DEFENSES AND JURY CHARGES

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CURRICULUM VITAE

EDUCATION

B.A., Trinity University, San Antonio, Texas, 1984
J.D., St. Mary's University, San Antonio, Texas, 1987

PROFESSIONAL ACTIVITIES AND RECOGNITIONS

Judge Advocate, U.S. Marine Corps, 1988-1992
Associate, Zimmermann & Lavine, P.C., Houston, Texas, 1992 - 1996
Law Office of Michael C. Gross, P.C., San Antonio, Texas, 1996 - 2012
Gross & Esparza, P.L.L.C., San Antonio, Texas, 2012 - Present
Board Certified, Criminal Trial Advocacy, National Board of Trial Advocacy, 1997
Board Certified, Criminal Law, Texas Board of Legal Specialization, 1995
Board Certified, Criminal Appellate Law, Texas Board of Legal Specialization, 2011
President, Texas Criminal Defense Lawyers Association, 2021-2022
President, San Antonio Criminal Defense Lawyers Association, 2011-2012
Defender of the Year, San Antonio Criminal Defense Lawyers Association, 2008
Defender of the Year, San Antonio Criminal Defense Lawyers Association, 2009
Named in Best Lawyers in America, 2005 - 2021
Named Best Lawyers San Antonio Non-White-Collar Lawyer of the Year - 2015, 2017
Named in Texas Super Lawyers in Texas Monthly Magazine, 2004 - 2021
Named Top 50 Texas Super Lawyers in Central and West Texas Region, 2010 - 2012, 2014
Named in Best Lawyers in San Antonio by Scene in San Antonio Magazine, 2004 - 2021
Named Top 10 Criminal Defense Attorneys in San Antonio by Scene Magazine - 2013
AV rated by Martindale Hubble

COURT ADMISSIONS

Supreme Court of the United States, 1991
Supreme Court of the State of Texas, 1987
United States Court of Appeals for the Armed Forces, 1990
United States Court of Appeals for the Fifth Circuit, 1990
United States Court of Appeals for the Tenth Circuit, 1998
United States District Court for the Northern District of Texas, 1990
United States District Court for the Southern District of Texas, 1991
United States District Court for the Eastern District of Texas, 1991
United States District Court for the Western District of Texas, 1992

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I. Defenses

A. The United States Constitution guarantees the right to present a defense

The United States Supreme Court has discussed the right of an accused to present a defense as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14 (1967).

The Court has determined that this right to present a defense includes the right to fully present a defense in that ". . . jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the government's evidence]." *Davis v. Alaska*, 415 U.S. 308 (1975). The Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment guarantee a citizen accused "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, *citing California v. Trombetta*, 467 U.S. 479 (1984). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284 (1973) *citing Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *In re Oliver*, 333 U.S. 257 (1948). This right to present a defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319 (2006) (citations omitted).

B. Texas Penal Code § 2.03 Defenses

Penal Code § 2.03 states that defenses are labeled, "It is a defense to prosecution . . ." A defense is not submitted to a jury unless evidence is admitted supporting the defense. If a defense is submitted to a jury, the trial judge shall instruct the jury that "a reasonable doubt on the issue requires that the defendant be acquitted."

C. Mistake of fact

Penal Code § 8.02 states, "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."

D. Entrapment

Penal Code § 8.06 states, "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."

E. Age

Penal Code § 8.07 states, "A person may not be prosecuted for or convicted of any

offense that the person committed when younger than 15 years of age except" perjury and aggravated perjury; Chapter 729, Transportation Code offenses not punishable by imprisonment or confinement in jail; motor vehicle traffic ordinances; misdemeanor punishable by fine only; violation of a penal ordinance of a political subdivision; violation of a penal statute that is, or is a lesser included offense of, a capital felony, an aggravated controlled substance felony, or a felony of the first degree for which the person is transferred to adult court if the person committed the offense when 14 years of age or older; or a capital felony or an offense under Section 19.02 for which the person is transferred to adult court. No person may, in any case, be punished by death for an offense committed while the person was younger than 18 years. A person younger than 10 years of age may not be prosecuted for or convicted of a misdemeanor punishable by fine only or violation of a penal ordinance of a political subdivision, and a person who is at least 10 years of age but younger than 15 years of age is presumed incapable of committing these offenses.

F. Justification

Penal Code § 9.02 states, "It is a defense to prosecution that the conduct in question is justified under this chapter."

G. Confinement as justifiable force

Penal Code § 9.03 states, "Confinement is justified when force is justified by this chapter if the actor takes reasonable measures to terminate the confinement as soon as he knows he safely can unless the person confined has been arrested for an offense."

H. Threats as justifiable force

Penal Code § 9.04 states, "The threat of force is justified when the use of force is justified by this chapter. For purposes of this section, a threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force."

I. Public duty

Penal Code § 9.21 states, "Except as qualified by Subsections (b) and (c), conduct is justified if the actor reasonably believes the conduct is required or authorized by law, by the judgment or order of a competent court or other governmental tribunal, or in the execution of legal process."

J. Necessity

Penal Code § 9.22 states, "Conduct is justified if: (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm; (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

Requirements (1) and (2) are decided by the jury, and (3) is a question of law for the court. *Rodriguez v. State*, 524 S.W.3d 389, 393 (Tex. App. - Houston [14th Dist.] 2017, pet. ref'd). Section 9.22 does not limit the defense of necessity to particular offenses, and necessity applies to any offense unless the statute specifically excluded the defense. *Bowen v. State*, 162 S.W.3d 226, 229 (Tex. Crim. App. 2005). Necessity applies to assault and aggravated assault. *Juarez v. State*, 308

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