
Final Examination

Criminal Law
College of Law
West Virginia University

Instructor: James R. Elkins

Fall, 2003

Instructions: The time allocated for the examination is 3 ½ hours. The examination consists of two parts. Part I is an essay question. Part II is a series of multiple choice questions. Part I (the essay question) & Part II (the multiple choice questions) will each constitute 50% of the grade for the course. The examination will be taken in the assigned examination room.

The first 2 ½ hours of the examination will be devoted to Part I (Essay Question). You will then be given a 15 minute break. The final 1 hour of the exam will be Part II (Multiple Choice Questions).

Open Book Exam: This is an open book exam. You are free to use materials you have brought with you to the examination. An open book exam does not mean you are free to confer with fellow students while taking the examination. During the examination you are to refrain from conversations with fellow students, whether in or outside the room where the examination is being administered.

Questions About the Exam: There should be no reason to consult with the instructor during the course of the examination. If you encounter a problem or find some significant discrepancy (factual or legal) with any aspect of the Essay question, you should resolve it by setting out the discrepancy and noting any facts or assumptions you find necessary to deal with the problem and the discrepancy.

Examination Numbers: Please place your examination number on *each* examination booklet you use. *Do not place your name on the examination blue books.*

Examination Booklets: Your response to the Essay question should be in examination blue books. Please write *legibly*. Write on only side of each page of the blue book. Use as many examination booklets as needed to fully respond to the questions. Please number the booklets: 1, 2, 3, etc.

Advice: Take time to organize your answer. You may find that the examination raises more issues than you can fully discuss in the allocated time. If so, discuss the issues you find most relevant and dispositive of the specific questions you are asked to address.

Jurisdiction: In answering the Essay question you are to draw on basic principles and doctrines of criminal law. You are not required to make specific references to West Virginia law but you are welcome to do so if it aids in your ability to answer the question.

PART I
ESSAY QUESTION

At trial, the following facts are established. On the evening of August 12, 2003, the defendant, Robert Guthrie, 28 years old, went to the restaurant where he was employed in the kitchen to wash pots and pans. Guthrie has been employed at Pasta House for 4 months, but has had an increasingly difficult time getting along with other kitchen employees. On the evening of August 12th, there was a great deal of joking around in the kitchen, and much verbal jousting, much of it at Guthrie's expense. At one point Guthrie tells Todd Stevens, who has taken the lead in making fun of Guthrie, to "zip it, and just leave me alone." Stevens continued to poke fun at the defendant, as did fellow workers, even after Guthrie made clear to Stevens and the others that he was not in the mood for their jokes. At one point in the evening, Michael Fitz, a fellow employee, who was closer to Guthrie than the others, told Stevens to ease up on Guthrie. Stevens paid little attention to Guthrie's concerns, and told Guthrie to "light up" and punctuated his statement by snapping Guthrie with a dishtowel several times.

Guthrie was determined to get through the evening. After warning Stevens to leave him alone, he turned back to his work. Standing with his back to the others now, Guthrie was snapped on the buttocks with a dishtowel by Stevens. Guthrie turned to Stevens and said, "You really shouldn't have done that," pulled a small pocket knife from his pocket, opened the larger of the two blades and stabbed Stevens in the neck three times. Bleeding profusely, Stevens was taken to the hospital for treatment of the wounds. Four days after being admitted to the hospital Stevens took pneumonia. He died the following week. The cause of death, as stated by Stevens' attending physician, was pneumonia.

Guthrie was charged with murder, and after a jury trial was convicted of 1st degree murder. The prosecution proceeded on the theory that Stevens death was a result of the stabbing, and that he became susceptible to pneumonia because of his weakened condition brought about by the stabbing.

The defense contended at trial that Stevens pneumonia was not the result of his weakened condition from the stabbing but rather an overall failure of his immune system brought about by a drug-resistant staph (*Staphylococcus*) infection for which Stevens had been receiving treatment for one month at the time of the stabbing.

The defense called as an expert witness, Dr. A.D. Ballis, who conducts clinical research on drug resistant staph infections. Dr. Ballis described how a staph infection inactivates the body's immune system. A protein produced by a staph bacteria causes previously healthy B cells—a specialized cell of the immune system—to commit a cell version of suicide, a process called apoptosis. Dr. Ballis has published a series of articles on apoptosis and its treatment in various professional medical journals.

Dr. Ballis testified that the B cell toxin produced by the staph infection “pushes” apoptosis and plays a significant role in adverse changes that occur to various body organs, including the lungs. It was his medical opinion that the staph infection was the most significant underlying factor in Guthrie’s pneumonia and the inability of the attending physicians to treat it successfully.

The defense also called a clinical specialist, Dr. Phyliss Austin, with extensive experience in the treatment of drug-resistant staph infections. Dr. Austin testified that based on Dr. Ballis research that she and other doctors around the country had been using (and writing in the medical journals about), a treatment of pneumonia in staph infection patients by injections of a drug—Flomex—which targets elimination of disease-causing B cells, and which with proper, carefully dosed injections could be used to control and bolster a weakened immune system and allow for normal treatment of pneumonia. Dr. Austin testified that, after reviewing the Stevens medical records, and careful consideration of the extent of the stab wounds, the nature of the pneumonia, and the progress of the staph infection, that with a proper administration of Flomex, Stevens would, in her opinion, have recovered from the pneumonia.

On cross-examination, Dr. Ballis testified that he had examined the Stevens medical records, and that while it was his medical opinion that the cause of death was pneumonia related, he could not say that the stab wounds were not a factor in Stevens’ death. When asked by the prosecution on cross-examination whether the stab wounds had not played a “significant” role in Stevens death, Dr. Ballis responded, “in this case, it was pneumonia that brought about the death of the deceased, and calculating the various causal factors and events that might have featured in Stevens pneumonia would, in my medical opinion, be guess work rather than science.” He went on to note that, “we can point to the organ in the body that fails, to the organ most proximately related to a patient’s death, but we cannot say, with any scientific certainty, or provide a definitive accounting for all the various weaken or adversely impacted body organs which may have played a secondary role in death. If we think about death as taking place upon a stage, there are main actors and minor roles. In my view, the stab wounds, serious as they were, played were relatively minor role in this particular death.” When pressed on this issue, by the prosecution, Dr. Ballis said, “I simply cannot provide you with a precise accounting for all the factors which may have been involved in the death of this young man.”

The prosecution called as a witness, Dr. Ralph Emory, the staff doctor at the hospital who supervised Stevens’ treatment. Dr. Emory testified that in his view the loss of blood and the weakened condition of patient played a “significant role” in Stevens’ death. On cross-examination by the defense, Dr. Emory admitted that the specific, final cause of death was pneumonia. Dr. Emory was further questioned by defense counsel as to the common nature of pneumonia. Dr. Emory replied that “Until 1936, pneumonia was the number one cause of death in the United States. But since the 30s, the use of antibiotics has brought it under control. But, even with the use of antibiotics, in 2002, pneumonia remained one of the leading causes of death for patients in hospitals.”

The defense then asked Dr. Emory a series of questions which explored the cause of Stevens' pneumonia. Dr. Emory admitted that pneumonia could be caused by bacteria, viruses, mycoplasmas, infectious agents such as fungi, and by various chemical agents. But he went on to add that the Stevens pneumonia had been clearly identified and treated as "bacterial pneumonia." The defense then asked, Dr. Emory: "Isn't it true that bacterial pneumonia can attack virtually anyone--infants, the elderly, alcoholics--indeed, isn't anyone with a weakened immune system at greater risk?" Dr. Emory answered this question as follows: "Yes, we are talking here about a weakened immune system, and any post-operative patient, as with Stevens, being treated for serious stab wounds, is more susceptible to pneumonia than are you and I. It's really quite simple. Pneumonia bacteria are present even in some quite healthy patients. When body defenses are weakened in some way, by illness, old age, malnutrition, general debility or impaired immunity, the bacteria can multiply and cause serious damage. When a person's resistance is lowered, bacteria work their way into the lungs and inflame the air sacs. Stevens' resistance was lowered by the stab wounds, beyond the weakening of his immune system by the staph infection and he got pneumonia."

The defense's concluding series of questions are reproduced here verbatim from the trial transcript:

Defense Counsel: "It is standard medical understanding, is it not, that if you develop pneumonia, your chances of a fast and complete recovery are greatest if the patient is young, if the pneumonia is caught early, if the patient's defenses against disease, that is his immune system is working well, and if you're not suffering from other illnesses?"

Dr. Emory: "Yes."

Defense Counsel: "Stevens was young and his pneumonia was caught early, was it not?"

Dr. Emory: "Yes."

Defense Counsel: "The pneumonia got the upper hand in this case, didn't it, because the patient's immune system was so thoroughly ravished by his staph infection that a standard treatment of antibiotics was insufficient to combat the infection?"

Dr. Emory: "We were hampered in the usual antibiotic treatment regimen in this case because of the various antibiotics that had been administered for the staph infection. And yes, the patient's immune system had been significantly impacted by the prolonged staph infection. As a physician I would not use the word ravished. The immune system had been impacted. We don't have an immune system gauge that will tell us exactly how well it is functioning. In Stevens' case it was functioning, but not as well as it should have, and perhaps not as well as we assumed it would. We were treating this young man for stab wounds and our ability to treat him more aggressively for the pneumonia was limited severely by his preexisting condition."

Defense Counsel: “You were primarily limited in treating him for the pneumonia because of his on-going treatment for the staph infection?”

Dr. Emory: “We are limited in treating a patient by all the presenting factors, and yes, the staph infection was a presenting factor.”

Defense Counsel: “Did you, in your treatment of Stevens, consider the Ballis-Austin treatment regime?”

Dr. Emory: “While we know about the Ballis-Austin research work, and have followed the progress of their proposed treatment regime, we stayed in this case with what is considered by most physicians as the standard treatment.

It is also undisputed from the evidence presented at the trial that the defendant Guthrie suffered from psychiatric problems at the time of the stabbing. One year prior to the incident at the Pasta House he was seen on four different occasions over a two month period by both a psychologist and a psychiatrist at Oakbrook, a community mental health center. Guthrie’s Oakbrook records indicate that he presented himself for evaluation because of several anxiety attacks. He was diagnosed as suffering from chronic depression, anxiety disorder, and an obsession with his buttocks which resulted in his being further diagnosed as having a Body Dysmorphic Disorder.¹ The defendant’s fixation with his buttocks seems to be linked to a buttocks wound received while he served in the U.S. Army in Afghanistan.

At the trial, the defendant testified he suffered a panic attack when he was snapped in the buttocks by a dishtowel. He described the anxiety attack as “intense”; he felt a lot of pressure in

¹ Body Dysmorphic Disorder (BDD) is described in standard psychiatric texts as a distressing and impairing preoccupation with an imagined or slight defect in appearance or some particular aspect of the body. An increasingly common psychiatric disorder, BDD often goes unrecognized and undiagnosed due to the patient’s reluctance to divulge symptoms of which he is ashamed. Any body part can be the focus of concern (including the genitals and the buttocks). BDD patients often engage in compulsive behaviors, such as mirror-checking, camouflaging, excessive grooming, and skin picking. The patient typically fears ridicule in social situations or avoids social situations where the defect may be seen or become known to others. The disorder is a source of general anxiety and seriously impairs relations with others. Obsessive ruminations about the imagined body defect may make it difficult to concentrate on work. The patient typically avoids social situations where the defect may be seen or discovered by others. BDD patients frequently suffer impairment in functioning as a result of their symptoms, some to a debilitating degree. Patients diagnosed with BDD are often delusional, and a significant number suffer from anxiety attacks and/or chronic depression. Psychiatric hospitalization, suicidal ideation, and suicide attempts are relatively common. Body Dysmorphic Disorder is listed in the DSM-IV under somatization disorders, but clinically, it seems to have similarities to Obsessive-Compulsive Disorder (OCD).

his head and his heart beat became so rapid that he thought he was going to have a heart attack. Guthrie claims to remember nothing about the actually stabbing of Stevens.

The defendant further testified that there was a boisterous atmosphere in the kitchen the evening of the stabbing and that he had been anxious all evening and was trying, as best he could, to avoid having an anxiety attack. (Those who have had experience with anxiety attacks report that they are a frightening emotional and physical experience and that when prone to such attacks one will go to great lengths to avoid them.) Guthrie testified that he could not understand why Stevens was picking on him, and why no one other than Fitz came to his defense. Other witnesses related that the defendant was not the particular object of the joking, and that this evening was no different from previous evenings. Stevens was playing around, as he did so often, and other witnesses found nothing particularly egregious in his conduct. Defendant testified that after he was snapped on the buttocks with the towel that he “lost it” and when he came to himself he was holding the knife and Stevens was backing away from him. One witness testified, that Guthrie turned to Fitz, after he stabbed Stevens and asked, “what happened?”

Dr. Felix Left called by the defense, testified that he examined Guthrie a month after the stabbing and confirmed in substantial part the diagnoses which had been made when Guthrie sought help at Oakbrook CMHC. Dr. Left found that Guthrie suffered from an anxiety disorder, chronic depression, and had a fixation on his buttocks (that is a body dysmorphic disorder). Guthrie’s attention to his buttocks had, in Dr. Left’s opinion, moved from the wound itself, to the buttocks more generally, and thus, warranted the Body Dysmorphic Disorder diagnosis. He found Guthrie severely depressed and suicidal. Dr. Left testified that there was little doubt that the defendant’s mental disorders affected his relationship with his co-workers as he feared that his preoccupation with his buttocks would be discovered and that this would bring great shame upon him. When Stevens eventually snapped Guthrie’s buttocks with the dishtowel, it significantly affected Guthrie’s perception of his acts on the evening of the stabbing, according to Dr. Left. It was Dr. Left’s opinion that while the defendant may have known the difference between right and wrong on the evening of the stabbing, he did not have the capacity at the time of the stabbing to conform his actions to the law. Dr. Left further testified that Guthrie’s perception of the events had been so dramatically affected by an anxiety attack, an attack which he found entirely credible,² and by the buttocks obsession associated with the body dysmorphic disorder, that his ability to think carefully and thoughtfully, or even rationally, about the situation that he confronted was severely impaired.

Dr. Clay Phelps was called by the prosecution to testify on Stevens’ psychological

² Stevens report of the anxiety attack just prior to the stabbing, although evidenced only by Stevens self-report, was found to be credible by Dr. Left based on his review of the trial testimony of the other witnesses about the situation which existed in the kitchen on the evening of the stabbing, and, significantly, that Stevens had been clearly diagnosed as suffering from anxiety disorder prior to the time of the stabbing. Based on psychological tests which Dr. Left had administered to Guthrie he found no evidence that Stevens was malingering.

condition. Dr. Phelps found that Guthrie did have a continuing preoccupation with his buttocks but described it as a continuing fear that the battlefield wound in the buttocks had not sufficiently healed (or as Guthrie put it, “if it healed, it didn’t heal right”). Dr. Phelps concluded that the wound so strongly reminded Guthrie of his war experience—some of it rather traumatic—that the preoccupation with his buttocks was rational. Dr. Phelps found the concern about the wound and the wound area insufficient as for diagnosis as a Body Dysmorphic Disorder as that condition is described in standard psychiatric texts. Dr. Phelps did find that Guthrie was suffering from anxiety disorder, but that Guthrie’s anxiety attacks had been infrequent prior to the stabbing and that there was no credible way to confirm Guthrie’s story that he suffered an anxiety attack preceding the stabbing of Stevens. The only evidence of an anxiety attack immediately prior to the stabbing, was Guthrie’s testimony. Dr. Phelps observed that, even though there was no evidence of malingering, or other exaggeration in Guthrie’s presentation of symptoms, he could not, as a psychiatrist conclude or deny the existence of this particular anxiety attack.

Trial defense counsel, Sharon Olson, had difficulty communicating with her client, and found him totally unwilling, or unable, to discuss his buttocks wound, and his continued concern about his buttocks, and the effect that his concern for his buttocks might have had on the events leading to the stabbing of Stevens. Olson was able to develop information about what happened on the evening of the stabbing, primarily with the help of Michael Fritz, who seemed to have worked harder than the others in the kitchen to get to know Guthrie. With the difficulty she experienced in working with Guthrie, and drawing on the psychological report from Oakbrook CMHC, and Dr. Left’s report, Olson wrote a letter (with a copy to the prosecutor) indicating that she had concerns about Guthrie’s competence to stand trial.

At a status conference on post trial motions, the trial court judge ordered that Guthrie appear at the hearing so that the competence issues raised by defense counsel could be explored. During the course of that hearing, Olson informed the court that she did not intend to present an insanity defense, but would present testimony concerning Guthrie’s psychological condition which would raise questions about his intent to kill Stevens. At this preliminary trial motions hearing, Olson expressed concern about Guthrie’s competence to stand trial, but indicated to the court that by working with other fact witnesses she was prepared to proceed to trial. During the course of this hearing, the trial court directed a number of inquiries to Guthrie, who told the trial judge that he was working as best he could with his lawyer, that he had no doubts about her ability to represent him, and that, “I know I’m in real trouble.” Asked by the trial judge, “do you think you are competent to stand trial?” Guthrie replied, “as ready as I’ll ever be.” The Defendant was then asked, “do you want to stand trial?” Guthrie replied, “Yes I do.” The trial court then directed that Olson confer with her client to determine whether she wished to file a motion for a court ordered competency evaluation. The trial judge ordered a recess in the hearing for the purpose of this conference. Olson conferred with Guthrie for approximately 15 minutes in a conference room near the courtroom and determined that Guthrie wanted to proceed to trial, that he had grave reservations about spending any time in a mental hospital for purposes of a competency evaluation, and that he opposed any actions on her part which would delay the trial.

After the hearing was reconvened, and hearing Olson's report on her conference with her client, the trial judge ruled that based on his personal observations of the defendant, counsel's representation that the defendant wanted to proceed to trial, that the defendant would not present an insanity defense at trial, and that defense counsel had declined to file a motion for a court-ordered competence to stand trial evaluation, that the trial court found there to be no basis for a court ordered evaluation to determine Defendant's competency to stand trial.

Before the case was submitted to the jury, the defense requested instructions on voluntary and involuntary manslaughter as well as 1st and 2nd degree murder instructions. The trial court agreed to give a voluntary manslaughter instruction, but declined to give an instruction on involuntary manslaughter. The trial court instructed the jury on murder and voluntary manslaughter as follows (with the jury instructions being numbered for convenience in further discussion):

- Murder of the First Degree is the willful, deliberate, premeditated, intentional and malicious killing of another person. [Jury Instruction No. 1]
- Murder of the Second Degree is the unlawful intentional killing of another person with malice but without deliberation or premeditation. [Jury Instruction No. 2]
- Voluntary Manslaughter is the felonious, unlawful and intentional taking of another person's life but without premeditation, deliberation or malice. [Jury Instruction No. 3]
- The Court instructs the jury that in your deliberations on whether the acts in this case constitute murder of the first degree, that is meant by the terms willful, deliberate and premeditated is that the killing was intentional. [Jury Instruction No. 4]
- The Court instructs the jury that to constitute a willful, deliberate and premeditated killing, it is not necessary that the intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that such intention should have come into existence at the time of such killing, as well as if it should have taken place at a time previous. [Jury Instruction No. 5]³

³ The defense specifically requested the following jury instruction on premeditation:

The jury is instructed that murder in the first degree consists of an intentional, deliberate and premeditated killing which means that the killing is done after a period of time or prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the

- The Court further instructs the jury that in order to constitute a “premeditated” murder an intent to kill can be inferred by the use of a deadly weapon. [Jury Instruction No. 6]
- The word malice, as used in these instructions, is used in a distinctly legal sense. You are not required to find that the defendant had any express malice in the form of anger or hatred, or that he acted out of revenge, but may find implied malice in the unjustifiable motives which prompted his actions. You may from all the evidence presented to you that the required malice of the defendant can be inferred or implied by the facts and circumstances in this case which have been proven to your satisfaction beyond all reasonable doubt.

Malice may be inferred from any deliberate and cruel act done by the Defendant without reasonable provocation or excuse, however sudden. Malice is not confined to ill-will toward the victim, but is to be found in those circumstances and acts which are ordinarily symptoms of a wicked, depraved and malignant spirit, and carry with them the plain indications of a heart, ignoring social duty, is fatally bent upon unlawful conduct. [Jury Instruction No. 7]

- The Defendant, in a prosecution for murder, can be held criminally responsible for those acts which, in a natural and continuous sequence resulted in death, and which, but for Defendant’s acts, the death would not have occurred.[Jury Instruction No. 8]⁴

circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder.

The trial court refused Defendant’s request and gave instead of the prosecution’s proposed instruction as set forth in Jury Instruction No. 5.

⁴ The defense specifically requested a causation instruction as follows:

In a prosecution for murder, it is incumbent upon the State to prove that the Defendant killed the deceased, that is, the Defendant was the criminal agent causing the deceased’s death. Accordingly, in this case, before you find Robert Guthrie guilty of any offense, you must first determine whether the evidence presented by the State has established beyond any reasonable doubt that the acts of the Defendant were the direct, proximate cause of the death of Todd Stevens.

The trial court refused the requested defense instruction and elected to give Jury Instruction No. 8 offered by the prosecution.

The defense specifically requested and the trial court refused to give a specific jury instruction on “diminished capacity” as follows:

- The jury may consider the Defendant’s mental condition, as shown by the psychiatric testimony in this case, in deciding whether the government has proved beyond a reasonable doubt that the defendant acted with premeditation, deliberation, and with malice aforethought in his intent to kill. If the evidence in this case leaves you with a reasonable doubt that the accused was capable of forming the required intent to commit the crime charged because of his psychological condition, then you should acquit the Defendant of the offense of murder and consider the lesser included offense of Voluntary Manslaughter.

When the trial court refused to instruct the jury on “diminished capacity” on the grounds that defendant’s psychological testimony had been fully allowed and that defense counsel had been allowed wide latitude in developing this evidence and arguing it to the jury and that this evidence would necessarily involve a determination by the jury as to the presence of the required mental elements of the charged offense, and that these elements had been defined in the jury instructions as a whole, a special “diminished capacity” jury instruction would not be required.

When the trial court refused to give defendant’s proposed “diminished capacity” jury instruction, defense counsel proposed that the trial court give, in lieu, of a “diminished capacity” instruction, the following instruction on “extreme emotional distress”:

- If you find, in your consideration of all the evidence, including evidence of the Defendant’s extreme state, that Defendant suffered no mental disease or defect that affects his accountability, but was exposed to an extreme and overwhelming stress; and had an extreme emotional reaction to it, as a result of which there was a loss of self-control, and his reason was overcome by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions, then you should consider the lesser charge of Voluntary Manslaughter.

The trial court refused to give defense counsel’s proposed jury instructions on “extreme emotional distress.”

The jury, based on the instructions given by the trial court, returned a verdict finding the defendant guilty of first degree murder. You are a lawyer retained by Guthrie and his family to appeal the murder conviction. Prepare a legal memorandum in which you lay out the issues which can be raised on appeal and how you expect the court to rule on these various issues. You should concentrate your detailed analysis and arguments on these issues which you consider to be most likely to receive a favorable decision on the part of the appellate court. (You may, of course, as time permits, point out those issues which you have considered and rejected.)