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Burden Of Proof Of Affirmative Defenses In Criminal Cases - Gunther v. State

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Burden Of Proof Of Affirmative Defenses In Criminal Cases

Gunther v. State[1]

Defendant was convicted by a jury of murder in the second degree. Although he did not deny mortally wounding his brother-in-law with a rifle, he presented evidence to show that he had done so in self-defense. On appeal, defendant objected to the refusal of the trial court to give certain requested instructions to the jury concerning the law of self-defense. The Court of Appeals reversed and remanded the case for a new trial, agreeing with defendant that the trial court should have informed the jury more fully of the essential elements of self-defense as applicable to the circumstances in this case.[2]

However, the court affirmed the refusal of the trial court to inform the jury that the jury ". . . should find the defendant not guilty if, on the whole of the evidence, it had a reasonable doubt as to whether or not he acted in self-defense." The issue to be considered is what is the law of the burden of proof[3] in a criminal trial when an affirmative defense is raised?[4]

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[1] 228 Md. 404, 179 A. 2d 880 (1962).

[2] *Id.*, 409. Specifically, (1) the trial court should have informed the jury that if the defendant was not seeking a fight but was apprehensive that he might be attacked by the deceased, the defendant would have a right to arm himself in anticipation of the assault and "that the right of the defendant to go wherever he legally had a right to go was not abridged by the fact that he might be attacked . . ." and (2) the jury, in determining who was the aggressor and whether the defendant was apprehensive of danger, could consider evidence of the violent and dangerous character of the deceased known to the defendant.

[3] The term "burden of proof" is itself a source of confusion. MCCORMICK, EVIDENCE §§ 306, 307 (1954), points out that there are actually two categories of "burden of proof." The first burden is the burden of initially producing evidence or of going forward with the evidence. This burden generally lies on each issue with the party who would be given an adverse ruling on the particular issue if no evidence were presented by either side. The second "burden of proof" is more literally a burden of persuasion. It relates to the burden of convincing the trier of fact on an issue and also refers to the standard to be used by the trier of fact in making its determination. The two standards most generally employed are the burden of persuasion by a preponderance of evidence (or to the satisfaction of the trier of fact), and the burden of persuasion beyond a reasonable doubt (or to a moral certainty). The burden of persuasion, respectively, on the opponent would then be to convince the trier of fact that the issue is at least evenly divided, and that at least a reasonable doubt exists. As noted in 9 WIGMORE, EVIDENCE § 2485 (3d ed. 1940) the frequent ambiguous use by the courts of the single term "burden of proof" without making clear which of its uses is being set forth, and the courts' apparent failure at times to understand the distinction of uses, have further compounded the confusion.

[4] *Initial Burden of the Prosecution.* In a criminal case the burden is on the prosecution for all the facts which are material to the crime,

After the state has made out its case, the accused may interpose an affirmative defense, which is a reliance on distinct substantive matter to exempt him from punishment and absolve him from responsibility.[5] Affirmative defenses[6] might include certain kinds of intoxication, duress, reasonable belief of necessity to avoid a greater harm or evil, execution of a public duty, self-protection, protection of property, mental disease or defect, military orders, unforseeable accidents, double jeopardy, alibi, license, statutory exception and entrapment.

The situations in the above list might be divided into three separate classifications: (1) non-participation; (2) legal exemption; and (3) lack of *mens rea.*

(1) *Non-Participation.* Alibi, although sometimes classified as an affirmative defense, is distinguishable from the other situations because it does not seek to justify or find a legal excuse for the criminal conduct, but rather, it is a mere form of denial of participation in the criminal act.[7] Since the prosecution has the initial burden of proving the presence of the accused at the scene of the crime, it seems logical that the defendant is entitled to acquittal if his alibi testimony raises a reasonable doubt as to his presence at the scene.[8] However, a minority view requires the accused to establish this defense, not merely to the point where a reasonable doubt is raised, but by a preponderance of the

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1 WHARTON, CRIMINAL EVIDENCE § 16 (12th ed. 1955). In order to establish its case, the prosecution must prove the commission of the crime, Norwood v. State, 45 Md. 68, 75 (1876), by the accused, Berry v. State, 202 Md. 62, 67, 95 A. 2d 319 (1953), within the period of statutory limitations where applicable, Ruble v. State, 177 Md. 600, 11 A. 2d 455 (1940), within the prosecutor's venue, Breeding v. State, 220 Md. 193, 200, 151 A. 2d 120 (1959). WHARTON, *supra,* § 15, states that there is a conflict as to whether the prosecution must prove venue beyond a reasonable doubt or merely by a preponderance of evidence. It is for the court to determine whether the evidence so presented by the prosecution is of legal sufficiency to sustain a conviction, 7 M.L.E., *Criminal Law* §§ 434, 435 (1961). The question of whether the evidence establishes the guilt of the accused beyond a reasonable doubt is for the trier of facts to decide, Gunther v. State, 228 Md. 404, 411, 179 A. 2d 880 (1962). The initial burden of the prosecution, therefore, is to present sufficient evidence to avoid a directed verdict for the accused at the conclusion of the State's case. The State may produce sufficient evidence so that the defendant will find himself in a situation which, from a practical standpoint, demands that he offer evidence in rejoinder. This is often explained by saying that the burden of going forward with the evidence shifts to the defendant. However, the burden of *proof* never shifts from the prosecution, WHARTON, *supra,* § 13.

5 20 AM. JUR., *Evidence* § 153.

6 MODEL PENAL CODE §§ 2.08-2.10, 3.02, 3.04, 3.06, 4.03 (Proposed Official Draft, May 4, 1962); AM. JUR., *Homicide* §§ 290, 293, 294; WHARTON, *op. cit. supra,* note 4, §§ 20, 24.

7 MCCORMICK, EVIDENCE § 321 (1954).

8 People v. Silvia, 389 Ill. 346, 59 N.E. 2d 821 (1945); HOCHHEIMER, CRIMES AND CRIMINAL PROCEDURE § 157 (2d ed. 1904).

evidence.[9] The Maryland Court of Appeals has adopted the majority view, stating:

> "An alibi of the accused, proceeding as it does upon the idea that he was elsewhere at the time of the commission of the crime, does, of course, if thoroughly established, preclude the possibility of guilt. . . . *If the jury, considering all the evidence, inculpatory and exculpatory, entertain a reasonable doubt of the defendant's participation in the crime, they should acquit him.* Thus a defendant is entitled to acquittal if the alibi testimony, taken into consideration with all the other evidence in the case, raises a reasonable doubt of guilt."[10]

(2) *Legal Exemption.* Double jeopardy, license and statutory exceptions[11] might be classified as legal exemption defenses. As defenses they do not attack any constituent element of the crime. For example, Article 27, Section 36 of the Maryland Code declares it to be a crime to carry a concealed weapon. However, subsection (b) of section 36 provides that "nothing in this section shall be construed to prevent the carrying of any of the weapons mentioned in the preceding paragraph of this section by an officer of this state, or of any county or city therein, who is entitled or required to carry such weapon as part of his official equipment, . . . or by any special agent of a railway. . . ." Suppose an individual is arrested and tried for carrying a pistol. Where do the burdens of proof lie as to whether or not the accused is an "officer" or a "special railroad agent"? Since such defenses are extrinsic to the prosecution's initial burden of proof, it is often said that the burden of proving them rests with the accused.[12] Hochheimer explains this by saying that "in exceptional cases, involving the commission of acts unlawful unless the defendant possesses a special qualification or authority, and where the proof lies peculiarly within his knowledge and is easily producible by him, it has been held that the defendant must prove himself within the exception."[13]

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[9] Porter v. State, 200 Ga. 246, 36 S.E. 2d 794 (1946).

[10] Floyd v. State, 205 Md. 573, 581, 109 A. 2d 729 (1954). (Emphasis added).

[11] For a thorough study of statutory exceptions see Annot. 153 A.L.R. 1218 (1944).

[12] This reasoning does not apply where a statutory exception is incorporated in the description of the offense so as to constitute a part thereof. Spurrier v. State, 229 Md. 110, 111, 182 A. 2d 358 (1962).

[13] HOCHHEIMER, *op. cit. supra*, note 8, 176; as for double jeopardy, substitute the word "punishable" for the word "unlawful" in the above quotation and the same reasoning would apply.

The Maryland Court of Appeals stated in *Howes v. State*[14] and recently reiterated in *Spurrier v. State*[15] that the burden is on the defendant to prove that he comes within one or more of the statutory exceptions. However, since in both *Howes* and *Spurrier* the defendants had not met the burden of producing evidence to raise a defense, the court was dealing only with the initial burden of producing evidence, and might have based its ruling on this narrower ground. The good sense of requiring the defendant to raise a genuine issue by introducing some kind of evidence of such a defense as this is apparent, but it does not follow that the burden of persuasion should be his.

The weight of authority is that, when evidence has been presented which tends to bring the accused within a statutory exception, the burden of persuasion is upon the prosecution on the whole case to overcome that evidence beyond a reasonable doubt.[16] A minority rule would place the burden on the defendant to establish the exceptive facts by a preponderance of the evidence.[17] The minority rule, however, appears to violate the basic criminal law maxim that the prosecution must prove guilt beyond a reasonable doubt. The maxim does not require it to meet possible defenses which are never raised, but it is difficult to see why proving guilt does not entail proving it in the face of any affirmative defenses supported by credible evidence.

(3) *Lack of Mens Rea.* Affirmative defense situations not classified as "denial of participation" or "legal exemption" all have the common characteristic that the accused's conduct is not criminal, because, in each case, the defendant acted without *mens rea.* The most common forms of this type of defense are insanity and self-defense.

For example, in a homicide case, the opinions are divided as to whether the defendant must overcome the presumptions of malice and/or of sanity[18] arising from the prosecution's initial proof of an intentional killing, by a preponderance of evidence, or whether the defendant need only produce some evidence to rebut them, in which case the State must then disprove the defendant's contention

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[14] 141 Md. 532, 539, 119 A. 297 (1922).

[15] 229 Md. 110, 182 A. 2d 358 (1962). The statute involved in Howes prohibited the sale of intoxicating liquors "except as hereinafter provided. . . ."

[16] 153 A.L.R. 1353 (1944). Spurrier was tried for carrying a concealed weapon. He unsuccessfully contended that the State had the burden of proving that defendant was not within certain classes of persons excepted from the statutory prohibitions against carrying concealed weapons.

[17] *Id.*, 1359.

[18] WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 214 (1954).

beyond a reasonable doubt,[19] *i.e.*, the State must then prove the defendant's sane guilty mind beyond a reasonable doubt, taking into account all of the evidence on both sides. The federal courts and the Model Penal Code in its present form adopt this view.[20] These authorities are in accord with the view expressed by the Supreme Court in *Davis v. United States:*

> "If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged."[21]

In *Frank v. United States*[22] the court, referring to *Davis,* stated: "This decision definitely places the federal courts with those courts holding that where there is a reasonable doubt as to whether the killing was or was not committed in justifiable self-defense the defendant is entitled to the acquittal." The reasoning behind this view is that, as to crimes where the state of mind is an element of the offense, without a "criminal" state of mind there can be no crime committed. Therefore, if the jury entertains a reasonable doubt as to the *mens rea* of the accused, it is in doubt as to his guilt.[23]

With the instant decision, Maryland appears to adopt the contrary view, which is that the defendant has the burden of proving his lack of guilty mind by a preponderance of the evidence, and that the prosecution need not prove the whole of this element of the case beyond a reasonable doubt.

Prior to *Gunther* the court had been presented with this issue in relation to the question whether the accused was required to overcome the presumption of sanity by a preponderance of evidence, or whether, after evidence of de-

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[19] 3 UNDERHILL'S CRIMINAL EVIDENCE §§ 642, 660 (5th ed. 1956).

[20] MODEL PENAL CODE, *op. cit. supra,* note 6, § 1.12(1): "No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof the innocence of the defendant is assumed." § 1.12(2): "Subsection (1) of this Section does not: (a) require the disposal of an affirmative defense *unless* and until there is evidence supporting such defense. . . ." (Emphasis added).

[21] 160 U.S. 469, 488 (1895).

[22] 42 F. 2d 623, 629 (9th Cir. 1930).

[23] State v. Clark, 34 Wash. 485, 76 P. 98, 102 (1904); *contra* Commonwealth v. Palmer, 222 Pa. 299, 71 A. 100, 101 (1908). "To reasonably doubt that life was taken in self-defense is not to be satisfied that it was so taken; and where this affirmative defense is left in doubt, it has not been established as a basis for acquittal." Comment, *Burden of Proving Self Defense in Homicide Cases,* 39 Journal of Criminal Law and Criminology 189 (1948-49) and DeGroot v. United States, 78 F. 2d 244 (9th Cir. 1935).

fendant's insanity had been introduced, the burden shifted to the state to prove defendant's sanity beyond a reasonable doubt. In every case the court avoided resolving the problem on the ground that the issue was not before it because of the lack of any real evidence of defendant's insanity.[24] It will be interesting to note whether the court will now use the instant case to support a future decision placing the burden of proving insanity, by a preponderance of evidence, on the defendant.

In the instant case the Court of Appeals affirmed the refusal of the trial court to inform the jury that it should acquit the defendant if, on the whole of the evidence, it had a reasonable doubt whether or not he acted in self-defense. Where this refusal has been upheld in other states, such refusal has been based on the following reasons:

1. that such an affirmative defense, *being opposed to the usual order of things,* must be established by a preponderance of the evidence;[25] and,

2. that the presumption of sanity and/or malice is necessary for the protection of society and for the administration of justice, and, on sufficient proof of the elements of the prosecution's main case to take the case to the jury, neutralizes the presumption of innocence upon which the rule of reasonable doubt rests.[26]

In reaching its conclusion in *Gunther* the Court of Appeals did not refer to either of these reasons, but concluded that "the defendant has the burden of *producing* evidence to support this affirmative defense"[27] and cited *Bruce v. State.*[28] The court in that opinion, however, was referring not to the burden of persuasion, but to the burden of going forward with the evidence, which burden the defendant in *Gunther* had met.[29]

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[24] Note, *Burden of Proof of Insanity in Criminal Cases,* 15 Md. L. Rev. 157 (1955), noting Thomas v. State, 206 Md. 575, 112 A. 2d 913 (1955). For a more recent statement by the Court of Appeals, see Lipscomb v. State, 223 Md. 599, 604, 165 A. 2d 918 (1960). It is interesting to note that the casenote author concluded that though the court in Thomas avoided deciding the issue, it "was obviously in favor of placing the burden on the defendant." Note, *supra,* 166. The subsequent Lipscomb decision appears to have had this in mind and therefore the court took pains to make clear that it was making no decision as to the burden of proof.

[25] *Supra,* note 23.

[26] For a general historical criticism of the use or misuse of the reasonable doubt concept from its inception, see *Some Rules of Evidence — Reasonable Doubt in Civil and Criminal Cases,* 10 Am. L. Rev. 642 (1876).

[27] 228 Md. 404, 410, 179 A. 2d 880 (1962). (Emphasis added).

[28] 218 Md. 87, 145 A. 2d 428 (1958).

[29] The court said that "there was some evidence that the defendant had acted in defense of himself. . . ." *Supra,* note 28, 408. Query: Would the confusion between the burden of going forward with the evidence and the

The court also stated in *Gunther:*

> "[S]ince all of the evidence in a criminal case must be considered together, the trier of the facts should not weigh the evidence relating to self-defense and determine from that alone whether there is a reasonable doubt of guilt. * * * It is thus apparent that the burden of proving self-defense to the satisfaction of the jury or the court (as the case may be) is on the defendant."[30]

The only authority cited for this statement was *Basoff v. State.*[31] There the defendant attempted to establish an alibi and the court, citing *Floyd,*[32] stated, "All the evidence in a criminal case is to be considered together, and the jury, or the trial judge sitting without a jury, does not merely weigh the evidence relating to the alibi and determine from that alone whether there is a reasonable doubt of guilt."[33] However, in *Gunther* the defendant did not request that the jury merely weigh the evidence relating to self-defense and determine from that alone whether there was a reasonable doubt of guilt. What the defendant did request was that the jury find him not guilty if, *on the whole of the evidence,* it had a reasonable doubt as to whether he acted in self-defense. In effect, the court said that the jury cannot separately consider that part of the evidence in the case relating to self-defense in order to determine guilt as a whole. However, the defendant had requested that the jury consider the evidence of the case *as a whole* to determine whether an essential element of the crime *(mens rea)* was lacking. Defendant's request was certainly consistent with the language in *Floyd v. State,*[34] previously quoted, but the court, instead of considering the defend-

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burden of persuasion have been eliminated and an instruction granted if defendant had requested the following instruction in Jenkins v. State, 80 Or. Cr. 328, 161 P. 2d 90, 107 (1945): "When the killing is proved beyond a reasonable doubt, or admitted by the defendant, and the plea of self-defense is interposed, as in this case, it then devolves upon the defendant to show any circumstances to excuse or justify it by some proof strong enough to create in your minds a reasonable doubt as to whether the defendant acted in real or apparent necessary self-defense, unless the proof on the part of the State shows that the defendant was justified in committing the act."

[30] *Supra,* note 27, 411.

[31] 208 Md. 643, 119 A. 2d 917 (1956).

[32] 205 Md. 573, 109 A. 2d 729 (1954).

[33] *Supra,* note 31, 655.

[34] "If the jury, considering all the evidence, inculpatory and exculpatory, maintain a reasonable doubt of the defendant's participation in the crime they should acquit him." 205 Md. 573, 581, 109 A. 2d 729 (1954).

ant's request as stated,[35] apparently misunderstood it[36] and then disposed of the request in the misunderstood form.

The defendant's view would appear to be the more logical one. Since proving *mens rea* is vital to the State's case in homicide prosecutions, if the defendant can create a reasonable doubt as to his state of mind it would appear that the State has not established its case.[37]

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[35] "That it (the jury) should find the defendant not guilty if, on the whole of the evidence, it had a reasonable doubt as to whether or not he acted in self-defense." 228 Md. 404, 408, 179 A. 2d 880 (1962).

[36] The court stated: "Apparently the defendant is contending that when a defendant pleads self-defense the State must prove beyond a reasonable doubt that the defendant did not act in defense of himself. Such is not the law. On the contrary, the defendant has the burden of *producing* evidence to support this affirmative defense." *Ibid.* (Emphasis added).

[37] Strahorn, *Criminology and the Law of Guilt*, 15 Md. L. Rev. 287 (1955). Strahorn states, "If the prosecution fails to prove beyond all reasonable doubt that any one of three elements of guilt of any crime, *viz*, the corpus delecti, defendant's causation, and requisite *mens rea*, the defendant is entitled to be acquitted. . . . Just as the absence of sufficient proof of the prosecution's case on the *mens rea* element calls for an acquittal, so does the proof of affirmative facts in defense which reach the same end as the lack of the prosecution's case." *Ibid*, 320.