We therefore hold that § 8.06 requires an accused who claims entrapment to produce evidence that he was actually induced to commit the charged offense; that is to say, that he committed the offense "because he was induced to do so." Accordingly, we agree with Justice Wilson that, if evidence of appellant's prior sales of LSD to Anderson was relevant to the question whether he was actually induced by Ayala's persistent conduct, it was admissible [under the newly discovered subjective component] 887 S.W.2d at 913.

Most states and the federal government utilize a totally subjective test. The Model Penal Code and most of the other states use the objective test. Texas is one of the few states that has a mixed test.

EXERCISE

Consider the basic facts of *Mendenhall v. State* 77 S.W.3d 815, 816 (Tex.Crim.App. 2002,

A Freestone County grand jury indicted appellant, Craig Emmett Mendenhall, for assaulting a public servant. See Tex. Pen.Code § 22.01(b)(1). The case went to trial before a petit jury. At trial the State presented evidence that on March 6, 1997, appellant assaulted a deputy sheriff on duty during appellant's divorce trial. In his defense, appellant presented evidence, including his own testimony, to the effect that (1) approximately six weeks before the assault, appellant's physician informed him that he was diabetic and placed him on a daily regimen of insulin injections; (2) his physician told him little regarding the appropriate diet for control of his illness; (3) in the hours before the assault, he received an insulin injection but failed to eat much afterward, leading to a decrease in his blood sugar; (4) the assault occurred during a brief episode in which he was unconscious or semi-conscious due to hypoglycemia (*i.e.*, low blood sugar); and (5) he "did not knowingly, intentionally, or recklessly try to cause [the victim] harm."

What defense(s) if any, are properly arguable by Mendenhall? Consider especially his argument that he was entitled to an insanity defense instruction. Assume that at the time of his acts he was unconscious or semi-conscious and did not know his conduct was wrong because he did not know of his conduct at all. Consider act, *mens rea* issues as well as the issues in this ch. and ch. 8. Formulate an answer and then review the materials in this ch. and ch. 4 and 8. Compare your resolution with that of the CCA:
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=tx&vol=app/108900&invol=1>

REVIEW QUESTIONS

Multiple Choice (Answers are found at the end of this chapter)

1. Voluntary intoxication
 - a. is not a defense.
 - b. is a defense if it negates an element of the crime.
 - c. is a defense to misdemeanors but not felonies.
 - d. is a defense to felonies but not misdemeanors.
 - e. is a defense is proven by the defendant beyond a reasonable doubt.

2. In Texas, involuntary intoxication
 - a. is treated the same as voluntary intoxication.
 - b. is a defense if it results in legal insanity.
 - c. is a defense only to misdemeanor charges.
 - d. is a defense only to felony charges
 - e. is an ordinary defense.

3. In Texas, the entrapment defense
 - a. does not exist.
 - b. is subjective only.
 - c. is objective only.
 - d. is both objective and subjective.
 - e. is the same as the federal defense.

4. A mistake of fact is a defense only if it
 - a. is subjectively reasonable.
 - b. involves the harm element.
 - c. is a defense if it is proven by the defense by a preponderance of the evidence.
 - d. involves an inchoate offense.
 - e. negates an element of the crime.

5. In Texas, the general rule is that mistake about or ignorance of the law is
 - a. an affirmative defense.
 - b. an ordinary defense.
 - c. not a defense.
 - d. a defense only for felony charges.

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- e. a defense only for misdemeanor charges.
6. In Texas, crimes committed after the defendant turns _____ cannot be tried in juvenile court.
- a. 12
 - a. 13
 - b. 14
 - c. 15
 - d. 16
 - e. 17

REFERENCES AND RESOURCES

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ANSWER KEY, CH. 9, EXCUSES

1. a
2. b
3. d
4. e
5. c
6. e