2

GENERAL PRINCIPLES OF LIABILITY

2C:2-1. Requirement of voluntary act; omission as basis of liability; possession as an act

a. A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable. A bodily movement that is not a product of the effort or determination of the actor, either conscious or habitual, is not a voluntary act within the meaning of this section.

b. Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
   (1) The omission is expressly made sufficient by the law defining the offense; or
   (2) A duty to perform the omitted act is otherwise imposed by law, including but not limited to, laws such as the “Uniform Fire Safety Act,” P.L.1983, c. 383 (C.52:27D-192 et seq.), the “State Uniform Construction Code Act,” P.L.1975, c. 217 (C.52:27D-119 et seq.), or any other law intended to protect the public safety or any rule or regulation promulgated thereunder.

c. Possession is an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

PRACTICAL APPLICATION OF STATUTE

The one football player slapping the other is a voluntary act and therefore makes him culpable for simple assault. However, if the facts were modified wherein the ballplayer’s striking conduct was the result of an epileptic seizure, his bodily movement would not be considered legally voluntary and, accordingly, it would be inappropriate to charge him with simple assault.

2C:2-2. General requirements of culpability

a. Minimum requirements of culpability. Except as provided in subsection c.(3) of this section, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

b. Kinds of culpability defined.
(1) **Purposely.** A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. “With purpose,” “designed,” “with design” or equivalent terms have the same meaning.

(2) **Knowingly.** A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. “Knowing,” “with knowledge” or equivalent terms have the same meaning.

(3) **Recklessly.** A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation. “Recklessness,” “with recklessness” or equivalent terms have the same meaning.

(4) **Negligently.** A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation. “Negligently” or “negligence” when used in this code, shall refer to the standard set forth in this section and not to the standards applied in civil cases.

c. **Construction of statutes with respect to culpability requirements.**

   (1) Prescribed culpability requirement applies to all material elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

   (2) Substitutes for kinds of culpability. When the law provides that a particular kind of culpability suffices to establish an element of an offense such element is also established if a person acts with higher kind of culpability.

   (3) Construction of statutes not stating culpability requirement. Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime with the culpability defined in paragraph b.(2) of this section. This provision applies to offenses defined both within and outside of this code.
2C:2-3.

**d. Culpability as to illegality of conduct.** Neither knowledge nor recklessness nor negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the code so provides.

**e. Culpability as determinant of grade of offense.** When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or criminally negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

2C:2-3. **Causal relationship between conduct and result; divergence between result designed, contemplated or risked and actual result**

**a.** Conduct is the cause of a result when:

(1) It is an antecedent but for which the result in question would not have occurred; and

(2) The relationship between the conduct and result satisfies any additional causal requirements imposed by the code or by the law defining the offense.

**b.** When the offense requires that the defendant purposely or knowingly cause a particular result, the actual result must be within the design or contemplation, as the case may be, of the actor, or, if not, the actual result must involve the same kind of injury or harm as that designed or contemplated and not be too remote, accidental in its occurrence, or dependent on another’s volitional act to have a just bearing on the actor’s liability or on the gravity of his offense.

**c.** When the offense requires that the defendant recklessly or criminally negligently cause a particular result, the actual result must be within the risk of which the actor is aware or, in the case of criminal negligence, of which he should be aware, or, if not, the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or dependent on another’s volitional act to have a just bearing on the actor’s liability or on the gravity of his offense.

**d.** A defendant shall not be relieved of responsibility for causing a result if the only difference between what actually occurred and what was designed, contemplated or risked is that a different person or property was injured or affected or that a less serious or less extensive injury or harm occurred.

**e.** When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor’s conduct.

2C:2-4. **Ignorance or mistake**

**a.** Ignorance or mistake as to a matter of fact or law is a defense if the defendant reasonably arrived at the conclusion underlying the mistake and:

(1) It negatives the culpable mental state required to establish the offense; or
(2) The law provides that the state of mind established by such ignorance or mistake constitutes a defense.

b. Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

c. A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(1) The statute defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
(2) The actor acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (a) a statute, (b) judicial decision, opinion, judgment, or rule, (c) an administrative order or grant of permission, or (d) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense; or
(3) The actor otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude.

The defendant must prove a defense arising under subsection c. of this section by clear and convincing evidence.

**Practical Application of Statute**

The Gloucester County Prosecutor’s Office and West Deptford Police Department were correct in their decision to decline prosecution of the jewelry clerk for manslaughter after he had shot and killed the shirtless man handcuffed in his store. Sound rationale to decline prosecution is that the clerk would be successful in a defense of mistake.

2C:2-4 provides that a mistake as to a matter of fact is a defense if an individual “reasonably arrived at the conclusion underlying the mistake” and such mistake negates an offense’s required mental state.

Manslaughter and aggravated manslaughter require an individual to manifest a mental state of “recklessness” to be convicted for either of these offenses. In other words, a person must act recklessly in causing another’s death.

A review of the circumstances that led to the shirtless man’s death shows that the jewelry clerk did not act recklessly in grabbing a gun to protect himself. The clerk had just been robbed by an armed assailant who repeatedly struck him with a baseball bat. The shirtless man clearly was involved in the robbery, egging the masked man on and calling for him to “knock the dude out.” Even though the half-clothed man was handcuffed, he reached for an item that reasonably could
appear to be a gun. Unfortunately, the item turned out to be a hairbrush and the clerk’s gun accidentally fired.

The jewelry clerk’s *mistake of fact*—that the robbery suspect was actually reaching for a brush and not a gun—was reasonable under the totality of the circumstances. It gave rise to him appropriately grabbing a gun to protect himself as he feared for his life. This reasonable conclusion negates manslaughter’s required culpable mental state of recklessness. Under New Jersey law, recklessness and mistake of fact have a mirror relationship. Where a person makes a reasonable mistake, he cannot act recklessly. Accordingly, while defenses are generally raised at trial to ward off a state-sought conviction, it would be fundamentally unfair to charge the jewelry clerk in this case—given the reasonableness of his mistake.

As a special note, generally courts will find that a *mistake of law*, or *ignorance of the law*, is no defense. Special exceptions will occur, however, in circumstances where a defendant has relied upon an erroneous statute or judicial opinion of an official interpretation of the law by a sanctioned body. For example, if the New Jersey attorney general or a county prosecutor specifically advised a pharmacist that it was legal to prescribe cocaine to individuals suffering from depression, then the state would be hard-pressed to charge that pharmacist with illegal drug distribution (under Title 2C:35 of the codebook) if he did indeed fulfill a prescription for cocaine for a depressed patient.

In most cases, however, individuals are responsible for knowing the criminal laws that govern in the state. Arguments that lack of knowledge or insufficient notice of the law is present almost always will be rejected. Rarely, if ever, should law enforcement officers not charge an individual with an offense because a defendant or his attorney claims ignorance of the law. If such a defense exists, it is a matter for the courts to determine.

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**2C:2-5.**

**Defenses generally**

Conduct which would otherwise be an offense is excused or alleviated by reason of any defense now provided by law for which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the defense claimed does not otherwise plainly appear.

**2C:2-6.**

**Liability for conduct of another; complicity**

a. A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

b. A person is legally accountable for the conduct of another person when:

(1) Acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct;
(2) He is made accountable for the conduct of such other person by the code or by
the law defining the offense;
(3) He is an accomplice of such other person in the commission of an offense; or
(4) He is engaged in a conspiracy with such other person.
c. A person is an accomplice of another person in the commission of an offense if:
(1) With the purpose of promoting or facilitating the commission of the offense; he
(a) Solicits such other person to commit it;
(b) Aids or agrees or attempts to aid such other person in planning or commit-
ting it; or
(c) Having a legal duty to prevent the commission of the offense, fails to make
proper effort so to do; or
(2) His conduct is expressly declared by law to establish his complicity.
d. A person who is legally incapable of committing a particular offense himself may
be guilty thereof if it is committed by another person for whose conduct he is legally
accountable, unless such liability is inconsistent with the purpose of the provision
establishing his incapacity.
e. Unless otherwise provided by the code or by the law defining the offense, a person is
not an accomplice in an offense committed by another person if:
(1) He is a victim of that offense;
(2) The offense is so defined that his conduct is inevitably incident to its commission;
or
(3) He terminates his complicity under circumstances manifesting a complete and
voluntary renunciation as defined in section 2C:5-1d. prior to the commission
of the offense. Termination by renunciation is an affirmative defense which the
defendant must prove by a preponderance of the evidence.
f. An accomplice may be convicted on proof of the commission of the offense and of his
complicity therein, though the person claimed to have committed the offense has not
been prosecuted or convicted or has been convicted of a different offense or degree of
offense or has an immunity to prosecution or conviction or has been acquitted.

**Practical Application of Statute**

**Accountable as an Accomplice—Soliciting an Offense**

Bill McNichol should be charged with the armed robbery of his football player
teammate, Rodney Crawson. While McNichol did not actually tote the gun
or physically steal the cash from Crawson’s automobile, under 2C:2-6c.(1)(a),
McNichol is an accomplice to the robbery because he solicited Westmont to
commit the offense.

2C:2-6b.(3) provides that a “person is legally accountable for the conduct of
another person when he is an “accomplice of such other person in the commission
of the offense.” McNichol is an accomplice to the armed robbery, due to his
solicitation of Michael Westmont’s criminal activities as aforementioned.
Accordingly, McNichol’s status as an accomplice makes him legally accountable
for the armed robbery to the same extent as Westmont.
Accountable as an Accomplice—Aiding an Offense

In the same vein, had the shirtless man lived, he would have been appropriately charged for armed robbery even though Jacques Vandermeit brandished the weapon and took the gems. What makes the shirtless man an accomplice to the offense is not that he solicited Vandermeit to commit the crime, but that he aided Vandermeit in the commission of it.

2C:2-6c.(1)(b) states that a person is an accomplice of another person in the commission of an offense if “...he aids or agrees or attempts to aid such other person in planning or committing it.” The shirtless man drove to the crime location with Vandermeit. He accompanied him into the jewelry store and urged Vandermeit to knock the victim out during the baseball-bat beating, and he stuffed a handful of diamonds in his masked partner's pocket. The sum total of these actions demonstrates that the shirtless man aided Vandermeit in committing the armed robbery of the jewelry store. Accordingly, he would be an accomplice to the offense and legally accountable for Vandermeit’s armed robbery conduct. But would the shirtless man be held legally accountable for the separate offense of aggravated assault? For Vandermeit’s beating of the jewelry clerk? The answer is probably yes.

Even though the shirtless man did not physically partake in hitting the clerk with the baseball bat, he actively urged Vandermeit to strike him. The shirtless man called for him to “knock the dude out.” Although case law is a bit gray in this area, New Jersey courts have routinely found this kind of conduct to amount to complicity, making an individual an accomplice to the offense. As such, the shirtless man would have been appropriately charged with aggravated assault had he not been killed by the jewelry clerk.

Accountable Due to Conspiracy

In both the football player heist and the jewelry store robbery, the criminal mastermind sought by state and local police would be legally accountable for the armed robberies—as a conspirator.

2C:2-6b.(4) sets forth that a person is legally accountable for the conduct of another person if “he is engaged in a conspiracy with such other person.” The elements necessary to charge someone with conspiracy will be discussed later in this book. Simply, however, the mastermind’s planning and arrangement with Michael Westmont (in the football player case) and Jacques Vandermeit (in the jewelry store case) to commit their respective armed robberies, make him a co-conspirator in those offenses. Being culpable in this manner, the mastermind is legally accountable for both armed robberies to the same extent as Westmont and Vandermeit. He would be appropriately charged with both crimes.

2C:2-7. Liability of corporations and persons acting, or under a duty to act, in their behalf

a. A corporation may be convicted of the commission of an offense if:
(1) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation unless the offense is one defined by a statute which indicates a legislative purpose not to impose criminal liability on corporations. If the law governing the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply;

(2) The offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(3) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.

b. As used in this section:

(1) “Corporation” does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(2) “Agent” means any director, officer, servant, employee or other person authorized to act in behalf of the corporation;

(3) “High managerial agent” means an officer of a corporation or any other agent of a corporation having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation.

c. In any prosecution of a corporation for the commission of an offense included within the terms of subsection a. (1) of this section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

d. Nothing in this section imposing liability upon a corporation shall be construed as limiting the liability for an offense of an individual by reason of his being an agent of the corporation.

2C:2-8. Intoxication

a. Except as provided in subsection d. of this section, intoxication of the actor is not a defense unless it negates an element of the offense.

b. When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

c. Intoxication does not, in itself, constitute mental disease within the meaning of chapter 4.

d. Intoxication which (1) is not self-induced or (2) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct did not know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. Intoxication under this subsection must be proved by clear and convincing evidence.

e. Definitions. In this section unless a different meaning plainly is required:
2C:2-8.  

(1) “Intoxication” means a disturbance of mental or physical capacities resulting from the introduction of substances into the body; 

(2) “Self-induced intoxication” means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime; 

(3) “Pathological intoxication” means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

**Practical Application of Statute**

When charging an individual with offenses, law enforcement officers may want to take intoxication into consideration. However, this is a defense and, as such, really is a matter for the trier of fact to determine at the time of trial. In any case, had the shirtless man survived the aftermath of the jewelry store robbery, intoxication may have been a valid defense for the offenses he was involved with that day. Autopsy results showed he had high levels of PCP and alcohol in his blood. 

To prevail in this defense, the shirtless man would need to show that either his intoxication was not self-induced or that it was pathological, meaning that it was “grossly excessive in degree.” Furthermore, subsection d. of the statute provides that he would need to demonstrate that this intoxication resulted in an inability to know the nature and quality of his actions, or if he did know it, that he did not know what he was doing was wrong. 

Was the shirtless man’s intoxication not self-induced, meaning that the masked man, Jacques Vandermeit, injected PCP into his system and forced him to consume alcohol? Evidence at trial could show that. If his intoxication was self-induced, was it grossly excessive in degree? An expert at trial could testify to this. Self-induced or not, grossly excessive or not, did the intoxication cause the shirtless man to not know the nature and quality of his acts or to not know what he was doing was wrong? Again, an expert at trial may be able to convince a jury of this. 

Although the West Deptford Police Department and Gloucester County Prosecutor’s Office certainly would want to take into consideration the shirtless man’s intoxication, for evidentiary purposes, they shouldn’t avoid charging him, or anyone for that matter, because of their findings of intoxication. Intoxication, as a defense, should be left to the court system for determination. 

As a special note, intoxication can be a defense to murder, reducing the offense to the lesser homicide statute of manslaughter. Courts have concluded that intoxication can negate the necessary mental states of murder, “purposeful” or “knowledge.” Intoxication can not be a defense to manslaughter, however, as it cannot negate one of manslaughter’s crucial elements—an actor’s “reckless” mental state. So while a defendant may be able to use the intoxication defense
to lower his charge from murder to manslaughter, he cannot escape a homicide conviction altogether because he was drunk or high.

2C:2-9.

Duress

a. Subject to subsection b. of this section, it is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

b. The defense provided by this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was criminally negligent in placing himself in such a situation, whenever criminal negligence suffices to establish culpability for the offense charged. In a prosecution for murder, the defense is only available to reduce the degree of the crime to manslaughter.

c. It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this section. The presumption that a woman, acting in the presence of her husband, is coerced is abolished.

Practical Application of Statute

Whether duress is a defense in a given case is a matter for the courts to determine. A modification of the facts involving the shirtless man, however, can exemplify where this defense may be applicable.

If Jacques Vandermeit, the masked criminal, had stripped the shirtless man of his clothing and forced him by gunpoint to be part of the jewelry store heist, then the shirtless man probably would be successful in a defense of duress. 2C:2-9a. provides that duress is an affirmative defense where an individual is coerced by the use of, or threat to use, unlawful force to commit a crime—“which a person of reasonable firmness in his situation would have been unable to resist.” Here, again, the code sets forth a reasonableness requirement. Certainly, a person of reasonable firmness would have accompanied Vandermeit into the jewelry store robbery if forced to do so by gunpoint. Therefore, under these circumstances, duress would be an affirmative defense for the shirtless man. Would duress be an affirmative defense, however, if the shirtless man was aware that the masked man was about to commit the robbery and actively sought to drive with him to the jewelry store? And once there the masked man forced him at gunpoint to join him in the robbery? It’s unlikely that the defense would be available here.

2C:2-9b. provides that the defense of duress is “unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress.” Under the aforementioned fact pattern, the shirtless man’s own decision to travel with the masked man to a robbery location likely would be found to be reckless. Accordingly, he would lose any defense of duress.
2C:2-10. Consent

a. In general. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

b. Consent to bodily harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if:

   (1) The bodily harm consented to or threatened by the conduct consented to is not serious; or

   (2) The conduct and the harm are reasonably foreseeable hazards of joint participation in a concerted activity of a kind not forbidden by law; or

   (3) The consent establishes a justification for the conduct under chapter 3 of the code.

c. Ineffective consent. Unless otherwise provided by the code or by the law defining the offense, assent does not constitute consent if:

   (1) It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

   (2) It is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature of harmfulness of the conduct charged to constitute an offense; or

   (3) It is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.

Practical Application of Statute

The West Deptford Police Department would be correct in charging Jacques Vandermeit with aggravated assault even if they learned that the jewelry clerk consented to Vandermeit’s baseball-bat beating. While 2C:2-10b.(1) provides a defense for the infliction of bodily injury that is consented to, it only permits it under circumstances where “the bodily harm consented to...is not serious.” Given that the jewelry clerk was struck multiple times with the baseball bat, the bodily harm likely would be quite serious. Accordingly, in this situation, consent would not be a defense.

A person, however, probably could prevail through a consent defense if another had consented to a slap in the face or a punch to the arm. Interestingly, the statute provides language in subsection b.(2) for a consent defense in circumstances of “joint participation in a concerted activity of a kind not forbidden by law.” This is why people are not prosecuted for participating in a boxing or wrestling match—the opponent’s consent to his beating is a valid defense in those situations.
2C:2-11. De minimis infractions

The assignment judge may dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

a. Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;

b. Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

c. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense. The assignment judge shall not dismiss a prosecution under this section without giving the prosecutor notice and an opportunity to be heard. The prosecutor shall have a right to appeal any such dismissal.

2C:2-12. Entrapment

a. A public law enforcement official or a person engaged in cooperation with such an official or one acting as an agent of a public law enforcement official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such offense by either:

   (1) Making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

   (2) Employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

b. Except as provided in subsection c. of this section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the trier of fact.

c. The defense afforded by this section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

Practical Application of the Statute

Entrapment is a defense that is rarely successful in its imposition. However, it is a legally viable mechanism for an accused individual to avoid conviction and, therefore, it is important to understand the narrow scenarios that allow it to be invoked.
As subsection c. of the statute provides, the defense is unavailable when an element of the charged offense involves “causing or threatening bodily injury.” With this being the case, none of the accused armed robbers—Westmont, Vandermeit or Peterson—could avail himself/herself of the defense since bodily injury was caused or threatened in all of their incidents. But what if the facts were modified in one of their cases? For instance, what if Michael Westmont merely snuck into Rodney Crawson’s car and stole his cash? And he was solicited to commit this nonviolent theft not by professional football star Bill McNichol, but by an undercover police officer—could Westmont claim entrapment? Perhaps.

For an entrapment defense to prevail, the statute necessitates that the underlying crime must be “induced or encouraged” by a “public law enforcement official.” This inducement must directly cause an individual to commit the crime. Even more so, for the entrapment defense to work, the defendant must prove that the law enforcement officer made “knowingly false representations” that the conduct constituting the offense is not prohibited or employed methods of inducement that created a “substantial risk” that a person not ready to commit the offense would thereafter commit it.

Based on the aforesaid, Michael Westmont could not succeed in an entrapment defense merely because an undercover officer solicited his thievery conduct. But he could be victorious via the defense if he proved that the undercover cop purposely lied to him, advising that taking Crawson’s cash was not illegal because the money had been abandoned and belonged to no one. Westmont could also be victorious if he were able to prove that he would have never normally been predisposed to commit the theft, but the undercover officer’s methods of persuasion were so severe that they changed his perspective, thereby causing him to steal Crawson’s cash. As one can see, the burden of proof here is on the defendant, and it is a very difficult burden to meet. This is why the defense if rarely invoked and also why triers of fact rarely accept it. Still, law enforcement officers should be wary of engaging in certain crime-inducement activities; otherwise their charges may not stick.