

**JULY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Criminal Law

QUESTION

Don arrived home at night and found Vic assaulting Don's wife. Vic escaped before Don could apprehend him. Convinced that the legal system would never bring Vic to justice, Don spent three months searching for Vic so that he could take care of the matter himself.

Alex, whom Don did not know, had his own reasons for wanting Vic dead. Alex heard of Don's desire to locate and retaliate against Vic. Hoping that Don would kill Vic, Alex sent Don an anonymous note giving Vic's location. Don, taking a pistol with him, found Vic where the note said he would be. After a heated argument in which Don accused Vic of attempting to rape his wife and Vic denied the accusation, Don shot Vic in the head.

Vic was rushed to a hospital where he was preliminarily diagnosed as "brain dead" and placed on life support systems for three days during which follow-up studies confirmed the permanent cessation of all brain function. A hospital physician then disconnected the life support systems which had kept Vic's heart and respiratory systems functioning, and Vic was pronounced dead.

Don and Alex were both charged with murder. Evidence of the above facts was admitted at trial. The prosecutor argued that the murder was willful, deliberate, and premeditated and that it was committed during the commission of felonies of assault with a deadly weapon and burglary. Alex was alleged to have aided and abetted Don. The court instructed the jury on aiding and abetting and on premeditated murder, felony murder, burglary, and assault with a deadly weapon, but ruled that there was no evidence to warrant instructions on manslaughter. The jury convicted both Don and Alex of first degree murder. Both have appealed.

1. How should the appellate court rule on Don's arguments that:
 - a. The uncontradicted evidence established that the hospital physician, not Don, killed Vic? Discuss.
 - b. The court erred in instructing on murder in the commission of a felony? Discuss.
 - c. The court should have instructed on manslaughter? Discuss.
2. How should the appellate court rule on Alex's arguments that:
 - a. The evidence is insufficient to support his conviction as an aider and abettor? Discuss.
 - b. The evidence is insufficient to support his conviction of first degree murder even if it does support a finding that he aided and abetted Don? Discuss:

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ANSWER A

I. Don's (D's) Arguments

A. The Cause of Death

A conviction for murder requires the death of a human being with malice aforethought. D's argument is that he didn't cause Vic's (V's) death, that the doctor did by turning off the life support equipment. For two reasons, this contention is without merit.

First, to be guilty for murder, D need only be a substantial factor in the death. There is no need to be the sole cause. Thus, even if V had died due to the doctor's negligence, D could still have been convicted of V's death, since he would have been a substantial factor in V's death, and legal proximate cause would not be broken by the doctor's negligence. Here turning off the life support equipment under these circumstances was appropriate and did not cut off D's liabilities.

Second, although at common law death was defined as the irreversible cessation of heartbeat and respiration, modernly it is defined as the permanent cessation of brain activity. This change is in effect in almost every jurisdiction today (due to the medical abilities to keep bodies "breathing and beating" indefinitely, and to facilitate organ donations). Thus, since V was "brain dead" at his arrival at the hospital, he was already dead, and later events were irrelevant.

B. Felony Murder

Felony murder is an unlawful killing in the commission of an inherently dangerous felony. Both assault with a deadly weapon and burglary are "inherently dangerous." However, the underlying felony for felony murder cannot be the actual killing act (that would be a type of bootstrapping that would make everything felony murder). Thus, the assault charge could not have been the basis for felony murder. That instruction was improper.

Burglary is an acceptable predicate for felony murder. However, first there must be a burglary. Burglary at common law is the breaking and entering into the dwelling house of another, in the nighttime, with intent to commit a felony therein. Modernly, most jurisdictions have eliminated the night time requirement, and expanded the locations from just dwelling houses to virtually any structure. Here, D went to V with the intent (apparently to shoot V) which is the proper intent. However, if the only evidence at trial was the facts given, there was no proof of any breaking and entering into any structure at all. D may have located V on the street for all we know, which is not burglary. Thus, on this evidence, the felony murder instruction based on burglary was improper as well.

The jury was instructed on both murder and felony murder. While the evidence would support a first degree murder conviction based on premeditated and deliberate intent

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to kill, the jury's verdict may have been improperly based on felony murder (which could have been first degree if one of the enumerated felonies in the statute was burglary). Thus, it can't be concluded beyond a reasonable doubt that the conviction was properly made (not under the felony murder doctrine), so the conviction must be reversed. However, a retrial is not barred by Double Jeopardy, so the state may try him again.

C. Manslaughter

Voluntary manslaughter is a murder (killing with malice) that is mitigated by provocation, unreasonable mistake or coercion. Only provocation is raised on these facts. Involuntary manslaughter is killing without malice, by a malum in se misdemeanor, intent to slightly injure, or criminal negligence. None of these are suggested by the facts.

Provocation

To mitigate a murder down to voluntary manslaughter, there must be a subjectively and objectively adequate provocation. To be subjectively adequate, the D must actually have been acting under a rage caused by the provocation. That is, if D was not himself "inflamed" even if a reasonable person would be, no mitigation. Or, if a sufficient cooling off period had elapsed so that D was no longer inflamed, then no mitigation.

Objectively adequate provocation means that a reasonable person under the circumstances would have been enraged. Thus, an unusually sensitive D does not get to mitigate.

At common law, only certain types of provocation were ever allowed, including catching your spouse "in flagrante delicto" (with another). Here, V apparently only attempted to rape D's wife, so this may not have been the right type of provocation. Modernly, the jury gets to decide provocation under the requirements described above. Traditional words alone were never enough, although now they may be.

In D's case, there are two different possible provocations - the assault on his wife, and the "heated argument" with V.

As to the first, three months had elapsed. This almost certainly was a sufficient cooling off period for even the most hot-headed person. Thus, it was not error to refuse a manslaughter instruction based on this.

As to the heated argument, this is a closer call. Depending on what was said by V and how heated it was, D may have been provoked. However, this provocation would not have been reasonable, at least on the given facts, so failure to instruct on manslaughter was ok.

II. A's Claims

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A. Insufficient evidence as aider/abettor

An aider and abettor (now usually just called an accomplice) is one who, with the specific intent that the crime be committed, aids or encourages another to commit the crime. An aider/abettor is fully liable for the resulting crime, even if they weren't present when it was committed.

Here, A hoped that D would kill V because he had his own reasons for wanting D dead. This is the sufficient specific intent required, which is the desire that the crime will be committed (or substantially certain knowledge that it would be). A provided D with V's location, after D searched three months for it. This is certainly "encouragement and aid."

Thus, A was an aider and abettor in V's death.

B. 1st Degree Murder

As discussed above, an aider/abettor is fully liable for the principal's commission of the underlying crime, even if not actually present. If D committed 1st degree murder, then A is also liable.

As described above, D's conviction must be reversed because of the faulty felony murder instruction. This impacts A as well, since it is possible that D is not guilty of 1st degree murder.

A's conviction must be reversed. This is because while A had the specific intent to kill and would thus be liable for murder under an intent to kill with malice, there was, however, no jury determination of premeditation and deliberation. It is possible, though unlikely, that the jury could find A didn't deliberate but wrote to D on a spur of the moment. A jury should decide this question.

ANSWER B

I. Don's Arguments

A. Physician Killed

The appellate court should reject Don's (D's) argument that the hospital physician, not he, killed Vic (V). D's conduct was both the actual and proximate cause of V's death. First, "but for" D's activities, V would not have died - the physician would never have touched him. Second, it is completely foreseeable that doctors will cease to keep alive the body of someone who is brain dead. Third, although there are not enough facts here, it is likely that the relevant jurisdiction has a statute defining legal death as brain death. If no, D is guilty of killing V regardless of the physician's actions.

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D could argue the “year and a day” rule, which says that a person cannot be convicted of murder if the victim does not die of his wounds within one year of being injured by the defendant. It is possible that V would have “lived” more than a year had the physician not intervened, but the fact is that he did not. No court is likely to rule otherwise.

B. Felony - Murder

The appellate court should rule that the court erred in instructing the jury on felony-murder because V was not killed during the course of a felony.

First, the state could not use burglary as a predicate for felony - murder, because the evidence is insufficient as a matter of law to support D’s conviction of burglary. At common-law, burglary involves a breaking into the home of another at nighttime with the intent to commit a felony within. Here, there is no evidence indicating either that the relevant jurisdiction has altered the common-law definition of burglary in any way; thus, the fact that the state failed to present evidence proving beyond a reasonable doubt that D killed V in a residence, that D killed V at night, and that D entered V’s residence (if it was a residence) by some kind of physical force (however minor) or trickery, as opposed to consent or implied consent (a business open to customer, for example), is fatal to the state’s claim that the murder of V was committed during burglary.

Second, assault with a deadly weapon cannot be a predicate for a felony murder because the felony used as a predicate must be separate and distant from the act of the murder itself. Assault with a deadly weapon is probably a lesser-included offense of a murder that involves a death weapon; even if it isn’t, however, it is still part of the same sequence of events that caused the murder. As such, just as child abuse that leads to death has been held not to be separate from the death for felony - murder purposes, the assault cannot justify a felony - murder instruction.

C. Manslaughter

The court did not err in refusing to instruct on manslaughter. To be entitled to such an instruction, a defendant must produce some evidence from which a jury could rationally conclude:

- (1) that the provocation was such that an ordinary reasonable person would also have been provoked;
- (2) that the defendant was, in fact, provoked,
- (3) that a reasonable person would not have cooled off in the time between this provocation and the killing; and
- (4) that the defendant did not, in fact, cool off.

Here, D has not satisfied all four elements. First, as a matter of law, words never constitute adequate provocation; thus, V’s denials of having raped D’s wife cannot be adequate provocation. Second, even if V’s original assault of D’s wife could itself have

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been adequate provocation, it could only have been so at that time. A reasonable person would have cooled off in the three months since the assault, and the evidence does not indicate that D was in a blind rage, unable to cool off.

II. Alex's (A's) Arguments

A. Aiding and Abetting

The court should reject A's argument. An individual who aids, encourages or counsels another to commit a criminal act is liable for that act if the person so aided, encouraged, or counseled actually commits that crime. Aiding and abetting is a specific intent crime; thus, an individual can be convicted of aiding and abetting only if he specifically intended the person aided and abetted to actually commit the crime (though knowledge of the unlawful goal may be enough for people who sell goods to another, knowing those goods will be used to commit a crime, if the price is so high that the supplier can be said to have a "stake in the venture").

Here, all the elements of the test are satisfied. First, A aided D's commission of the crime by supplying A with V's location; without the note, D could not have killed V. Second, A supplied the note hoping that D would kill V once he discovered his whereabouts; A thus specifically intended that D would carry out the crime.

B. 1st Degree Murder

If the evidence is sufficient to convict A as an aider and abettor, the court should rule that the evidence is sufficient to support A's conviction for 1st degree murder (M1).

Although D could not be convicted of M1 on a felon-murder theory (see above), the evidence was more than sufficient to allow the jury to conclude that D acted with premeditation - after all, he stalked V for three months and killed him with a deadly weapon once he found him.

Because D could have been convicted of M1, so could A. Under modern law, any accomplice is liable for the same crime as the principal unless he is an accessory after the fact, which is punished separately and less severely. A was not an accessory after the fact, so he is punished appropriately for M1.