

QUESTION

Jane, a police officer who was not in uniform, attempted to make a lawful arrest of Al for distribution of a controlled substance. Doug, who did not know either Al or Jane, arrived on the scene, a poorly lit alley, and did not realize that Jane was a police officer. Because Jane was wearing civilian clothes and holding a gun on Al; Doug thought Jane was robbing Al.

Doug ran up and shoved Jane away from Al, who fled down the alley. Jane fired a shot at Al, killing Al. Doug then wrested the gun from Jane and shot Jane, killing Jane.

Doug was indicted for murder of Jane under a statute which mandates imposition of the death penalty for first degree murder of a peace officer who is in the performance of her duties. During jury selection, over Doug's repeated objections, the prosecutor used his peremptory challenges to remove all African Americans and death penalty opponents from the jury.

1. What factual and legal defenses are available to Doug and, if they are accepted by the jury, of what crime, if any, should Doug be convicted? Discuss.
2. If Doug is convicted, how should the appellate court rule on an argument that the prosecutor's actions during jury selection denied Doug rights under the Sixth and
3. If Doug is convicted of first degree murder as charged and the jury is instructed that it has no discretion as to penalty, would imposition of the death penalty violate Doug's rights under the Eighth Amendment to the United States Constitution? Discuss.
4. Did Jane act lawfully when she shot Al? Discuss.

ANSWER A

1. DOUG'S DEFENSES TO MURDER CHARGE

A. Defense of Another

The defense of another is a justification for a killing if that other person would have been privileged to use lethal force in his own defense. Any mistake, even if reasonable, defeats the privilege of defense of another if lethal force is used.

Here, Doug would have been initially privileged to use force to protect Al because it seemed that Al was being robbed by Jane at gunpoint. Although Doug initially used appropriate non-lethal force in struggling with Jane, allowing Al to escape, he then used lethal force by shooting Jane. At this point, arguably, any defense of Al would be vitiated by the fact that Al was dead. Doug, however, did not reasonably know whether Al was dead or wounded, so he could mistakenly and reasonably believe that Al's life was still in danger and that he was justified in using lethal force.

However, Jane was a police officer making a lawful arrest. Al himself did not have a right to self defense against Jane. Doug would only be privileged to use lethal force if Al himself could have used lethal force against Jane. Because Doug was mistaken as to Al's right to self defense, Doug may not use defense of another as a defense.

B. Self Defense

Doug may assert that he was acting to defend his own life when he shot Jane, fearing that she would kill him after having killed Al. A person is entitled to use appropriate and reasonable force, including lethal force, to protect himself from death or serious bodily injury, so long as he is not the aggressor. Here, Doug was the aggressor because Jane did not initiate any use of force against Doug. Further, Doug's use of lethal force seems to have exceeded any privileged use of force, since he was likely out of danger after he obtained the gun from Jane. At the time he shot her, she was unarmed and did not pose a risk of serious injury to Doug.

In some states, imperfect self-defense will reduce a charge of murder to manslaughter. If Doug's belief in the need to defend himself was actual, but unreasonable, then murder would be reduced to manslaughter. In this case, we do not know if Doug thought that Jane would kill him. In any event, we know that his belief was probably unreasonable, since Jane was unarmed after he wrestled her gun away from her. The imperfect self-defense rule is a minority position, and probably would not apply here. Thus, Doug may not assert self-defense or imperfect self-defense to his advantage.

C. Adequate Provocation

A murder committed in the heat of passion and in response to adequate provocation will be reduced to involuntary manslaughter. Adequate provocation exists if:

- (1) the provocation would arouse sudden and intense passion

- in the ordinary person, such that he or she would lose self control;
- (2) the killing was actually done in the heat of passion;
 - (3) the ordinary person would not have time to cool down following the provocation and before the killing;
 - (4) the defendant in fact did not cool down.

Here, the provocation would be the application of deadly force against another person. Generally, adequate provocation exists when the person finds his or her spouse in bed with another person or when lethal force has just been used against the defendant. It is a question of fact for the jury whether seeing lethal force used against a stranger would cause the ordinary person to lose self control. The issue should be submitted to the jury. Most likely, a jury would find this is not adequate provocation because the force was not used against Doug but against Al, a stranger.

2. DOUG'S CHALLENGE TO JURY SELECTION

A. Sixth Amendment Right

The Sixth Amendment right to a jury trial includes the right to a jury representative of the community. The prosecutor's use of peremptory challenges against every African-American member of the panel establishes a prima facie case of use of challenges for an improper purpose. On appeal, the prosecutor must show there was a non-discriminatory reason for each of the challenges. Doug may assert this theory on appeal even if he is a member of a different race or ethnic group, since the right to a representative panel does not depend on the defendant's race.

The sixth amendment right to a trial includes the right to an unbiased jury. Doug can argue that the exclusion of death penalty opponents resulted in a jury that was biased in favor of "law and order" and more likely to convict a defendant. This would not be an unbiased jury. However, the prosecutor is putting on a case where the law provides for the death penalty. A jury that included persons unalterably opposed to this penalty could not even-handedly carry out the law and would not function as a proper jury. However, the mere existence of a belief that the death penalty is improper would not preclude a person from serving on a death penalty case. The prosecutor should first inquire as to whether the prospective juror could put aside personal feelings and fairly apply the law. The prosecutor did not do this.

However, these were not challenges for cause. So long as the jury is not racially screened -- as in the case of challenging black venire persons -- the prosecutor could properly exclude death penalty opponents using a peremptory challenge.

B. Fourteenth Amendment

The Fourteenth Amendment prevents states from racially discriminating. Here, the prosecutors use of peremptory challenges to exclude members of one race from the jury -- as demonstrated by the prosecutor's challenging of every African-American -- would violate the

equal protection rights of jurors. Doug would normally not have standing to raise the rights of third persons on appeal. The right to be free from discrimination belongs to the juror, not the defendant in this case.

However, because the defendant is more likely to be in a position to practically raise these rights, the court should probably allow Doug standing. It is highly unlikely and impractical for jurors excluded on the basis of race to contest the use of peremptory challenges. The defendant is in the best position to raise this challenge, rather than requiring all the jurors to bring suit. Therefore, Doug has standing to raise a Fourteenth Amendment claim. He should prevail, as there is no necessary and compelling purpose for this discrimination.

3. EIGHTH AMENDMENT CLAIM

The Eighth Amendment provision against cruel and unusual punishment requires juries to have discretion in deciding to implement the death penalty. The Supreme Court has held that this discretion extends to all factors in mitigation and all factors in aggravation of the crime. Here, if the jury is instructed that it has "no discretion" and must condemn Doug to die, Doug's Eighth Amendment rights have been violated.

Factors that the jury should be allowed to consider are Doug's claim that he actually believed Jane was robbing Al or that Jane would kill Doug also. While these issues may not allow a defense to the charge of murder, as noted above, they are reasonable mitigating circumstances that the jury must be allowed to consider.

4. DID JANE ACT LAWFULLY IN SHOOTING AL?

Lethal force may be used to stop a fleeing felon if he poses a danger to the officer or others. In this case, Al was being arrested for distribution of a controlled substance. In most states, this is a felony. However, Al was apparently unarmed. The crime of distributing illegal drugs, although harmful to society, does not pose the kind of immediate threat to third persons that would justify the use of lethal force. Therefore, Jane did not act lawfully in shooting Al.

ANSWER B

1. Defenses & Crimes

A. Defenses

Defense of Others

Defense of others allows a person to use non-deadly force to prevent the use of non-deadly force on another, or deadly force to prevent the use of deadly force on another. There is a split of jurisdiction as to whether a person may make a reasonable mistake in the defense of others or whether the person "steps in the shoes" of the person she was defending.

In a jurisdiction which allows mistake this issue is whether Doug reasonably believed Jane

was going to use deadly force on Al when he shot her. It is stipulated that Doug did not know Jane was a police officer and thought she was robbing Al. In addition, just before Doug shot Jane, Jane shot at Al, therefore, it was reasonable to believe at that time that Jane was going to cause Al serious bodily harm or injury (using deadly force). But Doug had wrested the gun away from Jane before he shot her. If Doug had disarmed Jane and knew that she was disarmed then he would not be privileged to use deadly force against her. However, if he shot her in the act of wresting the gun away then he would be privileged.

In a jurisdiction which does not allow for mistake in the defense of others then Doug would have the same right as Al would have for self-defense. Here because Al was being lawfully arrested he had no right of self-defense and therefore Doug would have no privilege of defense of others.

Authority of Law

Doug could also raise the defense of authority of law. Under that defense a person may use deadly or non-deadly force to prevent a crime or apprehend a criminal. However, unlike the police, the citizen must see the crime and they must be right. If there was no crime there is no defense. Here there was no crime because Jane was lawfully arresting Al. Therefore Doug cannot successfully raise this defense.

B. Crimes

In a jurisdiction which allows mistake under defense of others defense, Doug could be convicted of no crime if Jane was shot before Doug knew she could no longer use deadly force on Al.

In a jurisdiction which allows mistake, Doug would have no defense if he shot Jane after he knew she posed no threat to Al or himself, because he would be outside the scope of the defense. The same result would occur if Doug was in a jurisdiction where a reasonable mistake was not allowed under the defense of others.

If under this type of jurisdiction Doug could be properly convicted of murder.

Murder

Murder is the unlawful killing of a human being with malice aforethought. Malice is defined as one of four states of mind: 1) Intent to kill; 2) Intent to do serious bodily harm; 3) Wanton and reckless (depraved heart); 4) Felony-Murder. Here when Doug shot Jane he intended to at least do serious bodily harm because he was using a gun which is a deadly weapon. Therefore without justification or excuse, Doug would be convicted of murder.

1st Degree Murder

At common law there was no 1st degree murder. However modernly, most jurisdiction have created degrees of murder. In most jurisdiction 1st degree murder is characterized by the requirements of premeditation and deliberation. These require the defendant to think about his

act and weigh the consequences. Here Doug appears to have acted on impulse to prevent a robbery. His actions occurred in a very short period of time. And while it is possible to premeditate and deliberate within moments it is unlikely that Doug did either given the circumstances of him pushing Jane, Al running, Jane shooting and Doug wresting the gun from Jane. Thus it is unlikely that Doug could be convicted of 1st degree murder.

Voluntary Manslaughter

Voluntary manslaughter occurs when the malice of murder is mitigated by the heat of passion or by imperfect self-defense. Here there is no evidence of any event that would evoke the passion of Doug because he was not threatened or injured by Jane. If the jury finds that Doug shot Jane because he unreasonably believed she was going to shoot him then they may mitigate his malice and convict for voluntary manslaughter.

Self-defense

There is no indication that Doug believed his life was in danger or that Jane would inflict serious bodily harm on him. However, if Doug was in fear for his life while wresting away the gun from Jane, and when he shot her as well, then Doug would have the defense of self-defense which would prevent him from being convicted of any crime.

Obstruction of Justice

Various jurisdictions provide criminal penalties for interference with the police while they are carrying out their duties. However, most of those crimes require the person to have the specific intent to so interfere. Here Doug could reasonably believe that Al was being robbed because of the poor lighting, the alley location, Jane's dress and gun and therefore that mistake of fact would negate his intent to interfere. Therefore he could not be convicted of such a crime.

2. FLAW IN THE VENIRE

Under the 6th Amendment's right to a fair trial and the 14th Amendment's Equal Protection clause the defendant has a right to a jury of his peers. This means that the pool from which the jury is drawn must be representative of the community, not necessarily the specific jury.

Both the prosecution and defense are given a limited number of preemptory challenges to juries during voir dire. These allow the respective sides to dismiss jurors without reason. However, the Supreme Court has ruled that neither side can use their preemptory challenge to remove jurors based on race.

However, in order to challenge such removal, the defendant must belong to the group removed. Here there is no indication of Doug's race or ethnic background. Thus assuming Doug is of African-American descent he would have standing to challenge the jury removals based on race.

The prosecution would have to show some reason other than race for removing the jurors. If they can show such a reason, and not much of a reason is required, the appellate court would have to deny Doug's appeal on this ground. If the prosecution cannot explain their action then Doug's conviction would be overturned.

Death Penalty

The Supreme Court has ruled that jurors who cannot issue the death penalty may be removed. It is not enough to have some doubts but the jurors may be removed if they will not apply the death penalty. The court has not ruled as to whether removing such jurors by preemptory challenge is a reversible error. However, the appellate court is not likely to overturn the conviction based on such use of a preemptive challenge.

3. 8TH AMENDMENT

The 8th Amendment prohibits cruel and unusual punishments. The 8th Amendment's protections are applied to the states through incorporation into the due process clause of the 14th Amendment. The Supreme Court has upheld the death penalty as constitutional, however, it has put a variety of procedural safeguards in place to protect the rights of citizens.

First, the Court has struck down any statute which requires the automatic imposition of the death penalty. The Court has required that the decision be given to the jury. However, the jury is not to be given free reign over the decision, but the Court must carefully instruct them and give them specific requirements to be met before the death penalty may be imposed. Included in those requirements is the requirement that the defendant be allowed to present mitigating evidence. In fact any mitigating evidence that might be relevant to the jury's decision must be admitted.

Here the statute requires automatic imposition of the death penalty, allowing the jury no discretion. In addition because it is automatic, it is unlikely that Doug was able to present any mitigating evidence at all.

Therefore the court of appeals must overturn the sentence because the imposition violates Doug's rights under the 8th Amendment.

4. JANE'S ACTIONS

A police officer has the legal right to apprehend a fleeing felon with deadly force as long as that officer reasonably believes the felon is dangerous to the community by posing threat of serious bodily harm or death. Here the facts only indicate that Al was being arrested for distribution of a controlled substance and because distribution is not a violent crime, that by itself would be insufficient to allow Jane to use deadly force on Al. Jane's action would be unlawful unless she could show some other grounds for believing Al dangerous. In addition it is unclear whether the crime Al was being arrested for is a felony. If it is not a felony then Jane's action was unlawful.