1996

Criminal Law Defenses

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PUBLIC DEFENDER REPORTER

Vol. 18, No. 4 Fall 1996

CRIMINAL LAW DEFENSES

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This article examines a number of criminal law defenses: duress, necessity, intoxication, alibi, accident, mistake of fact, and mistake of law. Self-defense and entrapment were discussed in earlier articles this year.

AFFIRMATIVE DEFENSES

R.C. Section 2901.05(C) defines an affirmative defense as one either (1) expressly designated as such by statute or (2) "involving an excuse or justification peculiarly within the knowledge of the accused." This classification is important because it affects the two burdens of proof. By definition, an affirmative defense cast the burden of production (or going forward with evidence) on to the defendant. If the defendant fails to satisfy this burden, the jury will not be instructed on the defense. Moreover, in Ohio the burden of persuasion on an affirmative defense is allocated to the defendant and the standard of proof is a "preponderance of the evidence." R.C. 2901.05(A) provides that the "burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused."

Affirmative defenses in Ohio include self-defense, insanity, entrapment, and duress. The Ohio cases state that intoxication is also an affirmative defense but this is questionable. The term non-affirmative defense typically refers to defenses that negate an element of a crime. One commentator refers to these as "failure of proof" defenses: "General defenses differ conceptually from failure of proof defenses in that the former bar conviction even if all elements of the offense are satisfied, whereas the latter prevent conviction by negating a required element of the offense." 1 Robinson, Criminal Law Defenses § 22, 72-73 (1994). Mistake of fact, accident, and intoxication negate the required mental state for some crimes; the prosecution must prove that mental state beyond a reasonable doubt. Alibi negates the actus reus of the crime; here, again, the prosecution must prove that the accused committed the crime beyond a reasonable doubt.

DURESS

Duress, also known as coercion or compulsion, is recognized as a defense to criminal liability under some circumstances. "The common law defense of duress is long standing." State v. Metcalf, 60 Ohio App.2d 212, 214, 396 N.E.2d 786 (1977).

"The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person." 1 LaFave & Scott, Substantive Criminal Law § 5.3, at 614 (1986). The Ohio Supreme Court has noted that the underlying theme is "that imminent, immediate danger or threat of danger prevents the actor from exercising his own will, and there is no alternate path to take. Therefore, the actor is forced to choose between the lesser of two evils." State v. Cross, 58 Ohio St.2d 482, 483 n. 2, 391 N.E.2d 319 (1979). See also United States v. Bailey, 444 U.S. 394, 415 (1980) ("An escapee who flees from a jail that is in the process of burning may well be entitled to an instruction on duress or necessity, 'for he is not to be hanged because he would not stay to be burnt.'") (citing United States v. Kirby, 7 Wall. 482, 487 (1869)).

In State v. Cross, 58 Ohio St.2d 482, 488, 391 N.E.2d 319 (1979), the Ohio Supreme Court ruled that the common law duress defense applied to a charge of escape from detention. The Court also noted:

> It must be understood that the defense of necessity or duress is strictly and extremely limited in application and will probably be effective in very rare occasions. It is a defense and not a conjured afterthought. All the conditions must be met, and the court must find as a matter of law that the evidence is sufficient to warrant an instruction on the affirmative defense of necessity or duress.

Duress has been raised as a defense to numerous crimes, including robbery, burglary, malicious mischief, kidnapping, arson, prison escape, and possession of weapons. See 1 LaFave & Scott, Substantive Criminal Law § 5.3(b), at 619 (1986). The Ohio cases include prosecutions for escape, robbery, kidnapping, and drug offenses. E.g., State v. Cross, 58 Ohio St.2d 482, 391 N.E.2d 319 (1979) (escape); State v. Sappienza, 84 Ohio St. 63, 95 N.E. 381 (1911) (rob-

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bery); State v. Luff, 85 Ohio App.3d 785, 621 N.E.2d 493 (1993) (kidnapping); State v. Metcalf, 60 Ohio App.2d 212, 396 N.E.2d 786 (1977) (sale of marijuana).

Homicide

Duress is generally not a defense to murder. As one commentator has noted:

> [T]he case law in the absence of statute has generally held that duress cannot justify murder — or, as it is better expressed since duress may justify the underlying felony and so justify what would otherwise be a felony murder, duress cannot justify the intentional killing of (or attempt to kill) an innocent third person." 1 LaFave & Scott, Substantive Criminal Law § 5.3(b), at 616-17 (1986).

The Ohio cases are in accord. E.g., State v. McCray, 103 Ohio App.3d 109, 118-19, 658 N.E.2d 1076 (1995) ("Even the affirmative defense of duress cannot justify the taking of an innocent life."); State v. Luff, 85 Ohio App.3d 785, 621 N.E.2d 493 (1993) (duress raised to kidnapping but not aggravated murder); State v. Metcalf, 60 Ohio App.2d 212, 215, 396 N.E.2d 786 (1977) ("[T]he defense of duress is unavailable where one takes an innocent life."). In this context, the "choice evils" equation breaks down; there is no lesser evil.

Burden of Proof

State v. Sappienza, 84 Ohio St. 63, 70, 95 N.E. 381 (1911), a leading case in Ohio, held that duress is an affirmative defense. The Ohio Supreme Court wrote: "In the nature of things this was an affirmative defense, one which it was incumbent on the defendant to make out by a preponderance of the evidence." In reaching this result, the Court concluded that duress was like insanity and self-defense. "His plea is not that he did not participate in the robbery: did not intend to do the act, but that his intent was controlled by an outside force, vis: duress. This being an affirmative defense the burden of proving it was on the defendant, and the trial court did not err in refusing to put that burden on the State." Id. at 73. See also United States v. Bailey, 444 U.S. 394, 415 (1980) ("an affirmative defense — here that of duress or necessity").

Subsequent cases have continued to treat duress as an affirmative defense. State v. Cross, 58 Ohio St.2d 482, 488, 391 N.E.2d 319 (1979) ("affirmative defense of necessity or duress."); State v. Poole, 33 Ohio St.2d 18, 21, 294 N.E.2d 888 (1973) (Affirmative defenses in Ohio include "duress"). Therefore both the burden of production and burden of persuasion (by a preponderance of the evidence) are allocated to the defendant. R.C. 2901.05(A).

Reasonableness

The defense of duress is judged by an objective standard. Not only must the defendant have a subjective (good faith) belief but that belief must be reasonable. In United States v. Bailey, 444 U.S. 394, 410-11 (1980), the U.S. Supreme Court observed: "Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of § 751(a) was his only reasonable alternative."

The Ohio cases are in accord. In State v. Harkness, 75 Ohio App.3d 7, 11, 598 N.E.2d 836 (1991), the court of appeals wrote that the "appellant subjectively believed, and there was objective evidence to support the belief, that were he to be placed in jail he must be subject to serious bodily injury or death as the result of his activities as a police informant." See also State v. Milam, 108 Ohio App. 254, 256, 156 N.E.2d 840 (1959) ("a well-grounded apprehension of present, imminent, and impending death or serious bodily injury . . . [and] it was reasonable for him to believe that he could not avoid participation in the robbery without immediate exposure to death or great bodily injury").

Nature of Threat

In State v. Cross, 58 Ohio St.2d 482, 487, 391 N.E.2d 319 (1979), the Court recognized that "[o]ne of the essential features of a necessity or duress defense is the sense of present, imminent, immediate and impending death, or serious bodily injury. There is no such evidence in the present cause, for the defendant simply had a cold, saw an opening and escaped. A common cold is hardly a substantial health impairment that affected his health in an imminent way." The defendant argued that his health, safety, and legal interests were being neglected by prison officials. The Court concluded, however, that the defendant had not made out a duress defense. There was "no specific threat of death, forcible sexual attack or substantial bodily impairment in the defendant's immediate future." The Court further remarked:

> We are not faced with a situation where an inmate may be forced to flee a burning prison to save his life; or a situation where an inmate must choose between death, beating or homosexual advances. The evidence reveals that the conditions were not desirable, and that there was no substantial health impairment. We concur with other courts which have held that undesirable prison conditions are not sufficient to justify an escape or make one necessary. Id. at 487 (citations omitted).

See also United States v. Bailey, 444 U.S. 394, 409 (1980) ("Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law.").

State v. Milam, 108 Ohio App. 254, 265, 156 N.E.2d 840 (1959), also illustrates this point. In that case, the court of appeals commented that:

> the defendant did not participate in the robbery of his own volition but because of a well-grounded apprehension of present, imminent, and impending death or serious bodily injury at the hands of these men if he did not; that it was reasonable for him to believe that he could not avoid participation in the robbery without immediate exposure to death or great bodily injury; that he seized the first opportunity reasonably safe for him to desist from such participation; and that he refused to escape, when opportunity offered, from no consciousness of wrongdoing.

Threat to Others

The duress defense extends to a threat to another person. As one writer observed: "Doubtless a reasonable fear of immediate death or serious bodily injury to someone other than the defendant, such as a member of his family, will do." 1 LaFave & Scott, Substantive Criminal Law § 5.3, at 614 (1986). The court of appeals in State v. Metcalf, 60 Ohio App.2d 212, 216, 396 N.E.2d 786 (1977), wrote:

> Although only sparse authority exists on the issue of whether the duress is available where the offender seeks to protect others such as the members of his family, we conclude that both reasoning and precedent

in the context of the law of necessity dictate that the defense of duress may be invoked not only where the defendant fears for his own safety but, also, where he fears for the safety of others, in particular the members of his family.

The court went on to note that the trial court erred because it had not included in the instruction "some reference to the defendant's concern for his wife, the children, his cousin and the guest in his house." Id. at 216. See also State v. Luff, 85 Ohio App.3d 785, 804, 621 N.E.2d 493 (1993) (kidnapping charge) ("Luff testified that Lundgren had threatened to destroy his family. Luff testified that was his greatest fear and that he believed Lundgren was capable of harming his family.").

Imminence of Threat

In *Cross*, the Ohio Supreme Court noted that the duress defense required a threat of "present, imminent, immediate and impending death, or serious bodily injury." 58 Ohio St.2d at 487. Similarly, in United States v. Bailey, 444 U.S. 394, 409 (1980), the U.S. Supreme Court observed: "Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law."

In other words, "[f]ear of future harm cannot be the basis of such a defense." State v. Good, 110 Ohio App. 415, 419, 165 N.E.2d 28 (1960):

> The force which is claimed to have compelled criminal conduct against the will of the actor must be immediate and continuous and threaten grave danger to this person during all the time the act is being committed. That is, it must be a dangerous force threatened "in praesenti." It must be a force threatening great bodily harm and remains constant in controlling the will of the unwilling participant while the act is being performed and from which he cannot then withdraw in safety.

The rationale underlying the imminence requirement is the notion that the necessity to commit the crime is absent if the defendant has time to contact the police or otherwise refrain from committing the crime at that time. As the United States Supreme Court has commented: "[I]n the context of prison escape, the escapee is not entitled to claim a defense of duress . . . unless and until he demonstrates that, given the imminence of the threat, violation of [the escape statute] was his only reasonable alternative." United States v. Bailey, 444 U.S. 394, 411 (1980).

The duress defense does not extend to a situation where drug offenses occurred over a period of several weeks, "during which time the defendant was, for the most part, completely free from any possible domination." State v. Good, 110 Ohio App. 415, 420, 165 N.E.2d 28 (1960). Nor, does the defense apply where there are legal alternatives. "Under any definition of these defenses one principle remains constant: If there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harms,' the defense will fail." United States v. Bailey, 444 U.S. 394, 410 (1980) (citation omitted).

As the Ohio Supreme Court pointed out in *Cross*, "there was ample time and means available to resort to the legal system. Escape was not the only viable and reasonable choice available." 58 Ohio St.2d at 487-88.

Escape

There may be an additional requirement when duress is raised as a defense to the crime of escape. In *Cross*, the Court stated that the "coup de grace is the fact that appellant failed to turn himself in immediately after fleeing the supposed intolerable conditions. This makes it very clear what the defendant's intention were and that he purposely escaped to flee the system and for no other reason." 58 Ohio St.2d at 482. Another way to view this issue is *not* as an element of the defense but as an evidentiary inference to show that fear of death or serious injury was not present. The United States Supreme Court reached the same conclusion by classifying escape as a continuing offense. In United States v. Bailey, 444 U.S. 394, 411-12 (1980), the Court ruled that "an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure and that an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force."

Death Penalty Cases

The Ohio capital punishment statute recognizes duress as a mitigating factor in death penalty cases. R.C. 2929.04(B)(2) ("Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.").

NECESSITY

Necessity is recognized as a defense to criminal liability under some circumstances. It is similar to the defense of duress. The principal difference is that duress involves a human threat, whereas necessity involves a threat from natural forces:

> Common law historically distinguished between the defenses of duress and necessity. . . . While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property flooding, A could claim a defense of necessity. United States v. Bailey, 444 U.S. 394, 409-10 (1980).

However, "[m]odern cases have tended to blur the distinction between duress and necessity." Id. at 410. In State v. Cross, 58 Ohio St.2d 482, 483 n. 2, 391 N.E.2d 319 (1979), the Ohio Supreme Court wrote:

> The terms "necessity" and "duress" are distinct, yet are often used interchangeably and are often indistinguishable. They share in common the fact that they provide an excuse, justification or affirmative defense to a criminal charge. Running throughout their meanings is the theme that imminent, immediate danger or threat of danger prevents the actor from exercising his own will, and there is no alternate path to take. Therefore, the actor is forced to choose between the lesser of two evils.

The test for necessity is objective; a good faith belief in the necessity of one's conduct is insufficient. In State v. Prince, 71 Ohio App.3d 694, 699, 595 N.E.2d 376 (1991), the court of appeals set forth the elements of the necessity defense:

> The necessity defense justifies conduct which otherwise would lead to criminal or civil liability because the conduct is socially acceptable and desirable under the circumstances. The common law elements of necessity are: (1) the harm must be committed under the pressure of physical or natural force, rather than human force: (2) the harm sought to be avoided is greater than, or at least equal to that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; (4) the actor must be without fault in bringing about the situation; and (5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm.

Necessity is a defense to criminal liability, except for homicide. In United States v. Holmes, 26 F. Cas. 360 (Pa. 1842), the defendant, following the mate's orders to spare women, children, and husbands, helped throw fourteen male passengers from an overloaded life boat after a disaster at sea. Holmes was convicted of manslaughter on an instruction that indicated that a seaman was obligated to sacrifice himself to save the passengers. In another famous case, Regina v. Dudley and Stephens, 14 Q.B.D. 273, Eng. Rep. (1881 to 1885), two shipwrecked seamen in a lifeboat killed another seaman to avoid starvation. The court ruled that they were not justified in taking an innocent life to save their own.

INTOXICATION

Intoxication may be a defense under limited circumstances. Intoxication includes drugs as well as alcohol. State v. Hill, 73 Ohio St.3d 433, 442, 653 N.E.2d 271 (1995) ("cocaine intoxication"); State v. Slagle, 65 Ohio St.3d 597, 614 N.E.2d 916 (1992) ("marijuana"), cert. denied, 510 U.S. 833 (1993).

There are two types of intoxication: voluntary (self-induced) and involuntary intoxication. Involuntary intoxication is rare and is treated like insanity. "Involuntary intoxication . . . does constitute a defense if it puts the defendant in such a state of mind, e.g., so that he does not know the nature and quality of his act or know that his act is wrong, in a jurisdiction which has adopted the *M'Nagten* test for insanity." 2 LaFave & Scott, Substantive Criminal Law § 4.10(f), at 558 (1986).

Voluntary intoxication

Voluntary intoxication is recognized as a defense only when it negates a required mental element of the charged crime. In State v. Otte, 74 Ohio St.3d 554, 564, 660 N.E.2d 710 (1996), the Ohio Supreme Court recently observed: "Voluntary intoxication is not a defense, but where specific intent is a necessary element of the crime charged, the fact of intoxication may be shown to negate this element if the intoxication is such as to preclude the formation of such intent."

The defense is most often raised in aggravated murder prosecutions. "[I]n the cases of first degree murder, involving the element of deliberation and premeditation, the fact of intoxication may be considered to determine whether the deliberation and premeditation existed." Long v. State, 109 Ohio St. 77, 87, 141 N.E. 691 (1923). But the defense is not limited to such cases. For example, in State v. Mundy, 99 Ohio App.3d 275, 314, 650 N.E.2d 502 (1994), a gross sexual imposition case, the defendant "testified that 'if it happened, it had to happen while I was drinking" and that there was never any intention on his part to touch these victims in a sexual manner for sexual gratification." The court of appeals concluded that the trial court erred by not giving an intoxication instruction as requested. In State v. Davis, 81 Ohio App.3d 706, 712-13, 612 N.E.2d 343 (1992), the court of appeals commented that the "crime of escape under R.C. 2921.34 is a specific intent crime; thus, voluntary intoxication can serve as a defense to negate the specific intent element."

Partial defense

Intoxication is often referred to as a partial defense; it does not completely exculpate the defendant"s conduct, but it may reduce the crime to lesser included offenses_i.e., from aggravated murder to murder. While the term "partial defense" is often used, it is technically misleading because intoxication is a "complete" defense to the greater offense (aggravated murder).

Ohio cases

Nichols v. State, 8 Ohio St. 435, 439 (1858), decided in the last century, is apparently the first Ohio case on intoxication. The Ohio Supreme Court held that evidence of intoxication is admissible "to show that the accused did not at the time intend to do the act which he did do." The Court, however, also ruled that an instruction was not required. The Court believed it had "gone far enough" because "[i]ntoxication is easily simulated. It is often voluntarily induced for the sole purpose of nerving a wicked heart to the firmness requisite for the commission of a crime soberly premeditated, or as an excuse for such crime." Id. at 439.

In Long v. State, 109 Ohio St. 77, 91, 141 N.E. 691 (1923), a 1923 murder decision, the Ohio Supreme Court referred to intoxication as "an unfavored defense" and set forth the basic principles of the defense:

> It is well established in American jurisprudence that drunkenness is not a defense to crime. When all the elements of a criminal act have been proven the accused will not as a general rule be heard to allege his voluntary intoxication as an excuse. It is an exception to this general rule that one who is accused of a crime, the definition of which involves some specific intent, or the operation of other mental processes, intoxication, though voluntary, may be considered in determining whether or not the act was intentional, or, as in the cases of first degree murder, involving the element of deliberation and premeditation, the fact of intoxication may be considered to determine whether the deliberation and premeditation existed. Id. at 86-87.

The Court went on to note that "in order to render the accused guiltless, the intoxication must be so great and complete as to make him incapable of forming the intent, or of acting with deliberation and premeditation." Id. at 87.

More recent cases are consistent. In State v. Huertas, 51 Ohio St.3d 22, 28, 553 N.E.2d 1058 (1990), the defendant argued that intoxication caused him to lack the requisite prior calculation and design. The Supreme Court noted, "The mere fact that a defendant is intoxicated does not make him incapable of acting with prior calculation and design. Intoxication 'is often voluntarily induced for the sole purpose of nerving a wicked heart to the firmness requisite for the commission of a crime soberly premeditated, or as an excuse for such crime.'" The Court found sufficient evidence of prior calculation from the earlier threats Huertas

had made.

In State v. Slagle, 65 Ohio St.3d 597, 602, 605 N.E.2d 916 (1992), cert. denied, 510 U.S. 833 (1993), an aggravated murder case, the Supreme Court ruled that there was no evidence that Slagle "was too intoxicated to form the specific intent to kill." The police officers testified that, when they apprehended Slagle at the victim's residence, he was alert, responsive, had no alcoholic odor, and showed no physical signs of intoxication. Although Slagle alleged that he had consumed a large amount of beer prior to committing the murder, he never once requested to go to the bathroom in the five hours he was detained at the scene. Moreover, the fact that Slagle (1) entered through the front window because he knew it to be the farthest from the victim's bedroom and from view of his family's adjacent house, (2) that he systematically searched the house by stealth, and (3) that he removed his shoes to make less sound served to establish a "rational and non-impaired cognitive process."

Burden of Proof

A troublesome aspect of *Long* concerns the Court's comment on the burden of persuasion, which the Court allocated to the accused: "[T]he burden is upon such defendant to establish such defense by a preponderance of the evidence." Id. (syllabus, para. 4). This allocation of the burden of proof continues as the rule in Ohio today. It is, however, illogical and probably unconstitutional.

The Ohio courts have repeatedly stated that intoxication is relevant *only* if it negates a specific intent. State v. Mundy, 99 Ohio App.3d 275, 314, 650 N.E.2d 502 (1994) (The intoxication instruction should state that if the jury found that the defendant had established "by a preponderance or greater weight of the evidence that at the time these crimes were committed he was so influenced by alcohol that he was not capable of forming the required purpose or specific intent, then the jury was required to find Mundy not guilty, because purpose or specific intent is an essential element of the offense charged.").

The prosecution, however, has the burden of persuasion on every essential element of the offense, including mens rea elements if the crime is defined as requiring a mental element. It is inconsistent to say that the prosecution has the burden of persuasion for the "specific intent" element (beyond a reasonable doubt) but the accused also has the burden of persuasion (by a preponderance) on the same issue. This inconsistency is illustrated by State v. French, 171 Ohio St. 501, 505, 172 N.E.2d 613 (1961), in which the Supreme Court found "no error in the charge of the trial court which placed on the defendant the burden of proof of incapacity to commit rape because of intoxication." However, in an earlier passage, the Court wrote:

> Insanity, duress and self-defense are generally considered to be affirmative defenses and the burden of proving them by a preponderance of the evidence rests on him who asserts them. But not all evidence offered by an accused is to be regarded as an affirmative defense. It may be introduced, as is claimed here, not to excuse or justify an admitted act but only to rebut matters essential to be proved by the state. There may be occasions where it would be incumbent on the state to show intoxication as part of its proof, but the instant case is certainly not of that character. The state, having by its case in chief presented evidence of venue, age of defendant, and forcible rape, would have had no interest in showing intoxication, and any evidence on that subject introduced by the defendant must necessarily be a defense, whether we call it simply a defense or an affirmative defense. Id. at 504.

Voluntary intoxication, as defined by the Ohio courts, is similar to other "failure of proof" defenses such as mistake of fact or accident. The intoxication instruction therefore should be considered as an elaboration on the mens rea instruction of "purpose." Like mistake and accident, there must be some evidence in the record to warrant such an instruction on intoxication.

Instructions

The Ohio Supreme Court has "traditionally recognized a trial judge's discretion as to whether to instruct a jury on intoxication as a defense." State v. Hill, 73 Ohio St.3d 433, 443, 653 N.E.2d 271 (1995). Accord State v. Fox, 68 Ohio St.2d 33, 428 N.E.2d 410 (1981); Nichols v. State, 8 Ohio St. 435 (1858); State v. Mundy, 99 Ohio App.3d 275, 314, 650 N.E.2d 502 (1994) ("Whether the evidence presented in a particular case is sufficient to require a jury instruction on intoxication is a matter for the sound discretion of the trial court.").

Failure to request the instruction constitutes a waiver and the issue will be reviewed on appeal only for plain error. State v. Hill, 73 Ohio St.3d 433, 442, 653 N.E.2d 271 (1995) ("Hill failed to request any instruction as to the effect of intoxication. Thus, Hill waived all but plain error.").

In State v. Fox, 68 Ohio St.2d 53, 57, 428 N.E.2d 410 (1981), an attempted murder case, the Court recognized the appropriateness of a special jury charge but left that decision to the discretion of the trial court, concluding that the trial court had not abused its discretion — "not enough evidence was introduced to warrant the requested instruction."

In State v. Wolons, 44 Ohio St.3d 64, 69, 541 N.E.2d 443 (1989), the defendant was convicted of murdering his brother after a night of partying and alcohol consumption. The trial court refused to instruct on intoxication, finding that the level of inebriation imputed from the victim's blood alcohol level fell "short of negating a conscious awareness of the circumstances and events that transpired on the night of the stabbing." The appellate court reversed. The Supreme Court, in turn, reversed the court of appeals, stating that the standard of review was an abuse of discretion.

In State v. Hicks, 43 Ohio St.3d 72, 75, 538 N.E.2d 1030 (1989), the Supreme Court held that "[v]oluntary intoxication is a defense to a crime where specific intent is a necessary element of the crime and "the intoxication was such as to preclude the formation of such intent." The Court further noted that evidence which, if believed, would serve to acquit, is sufficient to raise the defense. However, in this case, the Court held that intoxication could not be a defense because there was no reasonable doubt that the defendant lacked purpose when he returned to the crime scene to murder his daughter, who he knew was the only witness to his first killing.

Diminished Capacity

Ohio does not recognize the defense of diminished capacity. In rejecting that defense, the Ohio Supreme Court concluded that an analogy between diminished capacity and intoxication would not stand close scrutiny. "While we concede that there is a superficial attractiveness to the intoxication-diminished capacity analogy, upon closer examination we . . . find the concepts to be quite disparate." State v. Wilcox, 70 Ohio St.2d 182, 193, 436 N.E.2d 523 (1982).

In the Court's view, it takes little expertise for jurors to decide whether intoxication precluded a defendant from possessing the requisite mental state. In contrast, the "finely differentiated psychiatric concepts associated with diminished capacity demands a sophistication (or as critics would maintain a sophistic bent) that jurors . . . ordinarily have not developed." Id. at 182.

Attempts to introduce diminished-capacity evidence through the "backdoor" of an intoxication defense is impermissible. In State v. Huertas, 51 Ohio St.3d 22, 553 N.E.2d 1058 (1990), the defendant was convicted of murder when he killed a man whom he had told, one week earlier, that he would kill if the victim did not stop dating Huertas' former girlfriend. Huertas acknowledged consuming 6-19 beers, 6-10 shots of rum, 1/4-1/2 a gram of cocaine and smoking approximately five marijuana cigarettes on the night of the murder. The Court perceived Huertas as attempting to raise a diminished capacity defense and refused to let a defense expert testify as to the effects of intoxication and the ability of an intoxicated person to suffer a blackout.

ALIBI

As the Ohio Supreme Court has recognized, alibi "is not an affirmative defense." State v. Poole, 33 Ohio St.2d 18, 21, 294 N.E.2d 888 (1973). In Sabo v. State, 119 Ohio St. 231, 245, 163 N.E. 28 (1928), the Court noted that its decisions have

> clearly pointed out the difference between an alibi and an affirmative defense, such as insanity . . .
>
> It is further correctly considered as a defense in the sense that the state is not bound to meet it until the issue has been raised by defensive testimony. It is further a defense in the sense that the state may offer rebutting testimony, though no testimony was adduced by the state on the subject in submitting its case in chief. It is only inaccurate to call it a defense in the sense that it is not in the nature of confession and avoidance. An alibi conclusively presupposes that the defendant had no participation in the commission of the crime, and that it was impossible for him to have participated because of his absence during the time and at the place of the commission of the crime.

Thus, an "alibi is, strictly speaking, not a defense, though usually called such in criminal procedure." State v. Norman, 103 Ohio St. 541, 542, 134 N.E. 211 (1928). The Court went on to comment: "A defense generally involves the duty that it be supported by some quantity of proof, casting the burden upon the party relying upon it. In that sense, an alibi is not a defense. It is a term used merely to meet the general issue of not guilty . . . . In short, the defendant tenders proof that the place at which he was at the time of the commission of the alleged crime at least raises a reasonable doubt that he committed the crime."

The "alibi defense" means that the accused did not commit the crime; the accused was some place else. The prosecution, of course, must prove that the accused committed the crime (an essential element) beyond a reasonable doubt. See State v. Childs, 14 Ohio St.2d 56, 64, 236 N.E.2d 545 (1968) ("[T]he burden of proof remains with the state even with respect to alibi evidence."). Accordingly, a jury instruction allocating the burden of persuasion to the defendant is plain error. State v. Walker, 2 Ohio App.2d 483, 2 OBR 610, 442 N.E.2d 1319 (1981). In addition, a defendant's "failure" to conclusively establish an alibi does not alter the prosecution's burden of proof. In Toler v. State, 16 Ohio St. 583, 585 (1866), the Supreme Court wrote:

> It is by no means true in law, that the defense of alibi admits the body of the crime or offense charged. It is an admission of nothing that is charged in the indictment, and denied by the general plea of not guilty. It is not a plea, but a defense under the plea of not guilty. . . . It is true, as the court say, that where the attempt to prove the alibi fails, the evidence offered in support of it may nevertheless be considered by the jury as otherwise affecting the case, than it bearing upon the particular question of the alibi. The defense's case is often much weakened by an unsuccessful attempt to prove an alibi. But this result happens not because of any implied or technical admission involved in the attempt, but because of fraud and subornation of perjury manifested in the attempt. It does not create an inference that the defendant was present at the scene of the crime.

See Ohio Jury Instruction 411.03(1) ("If the evidence fails to establish that the defendant was elsewhere, such failure does not create an inference that the defendant was present at the time when and at the place where an offense may have been committed.").

That is not to say that failure may not affect how the jury views the defense case. "An alibi is not only a legitimate, but a very complete, defense, when sufficiently sustained by evidence. But when this issue is presented by an accused and the evidence fails to sustain it, but, on the contrary, traces him to the very place at a given time, at which he says he was not, the situation becomes very dangerous for the accused." Scaccutto v. State, 118 Ohio St. 397, 401, 161 N.E. 211 (1928).

Further, the jury is not required to accept an alibi defense. If the trial court, however, decides that because of the alibi evidence, a reasonable jury could not find that the defendant committed the crime beyond a reasonable doubt, the court is required to grant a motion to acquit:

> In light of the nature of appellant's alibi evidence, vis a vis the evidence presented by the state in rebuttal of the alibi, there must be some doubt in a reasonable mind as to the guilt of appellant. To conclude otherwise is to argue that the average reasonable mind would be convinced that one confined in the Cuyahoga County jail could manage to escape therefrom, could travel to another county, there to commit a murder, and could later re-enter the jail facility, undetected, only to be subsequently release by an order of the court. State v. Walker, 55 Ohio St.2d 208, 221, 378 N.E.2d 1049 (1978) (Celebrezze, J., dissenting), cert. denied, 441 U.S. 924 (1979).

Instructions

From an evidentiary perspective, alibi is defensive in the sense that "some" evidence of alibi must be admitted in evidence before a jury instruction is required. See Ohio Jury Instruction 411.03(1) ("The defendant claims that he was at some other place at the time the offense occurred. This is known as an alibi. The word 'alibi' means elsewhere or a different place.").

Notice of Alibi Rule

Criminal Rule 12.1 governs notice of alibi. It provides that when a defendant in a criminal case plans to offer testimony to establish an alibi, the defendant must file a written

notice with the prosecuting attorney not less than seven days before trial. The notice must include specific information as to the place at which the defendant claims to have been at the time of the alleged offense.

ACCIDENT

In State v. Poole, 33 Ohio St.2d 18, 20, 294 N.E.2d 888 (1973), the Ohio Supreme Court ruled that "it has long been established that accident is not an affirmative defense in this state." It is a claim that the defendant lacked the requisite mens rea of the charged offense. In Jones v. State, 51 Ohio St. 331, 342, 38 N.E. 79 (1894), the Court wrote:

> The intent or purpose, to kill, being an essential constituent of the offense, should be averred and proven. This purpose, like every other material averment of the indictment, is put in issue by the plea of not guilty and to authorize a conviction must be proven beyond a reasonable doubt. Where the state has shown that the death was the result of design, purpose, or intent — and these terms in this relation are synonymous — then the notion of accident is necessarily excluded. That which is designedly or purposely accomplished cannot, in the very nature of things be accidental. Therefore, when the plaintiff in error introduced evidence tending to prove that the gun was accidentally discharged, he was merely controverting the truth of the averment in the indictment that it was purposely discharged.

In short, accident is not an affirmative defense like self-defense and insanity. An "absence of mistake or accident" is "not a separate category but merely a converse of the existence of specific intent." State v. Snowden, 49 Ohio App.2d 7, 12, 359 N.E.2d 87 (1976). For example, a defendant charged with murder who testifies that the weapon discharged "accidently" because he was unfamiliar with firearms is raising a defense of accident, which tends to negate the mens rea element of purpose. Consequently, the jury may not be instructed that the burden of proving accident is on the defense. Ohio Jury Instructions § 411.01(2) (1994) ("An accidental result is one that occurs unintentionally and without any design or purpose to bring it about. An accident is mere physical happening or evidence, out the usual order of things and not reasonably (anticipated) (foreseen) as a natural or probable result of a lawful act.").

The assertion of accident as a defense may permit the prosecution to introduce, under Evidence Rule 404(B), evidence of other crimes, wrongs or acts. See 1 Giannelli & Snyder, Ohio Evidence § 404.18 (3d ed 1996). For example, in State v. Grant, 67 Ohio St.3d 465, 471, 620 N.E.2d 50 (1993), the Court commented: "The existence of these basement fires, not caused by the bedroom fire, tended to prove arson upstairs and negate the possibility of accident. Moreover, these fires tended to show a common plan or scheme and identify Grant as the arsonist." See also State v. McCornell, 91 Ohio App.3d 141, 147, 631 N.E.2d 1110 (1993) ("The two serious physical injuries caused by appellant to [his wife] and her stories about them [being accidental] are too coincidental to be left unchallenged by the state.").

MISTAKE OF FACT

Mistake of fact is a defense if the mistake negates a mental state required for a crime. "Ignorance or mistake as to a matter of fact or law is a defense if it negatives a mental state required to establish a material element of the crime, except that if the defendant would be guilty of another crime had the situation been as he believed, then he may be convicted of the offense which he would be guilty had the situation been as he believed it to be." 1 LaFave & Scott, Substantive Criminal Law § 5.1, at 575 (1986). Accord Ohio Jury Instructions 409.03(1) ("Unless the defendant had the required (purpose) (knowledge) he is not guilty of the crime . . ."; (2) "In determining whether the defendant had the required (purpose) (knowledge) you will consider whether he acted under a mistake of fact . . .").

The commentators to the Model Penal Code stated it this way:

> Thus ignorance or mistake is a defense when it negatives the existence of state of mind that is essential to the commission of an offense, or when it establishes a state of mind that constitutes a defense under a rule of law relating to defenses. In other words, ignorance or mistake has only evidential import; it is significant whenever it is logically relevant, and it may be logically relevant to negate the required mode of culpability or to establish a special defense. American Law Institute, Model Penal Code and Commentaries § 2.04, at 269 (1985).

Thus, the defense of mistake is much like the defense of accident. Neither is an affirmative defense; both involve a claim that the defendant lacked the requisite mens rea of the charged offense. An "absence of mistake or accident" is "not a separate category but merely a converse of the existence of specific intent." State v. Snowden, 49 Ohio App.2d 7, 12, 359 N.E.2d 87 (1976). For example, a defendant who claims that she made a mistake about the nature of a controlled substance is asserting a lack of mens rea, i.e., knowledge that the substance was heroin.

> Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense. For example, to take the classic case of the man who takes another's umbrella out of a restaurant because he mistakenly believes that the umbrella is his, it is not really necessary to say that the man, if charged with larceny, has a valid defense of mistake of fact; it would be more direct and to the point to assert that the man is not guilty because he does not have the mental state (intent to steal the property of another) required for the crime of larceny. Yet, the practice has developed of dealing with such mistakes as a matter of defense, perhaps because the facts showing their existence are usually brought out by the defendant . . . . 1 LaFave & Scott, Substantive Criminal Law § 5.1(a), at 576 (1986).

An assertion of mistake as a defense may permit the prosecution to introduce, under Evidence Rule 404(B), evidence of "other acts" to negate the mistake claim. 1 Giannelli & Snyder, Ohio Evidence § 404.18 (3d ed 1996). Accordingly, a defendant claiming that she was mistaken about the nature of a controlled substance (e.g., heroin) may open the door to the admissibility of her prior heroin transactions to show that she is familiar with heroin and thus a "mistake" is unlikely.

MISTAKE OF LAW

There are two types of mistake of law. First, a mistake of law, like a mistake of fact, may negate a required mental state (mens rea). "Ignorance or mistake as to a matter of fact or law is a defense if it negatives a mental state required to establish a material element of the crime . . . ." 1 LaFave & Scott, Substantive Criminal Law § 5.1, at 575 (1986). Often, this type of mistake involves a mistake of civil, not criminal, law — e.g., property or domestic relations law. If a defendant, whose automobile has been repossessed, believes she is still the lawful owner of the vehicle and takes it, this mistake of property law negates the mental element for theft or larceny.

> It bears repeating here that the cause of much of the confusion concerning the significance of the defendant's ignorance or mistake of law is the failure to distinguish two quite different situations: (1) that in which the defendant consequently lacks the mental state required for commission of the crime and thus . . . has a valid defense; and (2) that in which the defendant still had whatever mental state is required for commission of the crime and only claims that he was unaware that such conduct was proscribed by the criminal law, which . . . is ordinarily not a recognized defense. Id. at 585.

The second type of mistake or ignorance of law involves the criminal law that the defendant is charged with violating. Here, the maxim "ignorance of the law is no excuse" applies. A belief, even a reasonable one, that the actor's conduct does not constitute a crime is irrelevant.

> Except for one particular situation . . . , it is usually an easy task to determine in which of these two categories the defendant's mistake belongs. For example, the crime of larceny is not committed if the defendant, because of a mistaken understanding of the law of property, believed that the property taken belonged to him; it is committed, however, if the defendant believed it was lawful to take certain kinds of property belonging to others because of the custom in the community to do so. The requisite mental state (intent to steal) is lacking only in the first of these two cases, for it "is not the intent to violate the law but the intentional doing the act which is a violation of law" which is proscribed. 1 LaFave & Scott, Substantive Criminal Law § 5.1(d), at 585 (1986) (citation omitted).

Exceptions

A limited number of exceptions to the general rule that mistake of law is no defense have been recognized. First, if a criminal statute has not been published or is not reasonably available, there may be a defense. Second, if the defendant reasonably relied upon an official statement of law, later determined to be invalid or erroneous, there may be a defense. This defense would include a statement in a (1) statute, (2) judicial decision, (3) an administrative order, or (4) an official interpretation of the public officer or body charged by law with responsibility for interpreting, administrating, or enforcing the law defining the offense. See 1 LaFave & Scott, Substantive Criminal Law § 5.1(e) (1986).

An interpretation by a lawyer is not covered by this defense. "The principal reason for this position apparently is that the risk of collusion is greater and that those desiring to circumvent the law would shop around for bad advice." 1 LaFave & Scott, Substantive Criminal Law § 5.1(e)(4), at 595 (1986).

Where recognized, these exceptions are considered affirmative defenses. As the commentary to the Model Penal Code observed:

> All of the categories dealt with in the formulation [of this defense] involve, for the most part, situations where the act charged is consistent with the entire law-abidingness of the actor, where the possibility of collusion is minimal, and where a judicial determination of the reasonableness of the belief in legality should not present substantial difficulty. American Law Institute, Model Penal Code and Commentaries § 2.04, at 275 (1985).

REFERENCES

3 Katz & Giannelli, Baldwin's Practice Criminal Law ch 91 (1996).

1 LaFave & Scott, Substantive Criminal Law § 5.4, (1986).

2 Robinson, Criminal Law Defenses § 124 (1994).