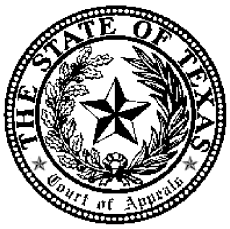
Affirmed and Opinion filed October 11, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00954-CR
NO. 14-00-00955-CR

ADRIAN CHARLES FLINT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause Nos. 844,059 & 833,100

O P I N I O N

Appellant, Adrian Charles Flint, was convicted of aggravated assault and injury to a child. In two points of error, appellant contends the trial court erred in instructing the jury. We affirm.

Appellant was charged with aggravated assault and injury to a child for shooting his girlfriend and their five-month-old daughter on January 9, 2000. At trial, appellant's primary defense was involuntary intoxication. Specifically, appellant claimed that shortly before the shooting, he smoked a marijuana cigarette that, without his knowledge, had been

laced with phencyclidine, or PCP. Appellant thus claims that as a result of smoking the PCP-laced marijuana cigarette, he was not aware of his conduct during the attacks.

In his first point of error, appellant argues the trial court failed to instruct the jury properly regarding the burden of proof on the affirmative defense of involuntary intoxication. In both cases, the trial court instructed the jury that involuntary intoxication is a defense, and correctly set forth the elements of that defense as established in *Torres v. State*, 585 S.W.2d 746, 749 (Tex. Crim. App. [Panel Op.] 1979). However, the trial court never expressly referred to it as an "affirmative defense." In the application paragraph of the charge in both cases, the trial court stated:

> [If] you further find from the evidence, or you have a reasonable doubt thereof, that at such time [of the offense] the defendant was suffering a disturbance of mental or physical capacity resulting from the introduction of an intoxicating substance into his body, and that the accused has exercised no independent judgment or volition in taking the intoxicant, and that as a result of his intoxication he did not know that his conduct was wrong or he was incapable of conforming his conduct to the requirements of the law he is alleged to have violated, then you will find him not guilty.

Appellant correctly notes that section 2.04 of the Penal Code states that if an affirmative defense is submitted to the jury, "the court shall charge that the defendant must prove the affirmative defense by a preponderance of evidence." TEX. PENAL CODE ANN. § 2.04(d) (Vernon 1994). Involuntary intoxication is an affirmative defense. *Hardie v. State*, 588 S.W.2d 936, 939 (Tex. Crim. App. [Panel Op.] 1979); *Torres*, 585 S.W.2d at 750. Thus, the trial court erred by charging the jury that it may acquit if it had only a reasonable doubt that appellant's mental or physical capacity was sufficiently disturbed as a result of involuntary intoxication.

Because appellant did not object to the court's charge in the trial court, we may reverse only if we find the error so egregious and harmful that appellant has not had a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). Appellant fails to demonstrate any harm, much less egregious harm, resulting from

the trial court's error. If anything, the error benefitted appellant by shifting the burden of persuasion on his affirmative defense to the State. Appellant contends that the court's charge was ambiguous, citing *Riley v. State*, 830 S.W.2d 584 (Tex. Crim. App. 1992). In *Riley*, because the defendant had previously been adjudicated insane, the prosecution had the burden of proving his sanity beyond a reasonable doubt. However, the court's charge contained conflicting instructions regarding the burden of proof on this issue, creating an ambiguous charge. *Id.* at 586. Here, no such ambiguity exists; the charge unambiguously places the ultimate burden of proof on the prosecution. We overrule appellant's first point of error.

In his second point of error, appellant complains the trial court failed to instruct the jury on the separate affirmative defense of insanity. It is undisputed that at trial, appellant did not request this instruction and did not object to the absence of this instruction from the charge. The trial court has no duty to *sua sponte* instruct the jury on an unrequested defensive issue. *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998). This is true even though the issue might have been raised by the evidence at trial. *Id.* The trial court did not err in refusing to instruct the jury on the defense of insanity. Appellant's second point of error is overruled.

The trial court's judgment is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed October 11, 2001.
Panel consists of Justices Yates, Edelman, and Wittig.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Don Wittig sitting by assignment.