

A man was prosecuted for selling cocaine to an undercover police agent. At his trial, the man testified that he only sold the drugs to the agent because the agent had told him that he (the agent) would be killed by fellow gang members unless he supplied them with cocaine. The prosecution did not cross-examine the man. As rebuttal evidence, however, the prosecutor introduced records, over the man's objection, showing that the man had two prior convictions for narcotics-related offenses. The court instructed the jury concerning the defense of entrapment and added, also over the man's objection but in accord with state law, that it should acquit on the ground of entrapment only if it found that the defendant had established the elements of the defense by a preponderance of the evidence. The man was convicted.

On appeal, the man argued that his conviction should be reversed for two reasons: the trial court violated the man's right to due process of law by imposing on the defense the burden of persuasion and erroneously admitted his prior convictions as substantive evidence concerning entrapment.

How should the appellate court rule on the man's conviction?

- A. Affirm the conviction.
- B. Reverse the conviction, because the trial court erroneously admitted the man's prior convictions as substantive evidence.
- C. Reverse the conviction, because the trial court violated the man's right to due process by imposing on the defense a burden of persuasion concerning entrapment.
- D. Reverse the conviction on both grounds.

## Explanation:

### Evidence of crimes or bad acts

(Federal Rule of Evidence 404)

Admissible for noncharacter purposes—eg:

Motive/opportunity

Intent

Mistake/accident (absence of)

Identity

Common scheme/plan

Mnemonic: **MIMIC**

Under the harmless error test, an appellate court should affirm a conviction if the prosecution proves beyond a reasonable doubt that a trial error (eg, constitutional violation, evidentiary error) did not contribute to the defendant's conviction. Here, the man is challenging his conviction on two grounds: (1) the jury instruction on entrapment violated his right to due process and (2) the trial court improperly admitted his prior convictions into evidence.

To comply with **due process**, a jury instruction must explain that the **prosecution has the burden** to prove every element of a **criminal offense** beyond a reasonable doubt. However, due process only applies to criminal offenses—not **affirmative defenses**, which justify or excuse a defendant's criminal conduct but do not negate an element of the crime. Therefore, the defendant can bear the burden to prove an affirmative defense under any **evidentiary standard**.

Here, the man was prosecuted for selling cocaine and asserted entrapment as a defense. This defense *excuses* criminal behavior if (1) the behavior was induced by a government agent and (2) the defendant would not have otherwise committed the crime. And since entrapment does *not negate* an element of the crime, it is an affirmative defense. Therefore, the trial court's jury instruction—that the man had the burden to prove this defense by a preponderance of the evidence—did not violate due process and is not a ground for reversal (**Choices C & D**).

The man's second challenge relies on Federal Rule of Evidence 404, which generally bars the prosecution from introducing evidence of the defendant's **bad character** (eg, past crimes, prior bad acts). But this evidence can be introduced if:

it is being used for a **noncharacter purpose**—eg, to prove **motive/opportunity**, **intent/knowledge**, absence of **mistake/accident**, **identity**, or **common plan/scheme** (MIMIC) *and*

its **probative value outweighs** the danger of **unfair prejudice**—eg, records showing multiple convictions of unrelated or heinous offenses should be excluded because their usefulness does not outweigh the bias they would cause.

Here, the man's two narcotics-related convictions were admitted as substantive evidence—to rebut the man's entrapment defense. The convictions showed that the man may have committed the crime without the agent's inducement because he did so in the past (evidence of motive or intent—not bad character). And since the prejudice posed by those convictions was outweighed by the probative value of assessing the man's entrapment defense, this evidence was properly admitted. Therefore, his conviction should be affirmed **(Choices B & D)**.

#### **Educational objective:**

A criminal defendant can be required to prove an affirmative defense under any evidentiary standard. Additionally, evidence of a defendant's bad character is generally inadmissible but can be used for a noncharacter purpose (MIMIC) if its probative value outweighs the danger of unfair prejudice.

#### **References**

U.S. Const. amend. XIV § 1 (due process clause applied to the states).

U.S. Const. amend. V (due process clause applied to the federal government).

Patterson v. New York, 432 U.S. 197, 210 (holding that a defendant can bear the burden of proof for affirmative defenses).

Fed. R. Evid. 404(b)(2) (admissibility of prior criminal convictions as character evidence).

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