

## FEBRUARY 2003 CRIMINAL LAW & PROCEDURE-EVIDENCE QUESTION

Don was a passenger in Vic's car. While driving in a desolate mountain area, Vic stopped and offered Don an hallucinogenic drug. Don refused, but Vic said if Don wished to stay in the car, he would have to join Vic in using the drug. Fearing that he would be abandoned in freezing temperatures many miles from the nearest town, Don ingested the drug.

While under the influence of the drug, Don killed Vic, left the body beside the road, and drove Vic's car to town. Later he was arrested by police officers who had discovered Vic's body. Don has no recall of the events between the time he ingested the drug and his arrest.

After Don was arraigned on a charge of first degree murder, the police learned that Wes had witnessed the killing. Aware that Don had been arraigned and was scheduled for a preliminary hearing at the courthouse on that day, police officers took Wes to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects. As Wes walked into the courthouse with one of the officers, he encountered Don and his lawyer. Without any request by the officer, Wes told the officer he recognized Don as the killer. Don's attorney was advised of Wes's statement to the officer, of the circumstances in which it was made, and of the officer's expected testimony at trial that Wes had identified Don in this manner.

Don moved to exclude evidence of the courthouse identification by Wes on grounds that the identification procedure violated Don's federal constitutional rights to counsel and due process of law and that the officer's testimony about the identification would be inadmissible hearsay. The court denied the motion.

At trial, Don testified about the events preceding Vic's death and his total lack of recall of the killing.

1. Did the court err in denying Don's motion? Discuss.
2. If the jury believes Don's testimony, can it properly convict Don of:
  - (a) First degree murder? Discuss.
  - (b) Second degree murder? Discuss.

### Answer A to Question 3

1. Did the court err in denying Don's motion?

The issue here is whether the court properly denied Don's motion to exclude evidence of the courthouse identification.

**Right to Counsel:**

Don's first ground for having the identification evidence excluded is that the procedure violated his federal constitutional rights to counsel.

Sixth Amendment: The Sixth Amendment of the US Constitution, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, affords citizens the right to counsel during all post-charge proceedings. The Sixth Amendment right to counsel only applies after a Defendant has been formally charged. Here, Don was arraigned and therefore the Sixth Amendment right to counsel for his post-charge proceedings applies.

Don is arguing that the identification should be excluded on the grounds that it violated his federal constitutional grounds that the identification procedure violated Don's federal constitutional rights to counsel. However, Don's attorney was present with him during the identification. Don is going to argue that they were not made aware of the identification and given an opportunity to object to it. His lawyer was told of the identification and its methods, however, it is unclear as to when the attorney was advised of this information. It seems more likely that he was told after the identification had already been made.

However, the Sixth Amendment right to counsel does not apply to identifications of the suspect, since it's not a proceedings for purposes of the Sixth Amendment right to counsel.

Fifth Amendment: Miranda warning: Miranda warnings also afford the defendant of right to counsel. This right is to have an attorney present during all interrogation or questioning by the police. Miranda warnings are given to someone upon arrest. They include the right to remain silent and that everything said can be used in court against him, the right to have an attorney present and the right to have an attorney appointed by the court if the arrestee cannot afford one. [In] this case the right to counsel issue did not arise as a Miranda violation, since there was no questioning or interrogation of the police, and the Defendant has already been arraigned.

This case involves the Sixth Amendment right to counsel in all post charge proceedings. There are certain occasions where there is no right to counsel, for example, a photo identification of a suspect, taking of handwriting or voice samples, etc.

Because the identification of a suspect by a witness does not afford the Sixth Amendment right to counsel, and because Don's lawyer was actually present with him during the identification, the court was probably correct in denying Don's motion to exclude the evidence on this ground.

### **Due Process:**

Don's second ground for having the identification evidence excluded is violation of due process of law.

### **Identification**

The police may use different methods wherein witnesses can identify suspects as the crime doer. These methods include photo identification, lineups and in-court identifications. The identification process must be fair to the suspect and not involve prejudice and therefore not violate his due process rights. For example, the lineup must include others of similar build and appearance as the suspect.

The police in this case were going to have Wes [sic] identify Don (or the murderer) through photo identification. However, they took him to the courthouse knowing that Don was having his preliminary hearing that day. The photo lineup did not have to be at the courthouse, in fact it is usually at the police station. This questions the officers' conduct and intent. Don is going to argue that this was done with the express purpose of having Wes see him at the hearing and associate him to the crime. This is prejudicial to Don and a possible due process violation.

The police will argue that it was mere coincidence that they ran into Don in the courthouse and that their intent was to have Wes identify the murderer [sic] through a photo identification. They will further argue that Wes told the officer he recognized Don as the killer without any request by the officer. Therefore his identification was spontaneous and not prompted. Therefore it did not violate Don's due process rights.

However it is very suggestive to a witness to see a defendant charged with the crime and make the identification that way. If Wes had identified Don independent of that situation then the identification would have been valid and there would be no due

process violation. However, that was Wes' first and only identification of Don, and Don is going to argue that it was prejudicial and violated due process of law.

### **Officer's testimony**

Don is further claiming in his motion to exclude that the officer testifying to the identification would be inadmissible hearsay.

#### Relevance:

For any testimony or evidence to be admitted it must first be relevant. Here the officer's testimony will be established as relevant since it involves a witness' identification of the defendant as the murderer.

#### Hearsay:

Hearsay is an out-of-court statement made by a declarant that goes to the truth of the matter asserted. Hearsay is inadmissible generally because of the Defendant's right to confront and cross-examine witnesses. The officer is going to testify that he heard Wes tell him that he recognized Don as the killer. The statement was made out of court and goes directly to prove that Don is the killer. Therefore officer's testimony is hearsay. The question then is, is it admissible hearsay? There are exceptions to the hearsay rule depending on whether the declarant is available or unavailable to testify. There is no indication whether Wes is available or unavailable so we must look at the possible exceptions to the hearsay rule.

Present Sense Impression: Present sense impression is an exception to hearsay. This is when a declarant is expressing a present impression at that moment without an opportunity to reflect. The State will argue that Wes, upon seeing Don, merely expressed that he recognized him as the murderer. It was an impression at the present he was expressing. However this exception will probably not apply in this case since [sic].

State of Mind: The state of mind exception is a statement by the declarant that reflects the declarant's state of mind. For example, if the declarant said he was going to Las Vegas this weekend, that statement would be admissible to show that defendant intended on going to Las Vegas for the weekend. This is an exception to hearsay and would be admissible. The state of mind exception does not apply to this case.

Excited Utterance: A statement made when the declarant is an excited state caused by

an event and has not had a chance to cool down. Nothing in the facts here indicate that Wes' identification of Don was an excited utterance and therefore this exception does not apply.

Admission by Party Opponent: Statements made by the opposing party are usually admissible as an exception to hearsay. Here, since the statement the officer is going to testify to is not that of Don's but rather Wes, the exception does not apply here [sic].

Declaration Against Interest: When a declarant makes a statement that goes against his own interests, that statement is admissible as an exception to the hearsay rule. Again, Wes' statement was not against his own interest but against Don's interest and therefore this exception is not applicable here.

None of the other exceptions, including dying declaration, business record, are applicable here. It appears as though the officer's testimony is inadmissible hearsay. Therefore the court erred in denying Don's motion on this ground.

## 2. (a) First Degree Murder

Under common law, murder was homicide with malice aforethought. There were three types: murder, voluntary manslaughter and involuntary manslaughter. Statutes have categorized murder into de [sic].

The issue here is that if the jury believes Don's testimony, can Don be convicted of first degree murder[?]

Murder is the killing of another human being. It requires an actus reus (physical act) and a mens rea (state of mind). The defendant must have the requisite state of mind in conjunction with a physical act to be guilty of murder. The state of mind does not have to be the specific intent to kill; it could be a reckless disregard or an intent to seriously injure or harm.

First degree murder is murder with premeditation or murder during the commission of violent felony (felony murder).

Premeditation: Premeditation and thus first degree murder, is a specific intent crime. Premeditation involves the prior deliberation and planning to carry out the crime in a cold, methodical manner.

In this case there are no facts to indicate that Don planned or premeditated Vic's murder. In fact, according to the facts, Don was intoxicated and has no recollection of the killing.

**Intoxication:** There are two states of intoxication, voluntary and involuntary. Voluntary intoxication involves the voluntary ingestion of an intoxicating substance. It is not usually a defense to murder. Voluntary intoxication can be a defense to specific intent crimes, if it was not possible for the defendant to have the state of mind to form intent.

Involuntary intoxication is the involuntary ingestion of an intoxicating substance, such as with duress, without knowing of its nature, prescribed by a medical professional, etc.

In this case, Don was intoxicated since he ingested the hallucinogenic drug. Although Don was aware of what he was taking when he took it, he will argue that he was forced to take it under duress. Since Vic threatened Don that he would abandon him in freezing temperatures far from any town, Don was forced to take the drug. Although involuntary intoxication is not a defense to murder, it is a proper defense to the specific intent required for premeditation and thus first degree murder.

Since Don did not premeditate the murder nor have the specific intent for premeditated murder, he cannot be convicted of first degree murder.

Felony Murder: Felony murder is murder committed during the commission of an inherently dangerous felony. There are no facts to indicate that Don was committing an inherently dangerous felony, independent of the murder itself. Therefore felony murder probably does not apply in this case and Don cannot be convicted of First degree murder.

## 2. (b) Second Degree Murder

Second degree murder is all murder that is not first degree and is not made with adequate provocation to qualify for Voluntary Manslaughter. Second degree murder does not require specific intent.

The issue here is if the Jury believes Don's testimony, can Don be properly convicted of Second degree murder?

Don is going to use the defense of intoxication. Although intoxication is not a defense to murder, involuntary intoxication can negate a required state of mind. Since it will

probably be determined that Don's intoxication was involuntary due to duress (see discussion above), Don will argue that he did not have the state of mind required to commit second degree murder. He will be compared to a person who is unconscious. An unconscious person cannot be guilty of murder. Don will argue that he was so heavily intoxicated that he has no recollection of the occurrences and therefore could not have had even the general intent to kill or seriously injure.

Voluntary manslaughter: in order for a murder charge to be reduced to voluntary manslaughter there must be adequate provocation judged by a reasonable standard and no opportunity to cool down and the defendant did not in fact cool down. Nothing in these facts suggests that Don acted under the heat of passion or was provoked in any way. In fact Don does not remember the killing and therefore there is no evidence of provocation.

Since was [sic] involuntarily intoxicated, he could not have the requisite state of mind for murder. Therefore he cannot be convicted of either first degree or second degree murder.

### Answer B to Question 3

#### I. Court's Denial of Don's (D's) Motion

##### A. Violation of D's right to counsel

The Sixth Amendment guarantees defendants the presence of counsel at all critical stages of a criminal proceeding which results in imprisonment, as well as providing that the police may not elicit information from a defendant in the absence of counsel once criminal proceedings have been initiated against the defendant, usually in the form of an arraignment. Among those stages of a criminal proceeding which are considered critical are a preliminary hearing, at trial, when making a plea, at sentencing, and at any lineup or show-up conducted following the filing of charges against the defendant.

In this instance, the identification of D occurred after he was arraigned, and thus D did have a right to have counsel present during any lineup or show-up. However, this right to counsel does not extend to photographic identifications, which are not considered adversarial proceedings, but instead only to in-person lineups or show-ups. Thus, the police in this instance will claim that they simply took Wes (W) to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects, something for which D was not entitled to the presence of counsel, and the fact that W witnessed D emerging from the courthouse was not part of their plan, and something for which they should not be held responsible. Further, the police will refer to the fact that when D emerged from the courthouse they made no request that W identify D, but rather W made such an identification completely of his own volition.

D's counsel will most likely argue that the police were well aware that D would be at the courthouse at that particu[la]r time, and that bringing W to the courthouse ostensibly to view photographs was in reality simply a veiled effort to conduct a one-on-one show-up in which W could identify D, and that D thus had the right to counsel at such a proceeding.

In this instance, the court did not err in denying D's motion based on grounds that the identification procedure violated D's Sixth Amendment right to counsel. The Sixth Amendment guarantees the right to counsel at any post-charge lineup or show-up in part to ensure that the defendant's attorney will be aware of any potentially unfair methods utilized in the identification process, and can refer to these inequities in court. Because D's counsel was in fact present when W saw and identified D, D's attorney would be able to raise any objections he had to the identification, and thus D was not ultimately denied his right to counsel. Thus, even if the court were to find that the police bring[ing]



W to the courthouse amounted to a show-up in which D was entitled to the presence of counsel, D was with his attorney when the identification was made, and therefore his right to counsel was satisfied.

B. The identification as violative of due process of law

The Due Process Clause of the 14<sup>th</sup> Amendment, made applicable to the federal government by the Fifth Amendment, ensures that the prosecution bears the burden of proving each element of a criminal case against defendant beyond a reasonable doubt, and also guarantees that a defendant will be free from any identification which is unnecessarily suggestive or provides a substantial likelihood of misidentification.

In this instance, D's attorney would probably contend that the police bringing W to the courthouse on the date of D's prelimi[n]ary hearing to view photographs of suspects in fact raised a substantial probability that W would in fact observe D emerging from the courthouse, which is exactly what occurred. D's attorney would contend that any identification made in this context is extremely suggestive, as the fact that D is emerging from a court of law and was in the presence of an attorney places D in a situation in which he appears to be of a criminal nature, and is likely to lead an eyewitnesses to mistakenly identify D based solely on these circumstantial factors. Further, D's attorney would argue that the situation was unnecessarily suggestive because the witness could believe the fact that criminal proceedings had already been initiated against D, thus warranting his appearance in court, sufficient evidence, perhaps even in the form of testimony by other eyewitnesses, exists which incriminates D, and may make W more likely to believe that D was the man he had seen commit the killing.

The court probably did not err in denying D's motion based on the fac[t] that W's identification was violative of due process of law. The 14<sup>th</sup> Amendment guarantees against unnecessarily suggestive identifications, or identifications posing a substantial likelihood of misidentification, are intended primarily to remedy lineups in which a criminal defendant is placed in a lineup with other individuals to whom he bears no physical similarities whatsoever. It is unlikely that a court would find that a witness seeing an individual emerging from a courthouse would be so prejudicial as to lead to an unnecessarily suggestive identification.

C. Hearsay

Hearsay is an out-of-court statement being offered to prove the truth of the matter asserted. In this instance, the officer's planned testimony that W had identified D at the courthouse would qualify as hearsay, as the officer would be testifying to a statement made by W out of court in order to prove that W identified D.

However, instances in which a witness has previously identified a suspect are admissible as exceptions to the hearsay rule even if the defense is not attacking the identification. Such statements of prior identification are considered to possess sufficient guarantees of trustworthiness that the party against whom they are offered is not denied his Sixth Amendment right to confront witnesses against him. Therefore, the court did not err in denying D's motion to exclude the evidence of the courthouse identification because the officer's testimony would in fact not be inadmissible hearsay.

II. Crimes for which D may be properly convicted

A. First degree murder

In order to convict a defendant of first degree murder, the prosecution must prove beyond a reasonable doubt that the defendant unlawfully killed a human being with malice aforethought, and that the killing was either premeditated and deliberate or was committed during the commission or attempted commission of an inherently dangerous felony (felony murder). In order to prove malice aforethought, the prosecution must show that defendant acted with an intent to kill, an intent to inflict serious bodily harm, acted with a depraved and malignant heart, or was guilty of felony murder.

In this instance, D's acts appear to be both the actual and proximate cause of Vic's (V's) death, as the facts indicate that D killed V and dumped his body beside the road. However, D would probably be found not to possess the requisite intent to kill or to inflict serious bodily harm by way of his raising the excuse of involuntary intoxication. Intoxication, whether voluntary or involuntary, may be raised to negate the presence of an essential element of a crime, generally intent. In this instance, D's intoxication would be involuntary, as he did not wish to take the hallucinogenic drug V offered, but was forced to when he feared that if he did not, he would be abandoned in freezing temperatures and his life would be in jeopardy. Ingesting a drug under such circumstances is the virtual equivalent of being unknowingly slipped the drug, or being forced to ingest the drug upon threats of death. As such, D was involuntarily intoxicated, and his intoxication resulted in his having no recall of the events between the time he ingested the drug and his arrest. D thus will be found not to have possessed the requisite intent to kill or intent to inflict serious bodily harm necessary for a finding of first

degree murder. Further, even if D were not able to rely on the excuse of intoxication in order to negate a requisite mental state, there is no evidence that the killing was premeditated or deliberate, and because it did not occur during the commission or attempted commission of an inherently dangerous felony, there is no basis for finding D guilty of first degree murder.

## 2. Second degree murder

The jury most likely could not properly convict D of second degree murder, either. Second degree murder also requires the prosecution to prove beyond a reasonable doubt that the defendant intentionally killed a human being with malice aforethought, though it relieves the prosecution of proving the additional elements of premeditation and deliberation or felony murder.

In this instance, D's involuntary intoxication resulting from his unwillingly ingesting a[n] hallucinogenic drug should sufficiently relieve him from being found guilty of second degree murder, as it negates the requisite mental states of intent to kill or intent to inflict serious bodily harm as discussed above. Further, D should not be convicted under a theory of depraved or malignant heart, as such a finding requires proof of reckless conduct which created a substantial and unjustifiable risk of death or serious bodily harm. A defendant must be consciously aware of the risk he is creating to be guilty of a depraved heart killing, and D's involuntary intoxication would most likely relieve him of guilt, since he had no recall of the events between the time he ingested the drug and his arrest, and would most likely not be considered to have appreciated the risk of his conduct.

If D were found to have been intoxicated voluntarily, rather than involuntarily, he could be properly convicted of second degree murder for V's killing. However, if the jury believes D's testimony that he only ingested the hallucinogenic drug because he feared if he did not he would be left out in the cold and could potentially die, they must find that D was involuntarily intoxicated, which would relieve him of guilt for second degree murder.