

## Question 1

Max imports paintings. For years, he has knowingly bought and resold paintings stolen from small museums in Europe. He operates a gallery in State X in partnership with his three sons, Allen, Burt, and Carl, but he has never told them about his criminal activities. Each of his sons, however, has suspected that many of the paintings were stolen.

One day, Max and his sons picked up a painting sent from London. Max had arranged to buy a painting recently stolen by Ted, one of his criminal sources, from a small British museum.

Max believed the painting that they picked up was the stolen one, but he did not share his belief with the others.

Having read an article about the theft, Allen also believed the painting was the stolen one but also did not share his belief.

Burt knew about the theft of the painting. Without Max's knowledge, however, he had arranged for Ted to send Max a copy of the stolen painting and to retain the stolen painting itself for sale later.

Carl regularly sold information about Max's transactions to law enforcement agencies and continued to participate in the business for the sole purpose of continuing to deal with them.

Are Max, Allen, Burt, and/or Carl guilty of:

- (a) conspiracy to receive stolen property,
- (b) receipt of stolen property with respect to the copy of the stolen painting, and/or,
- (c) attempt to receive stolen property with respect to the copy of the stolen painting?

Discuss.

## ANSWER A TO QUESTION 1

### **(a) Max, Allen, Burt, and Carl's liability for conspiracy to receive stolen property**

#### **Max**

The issue is whether Max is liable for conspiracy to receive stolen property.

Conspiracy requires (i) an agreement, express or implied, to accomplish an unlawful objective or to accomplish a lawful objective with unlawful means, (ii) an intent to agree to commit conspiracy, (iii) an intent to achieve the unlawful objective, (iv) an overt act in furtherance of the objective of the conspiracy.

#### **(i) Agreement**

There was no express agreement among Max and any of his sons, Allen, Burt, and Carl that the paintings were stolen. Max has knowingly bought and resold paintings stolen from small museums in Europe, and operates a gallery in State X with his sons. Max never told them about his criminal activities; thus there was no way they could have expressly agreed to commit the conspiracy. However, Max and Ted have an agreement, because Max had arranged to buy a painting recently stolen by Ted, one of his criminal sources.

There was no implied agreement among Max and his sons because there is no circumstance or conduct to indicate that they were in agreement. Max never affirmatively ensured that his sons were additionally compensated for keeping it a secret that they were undergoing criminal acts, nor had any of them given Max an indication confirming their understanding even if no explicit words were exchanged regarding the conspiracy. Here, each of his sons suspected that many of the paintings were stolen. However, Max had no idea that his sons might be aware. When Max picked up the painting that he thought was stolen, he did not share this belief with the others.

### **(ii) Intent to agree to the conspiracy**

There must be at least two guilty minds to be liable for conspiracy. Under the minority jurisdictions, unilateral intent is sufficient if the guilty mind genuinely believed that the other non-guilty mind had the intent to agree to the conspiracy. There was no intent to agree to commit the conspiracy because Max never shared his beliefs with the others that he was dealing with stolen paintings. Here, Burt did not share his knowledge about the theft of the painting. Nor did Carl have an intent to agree, because he was solely continuing to participate in the business for the sole purpose of selling the information to the police. Thus, there could not have been an intent to agree to the conspiracy with either Burt nor Carl based on the majority rule. Under the minority approach, there is still no intent to agree because the facts indicate that Max did not tell Carl about his illegal activities and nothing suggests Carl shared his information with Max. Because there was no agreement in the first place among Max and any of his sons, Max did not have the intent to agree to commit the conspiracy.

Max and Ted have the intent to agree to the conspiracy, as evidenced by Max's arrangement to pick up the painting that Ted stole.

### **(iii) Intent to achieve the unlawful objective**

There must be an intent to achieve the objective, which here is the intent to receive stolen goods. Max had the intent to receive the stolen goods because he has knowingly bought the paintings stolen from small museums in Europe.

### **(iv) Overt act in furtherance of the objective**

There must be an overt act in furtherance of the objective, which is anything including mere preparation. Here, Max committed an overt act when he picked up the painting which he thought was the stolen painting.

Max is guilty of conspiracy with Ted.

## **Allen**

See rule above.

### **(i) Agreement**

Allen did not enter into an agreement to commit the conspiracy because even though he suspected that many of the paintings were stolen, and that he believed the one stolen by Ted was stolen, he did not share his belief with others.

### **(ii) Intent to agree**

Allen did not intend to agree to the conspiracy because he did not share his belief that the painting may have been stolen with others. He only learned that the painting was stolen from reading an article and not from the other members.

### **(iii) Intent to achieve the objective**

Allen may have had the intent to achieve the objective because he did nothing to stop the receipt of the stolen paintings.

### **(iv) Overt act**

An overt act was the picking up of the painting sent from London.

Thus, Allen is not liable for conspiracy.

## **Burt**

See rule above.

### **(i) Agreement**

Burt made no agreement to enter into the conspiracy, because even though he suspected that they were stolen, and knew about the painting, he did not share his knowledge with the others. However, Burt has an agreement to enter into the conspiracy with Ted, because he arranged for Ted to send Max a copy of the stolen property and to retain the stolen painting itself for sale later.

### **(ii) Intent to agree**

Burt had no intent to agree with the others, because he did not tell Max, and he arranged for Ted to send Max a copy of the stolen painting and to retain the stolen painting itself for sale later. However, Burt had the intent to agree with Ted, given that Ted was the other end of the deal and he arranged for Max to receive the stolen painting.

### **(iii) Intent to achieve the objective**

Burt had the intent to achieve the objective because he knew the painting was stolen, and was going to sell it later at a more convenient time to gain a personal benefit.

### **(iv) Overt act**

Overt act was committed when they picked up the painting from London.

Thus, Burt is liable for conspiracy with Ted.

## **Carl**

See rule above.

### **(i) Agreement**

Carl made no agreement to enter into the conspiracy.

### **(ii) Intent to agree**

As discussed under Max's discussion, in the majority jurisdiction, because two guilty minds are necessary, there is no intent to agree since Carl was acting solely to sell the information to the police, and not to actually engage in the unlawful conduct. However, under the unilateral approach, one guilty mind, Max's guilty mind, would be sufficient for Max to be guilty of conspiracy. However, Carl would not be liable because he has no intent to agree himself.

### **(iii) Intent to achieve the objective**

Carl has no intent to steal property, but is only participating to sell the information to the police.

### **(i) Overt act**

Overt act was committed when the painting was received from London.

## **Conclusion**

Because there is no agreement to conspire, neither are liable for conspiracy with each other, but Burt and Max are liable for conspiracy as a result of their individual agreements with Ted.

**(b) Max, Allen, Burt, and Carl's liability for receipt of stolen property with respect to the copy of the stolen painting**

Co-conspirators are liable for the target crime and any crimes committed in furtherance of the conspiracy. As above, anyone who was liable for the conspiracy would be liable for the crime of receipt of stolen goods. However, the target crime of receipt of stolen goods did not occur because it was a copy of the stolen painting. Thus, no liability for the target crime at this point.

Receipt of stolen property requires (i) receipt or control of stolen property, (ii) of personal property by another, (iii) with the knowledge that the property was obtained in a way that constitutes a criminal offense, (iv) with the intent to permanently deprive.

**Max**

Max knew the property was obtained in a way that constituted a criminal offense, because he arranged to buy the painting recently stolen by Ted, one of his criminal sources. A painting is personal property, and it was stolen by another, Ted. He had the intent to permanently deprive because his motivation was to resell the stolen paintings. However, he did not actually receive or come into control of the property because the one he received was actually not stolen. Thus, he is not liable.

**Allen**

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting.

**Burt**

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting.

## **Carl**

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting. Further, Carl did not have the intent to permanently deprive because he was only working with the police so that the police could regain the stolen property and return it to its rightful owner.

## **Conclusion**

Because no one actually came into receipt or control of the stolen property, they cannot be liable for the copy of the stolen painting.

## **(c) Max, Allen, Burt, and Carl's liability for attempt to receive stolen property with respect to the copy of the stolen property**

Attempt requires the specific intent to achieve the criminal act and a substantial step in the direction of the commission of the act or dangerously close to the commission of the act.

## **Max**

Max had the specific intent to receive stolen property. He believed that the painting was the stolen one. Even an unreasonable mistake would negate specific intent. However, if the facts were as he believed them to be, it would have been a crime, and thus, his intent cannot be negated. Mistake of fact is no defense. He committed a substantial step when he picked up the painting from Ted.

## **Allen**

Allen also believed the painting was stolen because he read an article about the theft. Even if the stolen painting was not actually stolen, mistake of fact is no defense, and the



act would have been criminal had the facts been as he believed them to be, and thus, he is also liable for attempt.

### **Burt**

Burt knew about the theft of the painting. He had specific intent to receive the stolen painting. But as to this copy, he had arranged for it to be simply a copy, and had told Max to retain the stolen painting for sale later. Thus, he had no specific intent to receive stolen property when he picked up the copy of the painting. Thus, he is not liable for attempt.

### **Carl**

Carl suspected that many of the paintings were stolen. However, he did not have the specific intent to receive stolen property. He did not intend to permanently deprive because he was merely working with the police.

### **Conclusion**

Max and Allen are liable for attempt, but Burt and Carl are not.

## ANSWER B TO QUESTION 1

### A. Conspiracy to Receive Stolen Property

The crime of conspiracy requires: (1) an agreement between two or more people to accomplish an unlawful or fraudulent purpose, and (2) an overt act taken in furtherance of the conspiracy. Under the majority rule, all parties to the conspiracy must agree to pursue the unlawful or fraudulent purpose; however, under the minority rule, the agreement of only one participant is sufficient to establish the conspiracy (for instance, in circumstances where one participant conspires in an effort to commit a crime and the other is an undercover law enforcement officer). Regarding the overt act requirement, nearly any act taken by any co-conspirators in furtherance of the unlawful objective will suffice.

Co-conspirators are liable for both conspiracy as a separate crime, for and all foreseeable crimes committed by any co-conspirators in furtherance of the unlawful objective. There is no doctrine of merger applied to conspiracy, and thus one may be convicted of both conspiracy and the underlying crime(s) committed in furtherance of it. A co-conspirator need not personally participate in an underlying crime committed by a co-conspirator in furtherance of the conspiracy, so long as the crime was a foreseeable result of the unlawful objective.

In this case, there was no express or implied agreement between M, A, B, and C to receive the painting stolen by and acquired from T. Agreement among co-conspirators need not be in writing and need not even be expressed orally, but rather can be implied from conduct and knowledge under the circumstances. However, there must be some evidence of an understanding and meeting of the minds among the parties of the conspiracy that they will pursue an unlawful objective for conspiracy liability to occur. Here, while M certainly had the requisite knowledge and intent to receive stolen property, he did not do anything to obtain the agreement of A, B, or C to do anything in furtherance of that objective. In fact, M never told any of his sons that he regularly

bought stolen paintings from Europe, nor did he share his belief as to the specific painting in question being the stolen one. Far from agreeing with them to receive stolen property, he was trying to shield them from that fact. Moreover, the mere fact that A, B, and C suspected their father's nefarious activities does not suffice to create an implied agreement between any or all of them and him to pursue that common unlawful objective, as they neither shared those suspicions and/or knowledge with M or with each other. Nor does it matter that A believed the painting was stolen (and that the one they picked up was the stolen one), as he never did anything, through words or conduct, to share that belief. The same is true for B and C -- though each independently suspected or knew of their father's activities, there is nothing to suggest that through words or conduct, an agreement was reached between M, A, B, and C (or any subcombination of them) to receive stolen property. Thus, there is no conspiracy liability for M, A, B, and C here.

Moreover, if evidence of an agreement existed, there would also be a question as to whether C's role sufficed to show an agreement among the co-conspirators. As noted above, under the majority rule, all co-conspirators must agree to pursue an unlawful objective. Thus, C's status as informant to law enforcement and participation for the sole purpose of continuing to deal with law enforcement would destroy his agreement to further the objective in question. As a result, under the majority rule there would be no conspiracy for this reason as well. Under the minority rule, however, the agreement of only one participant will do, and thus there would be an agreement, if evidence of it existed, notwithstanding C's status.

If evidence of such an agreement did exist, however, the overt act requirement would be satisfied. The four of them going to pick up the painting that T had sent from London would qualify as an overt act in furtherance of a conspiracy, as nearly any conduct that is in furtherance of the objective in question will qualify.

Further, if an agreement existed, the defense of impossibility would not be available to M and his sons. While a defense of legal impossibility would work (i.e., if the objective of

the conspiracy is not actually illegal, there can be no conspiracy liability for agreeing to commit a lawful act), here the defense would be factual impossibility (i.e., that though they had hoped to receive a stolen painting, it was not in fact the stolen one but rather a copy). Factual impossibility is not a defense to crimes in general, nor is it to the crime of conspiracy, and thus if evidence of an agreement had existed it would not prevent their guilt.

Lastly, M and T may well be guilty of conspiracy to steal and/or receive the stolen painting. M and T agreed for T to sell the stolen painting to M, and T took the act of sending the copy and arranging for payment in furtherance of the conspiracy. Similarly, B has conspired with T, and if he receives the stolen painting from T, he may face conspiracy liability for the theft and/or receipt or sale of the painting as well.

## **B. Receipt of Stolen Property**

The crime of receiving stolen property requires that the defendant: (1) receive property that has been wrongfully taken from the rightful owner with the intent not to return it to its true owner, and (2) know that the property in question was wrongfully taken from its rightful owner. A defendant's knowledge may be express or implied under the circumstances, and, furthermore, the knowledge requirement may be met if the defendant under the circumstances is "willfully blind" to the fact that the property has been stolen.

In this case, however, the painting that M, A, B, and C received was not in fact stolen. Thus, they will not be guilty of having received stolen property based on their receipt of the copy. However, if B later does receive the true stolen painting from T, he would be guilty of this crime. With regard to receipt of the copy, however, B is not guilty for the reason that the copy was not stolen and for the additional reason that he knew that it was not the stolen item in question, and thus could not be found to have known or be willfully blind to the fact that it was stolen.

M, A, B, and C might also argue factual impossibility, as discussed above. However, since one of the prima facie elements of this crime is that the property is in fact stolen and that element is not met under these facts, there is no need to apply this defense here.

If M and his sons had received the authentic stolen painting, even in the absence of a conspiracy agreement among them, each of M, A, B, and C would be guilty of this crime. M and B plainly knew it was stolen, and A believed it was from the article, making his knowing receipt of the true article a crime (absent his immediately returning it to the authorities). C regularly sold information about M to the authorities, and thus also likely knew the painting was stolen. Thus, if they had received the true painting, each would be guilty of receipt of stolen property.

### **C. Attempt to Receive Stolen Property**

Attempt is a specific intent crime. It requires: (1) that the defendant take sufficient action toward the completion of a crime, and (2) specifically intend to commit that crime. There is a split of authority as to the appropriate test to use for determining whether a defendant has done enough to constitute an attempt. While all courts agree that "mere preparation" for the crime is not sufficient to impose criminal attempt liability, some courts require that the defendant take a substantial step toward the commission of the crime. Other courts require instead that the defendant come dangerously close to succeeding in committing the underlying crime in question. Unlike conspiracy, the crime of attempt is subject to the doctrine of merger, meaning that if a defendant actually does commit the underlying crime, the attempt merges into the completed crime, and the defendant thus cannot be liable both for attempt and for the completed crime.

M and A: In this case, M knew the painting had been stolen and believed the copy was the real thing, and A also knew it had been stolen and believed that this one was the real thing. Thus, M and A each specifically intended to commit the crime of receiving stolen property. Moreover, each took a substantial step toward doing so, and came

dangerously close, by picking up the copy of the painting. But for B's dirty double-crossing of his father and brothers, M and A would have succeeded in committing this crime. Thus, each of M and A is guilty of attempt to receive stolen property, regardless of the fact that the painting they picked up was a copy.

M and A will argue factual impossibility, as discussed above. However, this defense will fail, as factual impossibility is not a defense in general, nor is it a defense to attempt. After all, if M had tried to pickpocket someone's wallet but that person had left their wallet at home, M would nonetheless be liable for attempted larceny. So it is here with regard to attempt liability.

B: B presents a different case. Clearly he took a substantial step toward and came dangerously close to committing the crime, but he did not specifically intend to commit the crime of receiving stolen property by taking the copy of the painting. He in fact knew that the painting they picked up was a copy, and had not been stolen, and thus lacked specific intent. Thus, B would not be guilty under these circumstances for attempted receipt of stolen property by taking the copy of the painting sent from London. As noted above, he may be guilty for other conduct -- such as actually receiving the true stolen painting if T sends it to him, or for receiving proceeds of the sale of the true stolen painting under his agreement with T.

C: C, however, did believe that the painting that he picked up with the others was in fact stolen, and thus, like M and A, would be guilty for attempt. The fact that he was participating with law enforcement would not change this fact. C might be able to obtain immunity from prosecution as a result of his assistance, but absent a grant of immunity, he would be guilty along with M and A of attempted receipt of stolen property.