

Interoffice Memorandum
For Marcus Hill
From Margaret Hester
May 30, 2012

Implementing a Defense of Duress/Necessity: Must It Be Objectively Necessary?

The “necessity defense” allows an individual to break the law when the circumstances deem it so necessary. So, how does one determine what is necessary? Is an objective standard based on the opinion of a neutral observer used or the subjective opinion of the individual implementing the defense? Black's Law Dictionary states: "A person is excused from criminal liability if he acts under a duress of circumstances to protect life or limb or health in a reasonable manner and with no other acceptable choice." Black's Law Dictionary 929 (rev. 5th ed.1979). The public policy that supports the necessity defense is that "the law ought to promote the achievement of higher values at the expense of lesser values, and [that] sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." W. LaFave & A. Scott, Handbook on Criminal Law § 50, at 382 (1972). "[I]f the harm which will result from compliance with the law is greater than that which will result from violation of it, [a person] is justified in violating it." Id. at 381. LaFave and Scott state:

The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is justified in violating it. Under such circumstances he is said to have the defense of necessity, and he is not guilty of the crime in question—unless, perhaps, he was at fault in bringing about the emergency situation, in which case he may be guilty of a crime of which that fault is an element.

LaFave and Scott, Criminal Law Sec. 50 at 381 (1972).

“The United States Supreme Court recognized the necessity defense in *United States v. Bailey*, and qualified its use as follows: [u]nder 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 harm,’ the defenses will fail.” *State v. Gainey*, 351 S.E.2d 819, 821 (1987). (Internal citations omitted.) In *State v. Wray*, a druggist unlawfully sold spirituous liquors for medicinal purposes at the direction of a physician. The Court held that the druggist was not indictable because the liquor was sold "in good faith, and after the exercise of due caution as to its necessity as a medicine." *State v. Wray*, 72 N.C. 253 (1873).

Courts have recently held that there is little distinction between the defense of necessity and that of duress. At the time of *United States v. Bailey*, the majority discarded the labels ... choosing instead to examine the policies underlying the traditional defenses. *United States v.*

Bailey, 444 U.S. 394, 410 (1980). “In particular, the majority felt that the defenses were designed to spare a person from punishment if he acted ‘under threats or conditions that a person of ordinary firmness would have been unable to resist,’ or if he reasonably believed that criminal action ‘was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense.’” *Id.*, at 410. The Model Penal Code redefines the defenses along similar lines. See Model Penal Code § 2.09 (duress) and § 3.02 (choice of evils).

Typically in the law, a subjective standard is based on whether or not a person actually has a belief, while an objective standard is applied when determining whether or not that person’s belief was reasonable. Each of the cases and excerpts above refers to the reasonableness of the belief of necessity as opposed to the mere existence of a belief. Therefore, when implementing the defense of necessity, the person must first have the belief that his/her actions are necessary but it is essential that that belief be reasonable. One of the standards included by the North Carolina Court of Appeals is that there must be evidence showing that the defendant faced a threat of some kind at the time of apprehension. *State v. Cooke*, 380 S.E.2d 382, 382. A closer look into other cases that discuss “reasonableness” shows that the term reasonable or reasonableness is used to imply an objective standard, often based on how a reasonable person would act. “The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of *objective reasonableness-what would the typical reasonable person have understood* by the exchange between the officer and the suspect?” *State v. Lopez*, 723 S.E.2d 164 (2012). (Emphasis added.) The court in *State v. Schiro* referenced the same quote, but went a bit further stating that “[t]he scope of a valid consent search is measured against a *standard of objective reasonableness* where the court asks ‘what would the typical reasonable person have understood by the exchange between the officer and the suspect?’ ” *State v. Schiro*, 723 S.E.2d 134 (2012).

State v. Castillo
713 S.E.2d 190, 194

N.C.App.,2011 On the other hand, it need not be shown that the defendant lacked mental capacity with respect to all matters. A person may be sane on every subject but one and yet, if his mental disease or defect with respect to that one subject renders him unable to know the nature and quality of the act or to know that the act with which he was charged was wrong, he is not guilty by reason of insanity. Since sanity or soundness of mind is the natural and normal condition of people, everyone is presumed to be sane until the contrary is made to appear. This means that the defendant has the burden of proof on the issue of sanity—of insanity. However, unlike the State, which must prove all the other elements of the crime beyond a reasonable doubt, the defendant need only prove his insanity to your satisfaction; that is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt but simply to your satisfaction that the defendant was insane at the time of the alleged offense.

In making this determination, you must consider all of the evidence before you which has any tendency to throw any light on the mental condition of the defendant, including lay testimony reciting irrational or rational behavior of the defendant before, during or after the alleged offense; opinion testimony by lay and expert witnesses or other evidence admitted. None of these things are conclusive, but all are circumstances to be considered by you in reaching your decision. If you are not satisfied as to the insanity of the defendant, the defendant is presumed to be sane; and you would find the defendant guilty.

State v. Weeks
322 N.C. 152, 175, 367 S.E.2d 895
N.C.,1988.
May 05, 1988

In his final assignment of error relating to jury instructions, defendant contends that the trial court erred in its instructions concerning defendant's burden of proving his insanity defense. Defendant argues that a trial court's refusal to define "satisfaction," as used in the jury instructions, leaves unbridled discretion in the jury as to **909 a defendant's burden of proof and creates a potential for inconsistent jury decisions.

As conceded by defendant, the trial court instructed the jury substantially in accordance with existing North Carolina law on the insanity defense. The trial court instructed the jury in relevant part as follows:

[T]he defendant has the burden of proof on the issue of insanity. However, unlike the State, which must prove all the other elements of the crime beyond a reasonable doubt, the defendant need only prove his insanity to your satisfaction.

[35] Headnote Citing References Defendant contends that the trial court should have defined "satisfaction." However, as conceded by defendant, this issue has previously been addressed by this Court, and we found no error in the trial court's refusal to define "satisfaction" to the jury. State v. Franks, 300 N.C. 1, 265 S.E.2d 177. In the present case, as in Franks, the jury was properly instructed on the standard of proof needed by defendant to prove his insanity.

Furthermore, from its own determination and from the trial court's instructions, a jury knows what satisfies it, and a "jury is presumed to have understood the plain English contained" in the trial court's instruction. *Franks*, 300 N.C. at 18, 265 S.E.2d at 187. Defendant's argument is meritless.