Widener University

☐ 4601 Concord Pike, P.O. Box 7474 • Wilmington, DE 19803-0474 ☐ 3800 Vartan Way • Harrisburg, PA 17110-9450

School of Law Direct Dial Number: (302) 477-2135 (302) 477-2100 Fax: (302) 477-2255

(717) 541-3900 Fax: (717) 541-3966

MEMORANDUM

TO:

Criminal Law Students

FROM:

Professor Len Sosnov

DATE:

February 2, 1995

RE:

Fall Exam and Answers

Attached is a copy of the exam and some good sample answers to the questions. They are not perfect and opposite conclusions could be reached and defended equally as well on some issues. Such Answers would receive the same credit. It is important to spot the issues and address them, setting forth the governing legal principles and then applying the facts to reach conclusions which are supported by the reasons you give.

Attachments

Question One (75 points)

Mrs. Winona Cawkings ("W"), age 25, was the mother of one girl, Dottie ("D"), age 6, who lived with her. Mrs. Cawkings very much loved her child, as did her former husband and the father of the child, Harry Cawkings ("H"), age 27. Although divorced, they still had an on and off again relationship. H would come around to see W and daughter D.

On September 24, 1994, early in the evening, H came over to W's house, and they spent the evening and early morning hours continuously drinking liquor (Jack Daniels). Right after brief but passionate lovemaking, H asked W if he could take D for a ride to the neighborhood diner and get her breakfast. She said, "Okay, honey, please be careful." H said, "Baby, you know even drunk I usually can drive okay. The diner's only a mile away." W woke D, got her dressed, and told her, "Have a nice time at breakfast with Daddy." H left with D. About a half mile from the house he lost control of the car and drove into a tree. H, seriously injured, survived the crash, but D died on impact.

At the time of this incident, H was on probation for a conviction for drunk driving earlier that year involving an accident. As a term of probation, a breath-analyzer device had been installed in his car. The car would not start without someone with alcohol-free breath blowing into the device. W told the police, when questioned after the fatal crash, that she knew about the probation conditions and that her daughter would have to blow into the device to get the car started. "Harry was too looped to do it." She also said that she was aware that H had had to have their daughter activate the breath-analyzer on several other occasions to start the car. After the accident, H's blood was analyzed, and he had a .22

BAC (blood alcohol content), over twice the legal limit of .10 under the drunk driving laws.

The prosecutor is definitely going to charge H with drunk driving, which is a felony in this jurisdiction, and other charges. She also intends to charge W with various offenses.

You are working for the prosecutor. Besides the drunk driving charge against H (of which she is very confident H will be found guilty), she is considering other charges, some of which she wants you to evaluate. They are:

- (a) A drunk driving charge against W.
- (b) Any conspiracy charges against \underline{W} and \underline{H} .
- (c) Any possible homicide charges against W and H.

The prosecutor wants you to evaluate these charges individually with respect to each defendant (except the drunk driving charge against H). You should conclude what the likely chance for success is against each defendant, including what the most serious charges are that might work against each of them.

The conspiracy law in this state is the majority view adopted by most states. The homicide statute is as follows:

<u>Murder of the first degree</u> — Intentionally causing the death of another. (Life imprisonment or death)

Murder of the second degree — A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony. (Life imprisonment)

<u>Murder of the third degree</u> — All other kinds of murder shall be murder of the third degree (felony of the first degree punishable by up to 20 years in prison)

<u>Definitions</u> — As used in these statutes the following words and phrases shall have the meanings given to them in this subsection:

"Perpetration of a felony." The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, or kidnapping.

"Principal." A person who is the actor or perpetrator of the crime.

Voluntary Manslaughter.

(a) A person who recklessly causes the death of another.

or

(b) A person who kills an individual without lawful justification, if, at the time of the killing, he is acting under a sudden and intense passion resulting from reasonable provocation.

Involuntary Manslaughter

Grossly negligently causing the death of another. (Misdemeanor punishable by up to 5 years in prison).

PLEASE TURN THE PAGE FOR QUESTION II

Question II (45 points)

Herbie Clack is sitting at home, unemployed, depressed, without a car, and very short on money. He decides to rob a liquor store several miles away in another neighborhood. He is in the living room, drawing a map of his possible escape route, and a list of supplies he will need to get for the robbery (mask, gun, etc). Herbie has already taken out a pair of gloves from the closet which he plans to wear so that he doesn't leave any fingerprints. He has also called his friend Allan, who agrees to be the driver and lookout if he can borrow a car. His brother Clarence Clack walks in. An argument ensues when Clarence realizes what Herbie is planning to do, as Clarence is outraged at the embarrassment and shame it will cause the family if Herbie is caught.

Clarence is pushed by Herbie, stumbles, loses his balance, and falls, sustaining serious bodily injury (severe damage to his shoulder which will bother him for the rest of his life). Herbie decides not to go ahead with the robbery, afraid now that his brother Clarence will turn him in. What he doesn't realize is that the liquor store had been gutted by a fire a week earlier, and was closed permanently anyway. Two days later, Clarence tells the police his version of what happened, and Herbie is arrested and charged with attempted robbery and simple assault (negligently causing serious bodily injury).

All of the above facts are not in dispute. At trial, there will potentially be only three witnesses: Clarence, the defendant, Herbie, and a third brother, Donald.

Clarence will testify that he was standing about five feet away from Herbie arguing with him for a few minutes. Herbie yelled, "I told you to stay out of my business," and suddenly charged at him and pushed him hard. A third brother, Donald, who was home at

the time, and not involved in the argument, but present, will also testify to this version of events. Donald likes both brothers the same, and is an easygoing guy who doesn't argue with anybody.

The only defense witness will be Herbie. Herbie will testify that during the verbal argument, Clarence became very angry, said, "I'll stop you," and raised his hands as he very quickly walked towards him. Herbie will testify that he pushed him only to get him away because he feared his brother was about to punch him or grab him and throw him down.

The defense lawyer wants you to evaluate the following: (a) whether, if the testimony is as anticipated, he is entitled to an instruction to the jury on self-defense as a defense to the assault charge, and (b) what the likely outcome is on the attempted robbery charge, discussing possible defenses.

Question 1

(a) W will likely be convicted of a drunk driving charge on an accomplice theory. A person is an accomplice if she intends to aid criminal conduct, provides aid, and the criminal conduct is committed or attempted. Here, H did the crime of drunk driving as demonstrated by his .22 BAC and losing control of the car. W provided aid, their daughter, who was necessary to start the car for H, who had a device on the car which required someone to blow into it who had no alcohol breath. She had the intent to aid the drunk driving because she knew this, and knew the husband would go for a ride, and that he had been drinking Jack Daniels almost all night. She admitted to police that she knew Harry was too looped to blow into the device.

W would also be guilty of drunk driving on the *Pinkerton* theory because it was a crime committed in furtherance of a conspiracy to drunk drive. *See below*.

(b) They both likely would be convicted of the charge of conspiracy to commit drunk driving. A conspiracy is an agreement to commit a crime with the intent to promote the criminal conduct. This intentional agreement plus an overt act by any conspirator in furtherance of the agreement is enough for a finding of guilt. The evidence already discussed, plus their discussion before he left the house where he admitted he was drunk ("Baby, you know even drunk I can drive okay."), and she said okay and got her daughter, who both knew was necessary to start the car, shows an agreement to have H go drunk driving. The actual driving was obviously an overt act in furtherance of the agreement.

They should not be guilty of conspiracy to commit any homicide charges because they did not agree or intend to kill the daughter.

(c) For none of these charges or the previous ones can H or W claim a defense because they were drunk since voluntary intoxication is not generally a defense.

H is not guilty of first degree murder because he did not intentionally kill his daughter; he did not want this to happen. He also can't be convicted of second degree murder because the statute lists the felonies for second degree felony murder and drunk driving is not one of them. He possibly could be guilty of third degree murder which requires a showing of reckless indifference to the value of human life. Here, he said he knew he was drunk, he was drinking hard liquor all night, he was on probation for drunk driving where an accident was involved, and he has a special device on his car. Yet he did this very dangerous activity. But, probably would be found he did not have the extreme indifference to human life because he apparently drove okay a lot of times drunk ("I usually can drive okay."), and the last thing he wanted or thought would happen would be to kill his daughter. For the facts just stated, however, a conviction for voluntary manslaughter is very likely. That requires a showing of recklessness — a conscious disregard of a substantial and unjustifiable risk. He was aware of the risk of such a serious car accident — "usually drive okay," and his previous conviction for a drunk accident, and drove drunk anyway. Also, definitely guilty of involuntary manslaughter — objective standard, gross deviation from standard of care of ordinary person — obvious shouldn't drive in that condition. Not ordinary negligence, but gross negligence. Substantial and unjustifiable risk caused by what he did.

Ouestion 2

- (a) Yes, he is definitely entitled to a self-defense instruction because a defendant ("D") is entitled to an instruction on a defense if there is any evidence which believed would support the defense. If D is believed, Clarence angrily went at him with hands raised saying "I'll stop you" and D just pushed him to protect himself. If believed, that's self-defense. It's an objective standard, and he reasonably feared imminent unlawful bodily force and just responded to that and did not do with unlawful force, which would have been deadly force. Deadly force is force likely to cause death or serious bodily injury. He only pushed him, so he didn't use deadly force even though Clarence suffered serious bodily injury as a result. His brother's alleged force was unlawful because he had no right to angrily charge at D even if D was planning a robbery. he should get the self defense instruction and credibility is for the jury.
- (b) The likely outcome is that he would be acquitted (convicted) on the attempted robbery charges. It is, however, a close call. For an attempt conviction there must be the intent to commit the crime plus a substantial step towards completing the crime. He has the intent = purpose= to rob the liquor store as he has made the decision and has taken some steps but I think they don't go beyond mere preparation to be considered substantial. He has not left his living room yet, only has a getaway driver if the guy he called can borrow a car and hasn't checked out the store at all (which is closed). Even though he is drawing maps, making lists for supplies and called a friend, he only went to his closet to get gloves, and has no other supplies or weapons he would need so not substantial steps all things considered.

W not guilty of first degree or second degree murder for same reasons as H. She could be guilty of third degree murder or manslaughter, whatever homicide charge he found guilty of on a *Pinkerton* theory. As co-conspirators to drunk driving, the fatal act was reasonably foreseeable in furtherance of the conspiracy — they didn't plan driving into a tree, but the driving was in furtherance so decent chance of conviction on this theory.

She might be guilty on an accomplice theory to whatever homicide charge he's found guilty. She had the intent to aid the drunk driving conduct, but not the child dying.

Probably responsible for that consequence because it was the result of the conduct which she intended to and did aid.

Also, a good chance of getting a conviction against her for voluntary manslaughter without these theories because what she did should be viewed as causation for the death as well as H. Providing the child to start the car was a substantial and direct contributing factor. She was reckless — aware of and substantial and unjustifiable risk — and let daughter go anyway and start the car. And she knew father in drunk accident before and owed duty to daughter to stop her from going with the father. On this theory, not guilty of third degree murder, because not extreme indifference to value of human life, for same reasons as H.