

an appellate court determines that the prosecution has failed to disprove a defense beyond a reasonable doubt, jeopardy attaches and the accused may not be retried. Bush v. State, 611 S.W.2d 428, 431 (Tex. Crim. App. 1980).

2. AFFIRMATIVE DEFENSES

Section 2.04 of the Texas Penal Code is a procedural device that shifts both the burden of production and persuasion to the defendant. The defendant must prove an affirmative defense by a preponderance of the evidence. Van Guilder v. State, 709 S.W.2d 178, 181 (Tex. Crim. App. 1985), cert. denied, 106 S. Ct. 2891 (1986); Alford v. State, 806 S.W.2d 581 584 (Tex. App.—Dallas 1991), aff'd, 866 S.W.2d 619 (Tex. Crim. App. 1993).

Affirmative defenses are labeled by the phrase: "It is an affirmative defense to prosecution . . ." Examples of affirmative defenses are insanity and duress.

3. UNLABELED DEFENSES

Where a defense is not plainly labeled, it is nonetheless treated as a defense. Tex. Penal Code Ann. § 2.03(e). The defendant bears the burden of producing evidence on it, but the final burden of persuasion rests on the state to disprove the defense beyond a reasonable doubt. Many defenses, such as alibi, are found outside the Penal Code and many defenses are found within the Penal Code offenses. However, not all defenses are statutorily defined and not all statutory defenses are found in the Penal Code. See, e.g., Tex. Property Code Ann. § 162.031(c), creating an affirmative defense to the Property Code offense of Misapplication of Trust Funds when the trustee pays to the beneficiaries any funds he misappropriated within 30 days of formal demand or of the filing of a criminal complaint. For defenses that relate to specific provisions of the Penal Code, refer to the supplement.

4. EXCEPTIONS

If a statute includes the language, "it is an exception to the application . . ." then the charging instrument must negate the existence of the exception, and the prosecution must prove beyond a reasonable doubt that the defendant's conduct does not fall within the exception. Tex. Penal Code Ann. § 2.02. Exceptions are matters

that the Legislature has determined should be part of the state's pleading and burden of proof. There are, apparently, only two Penal Code exceptions: (1) Tex. Penal Code Ann. § 38.04, which states, "It is an exception to the application of this section that the attempted arrest was illegal," (2) Tex. Penal Code Ann. § 37.10, which provides that it is not an offense to destroy a government record if that destruction was legally authorized.

Failure to negate the exception is the same as failing to allege an essential element of the offense and renders the indictment void. See McElroy v. State, 720 S.W.2d 490, 493 (Tex. Crim. App. 1986); Lopez v. State, 846 S.W.2d 90 (Tex. App.—Corpus Christi 1992, pet. ref'd).

II. INSANITY

A. Overview

1. STATUTORY PROVISIONS

Section 8.01 of the Texas Penal Code provides that insanity is an **affirmative defense**. The defendant needs to establish that, at the time of the conduct charged, he or she was suffering from a severe mental disease or defect and, as a result of the disease or defect, did not know his or her conduct was wrong. See Taylor v. State, 856 S.W.2d 459 (Tex. App.—Houston [1st Dist.] 1993), aff'd, 885 S.W.2d 154 (Tex. Crim. App. 1994). Insanity is a defense that excuses the defendant from punishment because of his state of mind at the time of the commission of the offense. Pesch v. State, 524 S.W.2d 299, 301 (Tex. Crim. App. 1975).

2. BURDEN OF PROOF

(a) On Defendant

The defendant has both the burdens of production and persuasion in regard to the insanity defense. See Meraz v. State, 795 S.W.2d 146, 150 (Tex. Crim. App. 1990). The accused must prove insanity by a **preponderance of the evidence**. See Manning v. State, 730 S.W.2d 744, 747 (Tex. Crim. App. 1987).

(b) Shifts to State

Once the defendant has met his burdens of production and persuasion, the state must then prove defendant's sanity by proof beyond a reasonable doubt. If there is a prior adjudication

of insanity, the state must prove the defendant's sanity at the time of the offense beyond a reasonable doubt. In these rare situations, the defendant's sanity thus becomes an additional element, which the state must prove beyond a reasonable doubt. See Manning v. State, 730 S.W.2d at 748; Riley v. State, 830 S.W.2d 584 (Tex. Crim. App. 1992).

Legal vs. Medical Insanity: If an accused presents undisputed evidence as to the presence of a mental disease or defect, **even if it established medical insanity, it will not necessarily establish legal insanity.** Schuessler v. State, 719 S.W.2d 320, 329 (Tex. App.--San Antonio 1986, no pet.). Experts may help the jury in their determination, but they cannot dictate their conclusions. They are left to accept or reject, in whole or in part, the opinion testimony of medical or psychological experts and can accept lay testimony over that of experts. See Graham v. State, 566 S.W.2d 941 (Tex. Crim. App. 1978); Bigby v. State, 892 S.W.2d 864 (Tex. Crim. App. 1994).

Insanity vs. Incompetency: A prior finding of incompetence to stand trial does not constitute an adjudication of insanity. Thus, the burden of proof regarding insanity where there has been a prior finding of incompetence remains on the defendant. See Morris v. State, 744 S.W.2d 290, 294 (Tex. App.--Corpus Christi 1987, pet. ref'd). Further, a prior adjudication of insanity is not sufficient to raise the issue of the defendant's incompetency so as to warrant a competency hearing. See Arnold v. State, 873 S.W.2d 27 (Tex. Crim. App. 1993).

Diminished Capacity: Evidence of diminished capacity means such evidence of a mental disease or defect, not amounting to legal insanity, offered to negate the culpable mental state. In Penry v. State, 903 S.W.2d 715, 767 (Tex. Crim. App. 1995)(concurring opinion), the Court of Criminal Appeals recognized diminished capacity, not as an affirmative defense, but as a means of rebutting the element of mens rea. Id.

The general rule as set forth in Penry is that evidence of mental illness and poor judgment (i.e., diminished capacity), falling short of insanity, is not admissible. The exception arises, where specific intent is an element of the offense, as in the different degrees of murder or in the "with intent" crimes. See Cowles v. State, 510 S.W.2d 608, 610 (Tex. Crim. App. 1974); Wagner v. State, 687 S.W.2d 303, 305 (Tex. Crim. App. 1984).

Specific intent offenses are those such as burglary, theft, etc., and offenses such as murder, where the culpable mental state focuses on the result of the criminal conduct.

3. PROCEDURAL CONSIDERATIONS

a. Notice

Article 46.03, Section 2, of the Texas Code of Criminal Procedure provides:

(i) A defendant planning to offer evidence of the insanity defense shall file a notice of his or her intention to offer such evidence with the court and the prosecuting attorney:

(a) At least 10 days prior to the date the case is set for trial; or

(b) If the court sets a pretrial hearing before the ten-day period, the defendant shall give notice at the hearing; or

(c) If the defendant raises the issue of his incompetency to stand trial before the ten-day period, he shall at the same time file notice of his intention to offer evidence of the insanity defense.

(ii) Unless notice is timely filed pursuant to the requirements set out above, evidence on the insanity defense is **not admissible** unless the court finds that **good cause** exists for failure to give notice.

b. Good Cause for Failure to Give Notice

(i) "Good cause" exists as a matter of law where a defendant has not been given 10 days notice of the trial date, even if the trial date is a subsequent setting. See Schaffer v. State, 590 S.W.2d 490, 491 (Tex. Crim. App. 1979).

(ii) Failure to give notice is strictly enforced: In Wilson v. State, 633 S.W.2d 892 (Tex. Crim. App. 1982), the defendant claimed the trial court's instruction on the insanity defense improperly placed the burden of proof on him. Defendant claimed he was entitled to a presumption because of his continuous treatment for mental illness. The Court noted that defendant never filed a notice of intent to raise the insanity defense, nor did the record indicate that the trial judge made a finding of good cause, thus allowing him to pursue the