
Final Examination
CRIMINAL LAW

College of Law

West Virginia University

Instructor: James R. Elkins

Fall, 2004

Instructions: The time allocated for the examination is 4 hours. The examination consists of two (2) questions. Each examination question will count 50% of the final grade. The examination must be taken in the assigned examination room.

Closed Book Exam: This is an closed-book exam. You are not allowed, during the exam, to use any materials or notes or to confer with fellow students while taking the examination. You should refrain from conversations with fellow students during the examination.

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

Examination Blue Books: You are allowed to use as many Blue Books for your examination as you may think necessary to fully and completely answer the questions. All of your examination will be confined to examination Blue Books. Please write *legibly*. Use only the front side of each Blue Book page (this means that you should not write front and back of the page). Please number your exam blue books: 1, 2, 3, etc. Double check to see that your examination number is placed on each Blue Book.

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 a significant discrepancy (factual or legal) with any aspect of an exam question, you should resolve it by setting out the discrepancy and noting any facts or assumptions necessary to deal with the problem and the discrepancy.

Advice: Read the questions carefully and organize your answers. If an examination question raises more issues than you can fully discuss in the allocated time, you should focus on the most relevant and significant issues related to the specific questions presented. you are asked to address. (The purpose of the examination is not to “throw” law at a problem but to use law to resolve difficult and perplexing issues.)

Jurisdiction: In answering the examination questions you should focus on basic principles and doctrines of criminal law (including any West Virginia cases you were assigned) noting as we did in class those instances in which different jurisdictions take different approaches to particular legal doctrines (e.g., the duty to retreat in self defense cases). You are not required to draw specific attention to West Virginia cases or legal doctrines and you are not required to attempt to answer the questions as if the case were being decided in West Virginia.

Question I

Scott Jeffrey and Rebecca Jeffrey were charged with 1st degree murder and conspiracy for the death of their son, Joshua. They were represented by different defense counsel but jointly tried. After a three-day trial, Scott Jeffrey and Rebecca Jeffrey were convicted of 1st degree murder and conspiracy to murder in the death of 20 month old Joshua Jeffrey.

The testimony at trial established that Scott and Rebecca Jeffrey had argued, fought, and raged with each other from early in their marriage. They fought less, but no less intensely, after Joshua was born. Scott seemed to have found a new target for his anger and rage, his son, Joshua. Scott Jeffrey subjected Joshua to a continued pattern of physical abuse. Rebecca Jeffrey testified that Scott frequently hit Joshua in the stomach and face with his hands, and would sometimes whip Joshua on the buttocks and legs with a square two-foot long flat stick. At other times he would tie a rope or rag around the child's neck and talk to Joshua as if he were training a bird dog.

Rebecca Jeffrey testified that a week or two weeks prior to the evening on which Joshua died, sometime around the 1st of July, she had been bathing him in the bath tub when he fell and hit his head "pretty hard" against the tub. "I knew Joshua had been hurt and I thought we should take him to the hospital but Scott said we'd get in trouble if we did. They might think that I had caused the accident, and if so, there would be real trouble. I knew that there was no way to reason with Scott about this kind of thing and I just tried to put it out of my mind."

On the night Joshua died, Rebecca Jeffrey testified that Scott was attempting to get Joshua to eat and to walk but became furious apparently because Joshua would not eat. The defendant then began picking Joshua up "midway-to over his head and dropping him" and causing Joshua to hit his head against the floor. "He dropped Joshua four or five times." Scott Jeffrey stopped dropping Joshua when he stopped crying. Rebecca Jeffrey testified that she did not attempt to intervene because she knew it would do no good, and that her husband would get even more angry and that he would take that anger out on both her and on Joshua.

The EMT (emergency medical team) who arrived on the scene after Rebecca Jeffrey called 911, on July 11 at 8:00 P.M. The EMT team found Joshua in cardiac and respiratory arrest. On the way to the hospital, the EMT asked what happened to Joshua, the defendant, Scott Jeffrey, told them "the boy was sitting in a high chair without a tray and was fidgeting around in the high chair, and pitched forward, and when he fell he bumped his head." Rebecca Jeffrey confirmed Scott Jeffrey's account when questioned by the EMT team.

Dr. Ralph Johns, the emergency room physician, attempted resuscitation, and when resuscitation failed, Joshua was pronounced dead. Dr. Johns's determination as to the cause of death was "traumatic arrest secondary to various head injuries of recent and near recent origin." Dr. Johns further noted that Joshua had suffered various physical trauma injuries, in particular, "a serious closed, skull fracture with a three millimeter distraction" which he estimated to have occurred

approximately 10 days prior to Joshua's death. There were also "deep bruises to the torso and to the arms" of unspecified date and origin. Dr. Johns noted the immediate cause of death as: "cardiac and respiratory arrest from a severe brain concussion induced by injuries suffered on July 11th which were substantially augmented by an older skull fracture which occurred 10 days, more or less, before death."

Scott Jeffrey admitted to a hospital social services worker that Joshua would scream and throw temper tantrums and when he did he punished him. He further admitted that he sometimes punished Joshua "too hard" but that it was the only way to get him to be quiet. As to the head injury, repeated to the hospital social services worker the story he had given the EMT team. Rebecca Jeffrey finally admitted to the social services worker that Scott Jeffrey had been dropping Joshua and that his injuries on July 11th had not occurred as Scott had tried to account for them. The social services worker testified that neither Scott nor Rebecca Jeffrey showed any remorse or regret after being told of the death of their son, and that in her experience, their response was odd and that she had never witnessed anything quite like it.

An autopsy performed by Dr. Philip Irvin, State Medical Examiner, served as the basis for his testimony that Joshua had multiple bruises of varying ages. There were bruises on his face, his torso, and extensive bruises on his lower extremities. Dr. Irvin testified that the severe bruises on the child's scalp "would be indicative of approximately four or five separate impacts of the hard on a hard surface." In addition, Dr. Irvin discovered a skull fracture and a related hemorrhage which occurred, by his estimate, ten days prior to the child's death. He further testified that he found an acute subdural hematoma which occurred near the time of death. In his view, Joshua died of an "acute craniocerebral injury, accompanied by a skull fracture and prior brain injury." He further testified that, based upon his training and experience, the head injuries Joshua sustained were, in his professional opinion, the result of parental abuse.

On cross-examination, by defense counsel representing Scott Jeffrey, Dr. Irvin was asked which of the head injuries, the one from 10 days prior to death, or those sustained immediately prior to death, was the cause of Joshua's death. Dr. Irvin testified that, "the immediate cause of death was clearly the head injuries sustained immediately prior to Joshua's death, but that the earlier skull fracture of some 10 days prior, was also a contributing factor." It would, he said, "be virtually impossible to place a quantitative value on the contribution of the earlier injury as a cause of death, but in my professional opinion, the earlier skull fracture, serious as it was, left Joshua alive, those he suffered on the evening he died were the immediate cause of death."

On further questioning by the prosecution, Dr. Irvin was asked, "would Joshua have died from the head injuries he sustained on the evening of his death if there had been no prior injuries?" Dr. Irvin replied, "you are asking me to speculate about matters which would require conjecture on my part. We know, with certainty, that the injuries Joshua sustained on the evening he died, given the condition he was in, resulted in death. Whether he would have died two days or four days later, or two years later, if he had not received those prior injuries, we simply cannot say with 100% assurance."

Scott Jeffrey testified at trial and conceded he was not always the best of parents. He did not deny that he used harsh physical forms of discipline for his son. He denied dropping Joshua on the day he died. When cross-examined about specific incidents of abuse against his son and his wife, he replied that they were exaggerated or he could not remember them. He also testified that much of what his wife said about him abusing Joshua was imagined, and that “whatever she says about what I done is nothing more than her anger at me for doing or not doing one thing or another over the years we been married. She don’t know truth from shit and never has.” The defendant asserted at trial that he loved Joshua and had never, by his use of stern, physical discipline, intended to kill his son. He further testified that while Rebecca was not much of a wife or a mother, it was his business as father to discipline his son. “She didn’t ever hit the boy so far as I’ve seen her but she never had anything to say about the way I went about handling Joshua.”

Rebecca Jeffrey testified that she knew Scott Jeffrey had a mean streak and sometimes drank too much when she married him. Soon after they got married, Scott ran around with his old friends, got drunk and would come home and get upset over little things. When he was sober, he was good to her. However, after he was out with his friends, he would get angry for no good reason, yell and swore at her and tell her that she was no good, “never was and never will be, and that if he had any sense he’d leave her.” Over the years, the drinking problem worsened and a pattern of violence and physical abuse emerged. She testified that he often hit her or grabbed her by the hair. On more than one occasion he had put his fists through the walls and in one rampage had completely destroyed two living room chairs by throwing them against the wall. He once hit her in the face when she suggested he drank too much, and on that occasion, knocked her unconscious.

She sought medical attention on four occasions, once after the beating in which he knocked her unconscious, one time when he cut her with a kitchen knife, another time when he pushed her and she fell down the stairs and broke her ankle. (Medical records support Rebecca Jeffrey’s testimony that she sought medical treatment as a result of injuries incurred from these various incidents.)

Rebecca Jeffrey’s sister, Alice Jeffrey, testified that her sister was terrified of Scott Jeffrey and whenever she tried to get Scott to treat her right she ended up being beaten. She related how Rebecca, on one occasion left Scott to come and stay with her after he had knocked her to the floor after she told Scott there was no milk for cereal, raged for two days, and then threw a knife at her when she asked him to replace the battery on her car so she could go to work. Scott called Rebecca repeatedly while she was staying with Alice, and after a week with Alice, she went back to him. Alice testified that Rebecca, while staying with her, would break down and cry, “acted real depressed,” and admitted to Rebecca that about the only way she was going to get away from Scott Jeffrey was to kill herself. Rebecca told Alice, “either Scott is going to end up killing me or I’ll kill myself. I don’t see any way out.”

Rebecca Jeffrey testified that she had never physically abused her son Joshua and that she had

never approved of Scott's use of physical discipline. When asked on cross-examination by the prosecution whether she was physically present when Scott beat and abused Joshua, she admitted that she was. Asked whether she had ever called the police or welfare authorities to repeat Scott's abuse of Joshua, she admitted that she had not. On re-direct examination by defense counsel, Rebecca Jeffrey was asked what would have happened if she had reported her husband's abuse to the police or to other authorities, she said, "he would have beat me just short of death or maybe he would have just killed me." Asked whether she could not simply have left her husband, as she did when she left Scott to stay with her sister, she testified: "I had no place to go. My sister had her own life to live. She can't take me and Joshua in. She don't need my troubles as well as her own. Scott woulda' come and got me. And if I didn't listen to me and do what he said, he told me plenty of times, he'd kill me. You don't just up and leave a man like that."

The defense sought to present the testimony of Dr. William Michaels, a forensic psychiatrist. Upon objection by the prosecution, the trial court held an *in camera* hearing to hear the proposed testimony of Dr. Michaels. He stated for the record that he had examined defendant and diagnosed her as suffering from low self-esteem, posttraumatic stress disorder (PTSD), dependent personality, and chronic depression. She was, he testified, "as typical a case of "battered woman syndrome as we are likely to see in clinical practice." Based upon his review of police reports, interviews with Rebecca Jeffrey and other family members, and psychological tests conducted by a psychologist associated with his practice, he concluded that Rebecca Jeffrey had become so fearful of Scott Jeffrey and of her own life, that she lacked the will and the capacity to protect her son from the physical abuse of her husband.

The State objected to Dr. Michaels's testimony and moved that it be stricken on the grounds that Dr. Michaels had presented no theory or standard by which psychiatry could distinguish between those so severely affected by a history of abuse and battering and could not form the criminal intent required by murder and those who, with a similar history, retained the capacity to form intent to murder. The State argued that Dr. Michaels testimony was, in theory and in practice, "speculative" and would, if admitted, "confuse" the jury. The State further argued that use of a "battered woman syndrome" defense should not be extended beyond its traditional use in self-defense cases to help juries determine whether a victim of abuse charged with murder had a reasonable belief that she was in imminent danger of serious bodily harm.

The defense responded that Dr. Michaels, if his testimony on "battered woman syndrome" was to be precluded, could testify simply as an expert on domestic violence and its psychological effect on a victim and how it would affect her fear of Scott Jeffrey. Defense counsel pointed out that Dr. Michaels's testimony *in camera* had gone well beyond simply diagnosing Rebecca Jeffrey as suffering from "battered woman syndrome." He had also provided testimony on the dynamics of economic and psychological control that an abuser has over his victim, and described the cycle of intimidation, threats, and violence used by Scott Jeffrey to create a sense of helplessness in his victim, a helplessness that would render Rebecca Jeffrey unable to protect her son. Dr. Michaels's testimony related how a history of physical abuse, coupled with verbal and psychological abuse (demeaning and humiliating the victim), can result in feelings of guilt,

shame, self-blame, fear, depression, and anxiety. It can, testified Dr. Michaels, “so distort your thinking you don’t know what’s real and what’s not. The victim learns to live with a reality that the rest of us have trouble understanding.”

The defense argued that there was no logical or legal justification for allowing a “battered woman syndrome” diagnosis and testimony in self-defense cases and not allowing it in cases in which it could directly, as in the case of Rebecca Jeffrey, explain for a jury why she acted in regards to Scott Jeffrey as she did, acts which had resulted in her being charged with murder.

The trial court judge granted the prosecutor’s motion to refuse to allow testimony regarding “battered woman syndrome,” finding that the history and extent of Rebecca Jeffrey’s abuse could be adequately shown by lay witnesses and by her own testimony and that it was the proper role of the jury to determine whether a history of abuse had direct bearing on Rebecca Jeffrey’s acts and intent to murder her son.

Before the trial commenced, defense counsel considered the possibility of raising an insanity defense based on Dr. Michaels’s diagnosis of depression, post-traumatic stress disorder (based on a finding of “battered woman syndrome”), and dependent personality. Rebecca Jeffrey strenuously resisted the use of an insanity defense, and taking account of her objections (“I couldn’t live with myself if I was found in court to be crazy”) and Dr. Michaels evaluative report, the decision was made not to raise an insanity defense. During this time, Rebecca Jeffrey was sometimes barely communicative and her defense lawyer found her increasingly depressed and unable to focus on the events leading up to Joshua’s death. She mentioned that she had thought about taking her own life on several occasions but refused, at the suggestion of defense counsel, to seek psychiatric help.

At a pretrial hearing, at which the prosecution inquired as to whether the defense was going to present an insanity defense, defense counsel provided the State and the trial court with Dr. Michael’s evaluative report (which contained basically the same information which was later produced at the *in camera* hearing) and verbally suggested that counsel was “having problems” communicating with Rebecca Jeffrey and that given her psychological condition there was a question as to whether she was competent to stand trial. The trial court judge then inquired: “Do you want to make a motion to have your client evaluated?” Defense counsel responded, “Not at this time, judge.” The trial court judge, then turned to Rebecca Jeffrey and asked her whether she know what was going on and that she was going to stand trial for murder. Ms. Jeffrey replied, “sometimes I’m better at understanding all this than at others. Sometimes I’m so depressed I can’t seem to talk about nothing. Losing Joshua the way we did makes everything different. I can’t think straight anymore. My life has been such a waste, I don’t know that it’s worth livin’ anymore.” When asked by the trial court judge whether she knew who her defense counsel was and what he was trying to do, she replied, “he’s doing the best he can. I don’t know what he’s really supposed to be doing. The only thing I know about what lawyers do is what I see on TV.” Asked whether she knew she was going to stand trial for murder, Rebecca Jeffrey stated: “Scott’s the one done all the beating. I’m not exactly innocent, but it wasn’t me that killed Joshua.” Based

on this brief exchange between the trial court judge and the defendant, Rebecca Jeffrey, and a reading of Dr. Michaels's report, the trial court judge entered a finding that Rebecca Jeffrey was competent to stand trial.

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■ After all the evidence in the case was presented to the jury, defense counsel for Rebecca Jeffrey moved for a motion of acquittal on the grounds that the evidence was insufficient to support a conviction for murder, indeed, insufficient for a conviction of manslaughter. The trial court denied the defense motion finding that sufficient evidence had been produced by the State to submit the case to the jury. The trial court judge submitted the case of Rebecca Jeffrey to the jury with instructions on 1st and 2nd degree murder, and voluntary and involuntary manslaughter.

■ When the trial court invited defense counsel to submit arguments on proposed jury instructions, defense counsel for Scott Jeffrey argued that the prosecution had failed to prove that Scott Jeffrey was guilty of murder, and if he had committed any crime, it was manslaughter. The trial court ruled that the evidence produced at trial was sufficient for a jury to find, if it read the evidence most favorable to the prosecution, that Scott Jeffrey was guilty of 1st degree murder. The court proposed (and eventually gave) jury jurisdictions on 1st and 2nd degree murder, and on voluntary manslaughter. Defense counsel objected to the jury instructions on murder and voluntary manslaughter. The defense requested, and was denied by the trial court, a jury instruction on involuntary manslaughter.

Defense counsel for Scott Jeffrey requested a jury instruction on causation and the judge indicated that he thought the evidence presented to dispute causation was weak and he did not feel it necessary to give a causation jury instruction. Defense counsel argued that there was more than enough evidence to raise the question as to whether the bathtub "accident" prior to the evening in question may have contributed significantly in Joshua's death.

The prosecution stated that it had no objection to given a causation jury instruction if it were properly drafted. The trial court, still pondering whether to give a causation instruction, indicated that if it did, the instruction would be as follows:

You may find Scott Jeffrey committed the acts charged if the state proves that his alleged acts were a proximate cause of Joshua Jeffrey's death, that is, his acts significantly contributed to Joshua's death. The state, of course, must prove beyond a reasonable doubt that the defendant caused Joshua Jeffrey's death. On the matter of proximate cause, you are instructed that this does not necessarily mean the last act of cause, or the act in point of time nearest to Joshua's death, but that proximate means that but for defendant's conduct, the death would not have resulted.

Defense counsel took objection to this phrasing of the trial court's proposed jury instruction, arguing that it would be more likely to result in a conviction than if no jury instruction of any kind were given on causation and that the proposed instruction was not a correct statement of the law. The trial court judge told defense counsel, "you can take it or leave, that's up to you." Given this alternative, defense counsel for Scott Jeffrey decided to forego a jury instruction on causation.

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Scott and Rebecca Jeffrey were both convicted of 1st degree murder and conspiracy to murder their son, Joshua Jeffrey.

As a knowledgeable defense lawyer, what issues raised by the record and the convictions in this case will you raise on behalf of Scott and Rebecca Jeffrey on appeal? For each of the issues that you identify provide the argument and analysis which you think an appellate court could draw upon to overturn the convictions.

If there are more issues than you can address in the allotted time, select those issues which you think constitute the most egregious errors, errors which would provide the basis for a successful appeal, for Rebecca and Scott Jeffrey.

Question II

David Morbet was charged and convicted of attempted murder. The testimony of David Morbet and Lacy Benson at trial establish the following facts: David Morbet went to the home of Philip Wilson at 8:30 P.M. in search of the woman he had been living with for six months. She had known Wilson before he got involved with her and he hoped that Wilson might either know where she was or might help him find her. Wilson was his friend. Morbet did not find Wilson at home, but Wilson's friend, Lacy Benson, answered the door. Benson invited Morbet in to wait for Wilson. While waiting they began to drink. Over the course of the next three hours they consumed a six-pack of beer and a fifth of Henry McKenna. (*The Spirit Journal* writes, "In Henry McKenna, we have a fine Bardstown, Kentucky straight single-barrel whiskey with aromas of charcoal and sweet citrus. There is a depth of richness with caramel and charcoal flavors, and a sweet, spicy finish.") (A fifth is the unit of measure of liquor and equals one fifth of a gallon). Both Morbet and Benson agree that they were intoxicated when they decided to go look for Philip Wilson around midnight.

During the course of their driving around Benson jokingly and rather brazenly suggested to Morbet that they have sex. Morbet told her he didn't think it was such a good idea, since he and Wilson were good friends. Benson suggested that he wasn't much of a man if he wasn't interested in having sex with her.

With Benson continuing to suggest and entice him to have sex, Morbet drove Benson to a parking lot behind an abandoned warehouse where he relents, telling her, "alright, you talked me into it." Morbet and Benson get into the back seat of the car, and begin to play around. Morbet, realizing that having sex with Lacy Benson is very much the dumb idea he at first thought it to be, begins to put his clothes back on. Benson tells him, "it looks like it's what I thought all along, you're not all that much of a man." Morbet tells her that not having sex with her has got nothing to do with being a man. Benson then tells Morbet, "let's face, you don't know a damn thing about women. You wouldn't know how to make love to a woman if she gave you a booklet of instructions and a week to study it." Morbet, growing tired of her sexual taunts, told her to shut-up. She didn't. After another long harangue about his manhood and his sexual experience with women, Benson said, "you and Philip Wilson are more interested in each other than they you are women, and we both know what that means." Morbet, according to Benson, "flew into a rage." "He grabbed me around the neck with his hands, told me—I know how to shut you up—and began squeezing my neck and choking me." Benson testified that Morbet's only statement while he was choking her was: "You're not doing much of that trash talk now are you. Don't anybody have to listen to you and that kind of trash." According to Benson, he choked her for several minutes, and quite choking just as she thought she was going to black out. When he quite choking her, Benson asked Morbet, "David, why did you try to kill me?" He replied that he was afraid that if she told Philip Wilson what had happened that Wilson would kill him, or maybe kill both of them. Morbet denies making this statement.

On cross-examination, Lacy Benson was asked if she actually knew how long Morbet had tried to strangle her. She replied, "I'd say for two minutes. It seemed like a awfully long time." But when pressed, she admitted, "I wasn't looking at my watch. I thought I was going to die. It seemed like he was choking me forever. I'd say it was 2 minutes, that's about the best I can guess it was."

Medical testimony at the trial established that Lacy Benson had extensive, external, physical trauma to the neck and chin, with bruising at several places around her neck and a small skin hemorrhage on one side of her face. Dr. Leon Franks, a physician, who examined Lacy Benson, in the early morning hours of the morning following the encounter with Morbet, testified that the physical trauma of the neck and chin was consistent with the testimony given by Lacy Benson. Dr. Franks testified that the bruising to the neck and chin skin abrasions were clearly associated with strangulation and that in his medical opinion the strangulation associated with the production of Lacy Benson's bruising "created a grave risk of death because pressure of this kind applied for 2 to 3 minutes closes off the veins in the front of the neck. This prevents the return of blood from the head, where it is pumped by the arteries, causing death to brain cells. This kind of pressure, when sustained, can result in brain damage or in death."

Dr. Ralph Donnelly, a forensic pathologist called by the defense, testified that he had reviewed the medical reports of Dr. Franks in regards to Lacy Benson's injuries and that he had, two years before the trial, conducted a research review of medical records in 25 strangulation cases. He noted that it was important to distinguish between the cases in which the only observable injury was the external physical trauma to the skin, as in Lacy Benson's case, and cases in which there was evidence of internal injuries as well. Upon reviewing the Lacy Benson medical records, Dr. Donnelly testified, based on a reasonable degree of medical certainty, that Lacy Benson's injuries were of the less serious, external physical trauma type, and that significant indicators of strangulation necessary to bring about death were absent.

On cross-examination, Dr. Donnelly was asked if, as an expert in strangulation cases, he had been able to physically examine Lacy Benson, as did Dr. Franks, that he might have found still further indicators that the strangulation of Lacy Benson was of the kind which, if sustained, would have resulted in death. Dr. Donnelly replied, "well, it's true that the more thorough the examination, the better we are able to judge the scope and extent of the strangulation and whether it would be likely to have resulted in death. But in this case, Dr. Franks's examination was notable for its completeness. It contained a rather detailed statement as to the nature and scope of the physical trauma to the neck and face. Based on this rather exceptional examination, I consider myself thoroughly and sufficiently informed about the nature of the injuries to say that the strangulation in this case did not pose a threat to Lacy Benson's life. I did not find that the abrasions on the neck, even when combined with the physical trauma described by Dr. Franks, to be of a kind that would have, without more, have led to death by strangulation."

Dr. Donnelly, the cross-examination continuing, was asked, if he agreed with Dr. Franks testimony that "strangulation creates a grave risk of death because the pressure from the hands

closes off the veins in the front of the neck and prevents the return of blood from the head, where it was pumped by the arteries” and he agreed that he did.

On cross-examination, of Dr. Donnelly, the prosecution asked whether sufficient pressure could have been applied to bring about death but that the deadly pressure was simply removed in a timely fashion to avoid death. Dr. Donnelly replied, “no, in that case the pressure would have resulted in internal injuries as well as the external ones.”

The defense, in its cross-examination of Dr. Franks, inquired as to whether Lacy Benson had been given a follow-up examination to determine whether there was any symptomatic voice changes (hoarseness or loss of voice), or reported difficulty or painfulness in swallowing due to unobserved injury to the larynx cartilage or hyoid bone, the small horseshoe shaped bone in the neck. Dr. Franks admitted that no such follow-up examination was conducted and further admitted that symptomatic voice changes and difficulties in swallowing post-strangulation would have been indicators of the kind of series threat to Lacy Benson’s life that he had concluded was present.

The prosecution asked Dr. Franks, whether absent the kind of examination that would have determined the nature, scope and extent of Lacy Benson’s internal injuries to the neck, that it was not also possible to conclude that Lacy Benson had suffered internal as well as external trauma indicative of deadly pressure being placed on her neck. He replied, “yes, that would be my understanding.”

Morbet testified that he had no reason to kill Lacy Benson and never had any intention to do so. She was, he testified, “saying things that no one should say and the only way to shut her up was to do it the way I did it. I was trying to shut her up, not kill her.” On cross-examination, Morbet admitted that what he did was “stupid” and “not exactly the best way to deal with the situation” but that “doing something dumb does mean you want to kill someone.”

Morbet claims that he was intoxicated, and that it was the intoxication, rather than his friendship for Philip Wilson that prevented him from having sexual intercourse with Lacy Benson. Morbet testified that he had no reason to kill Lacy Benson, and had never had any intention of causing her serious harm. “The only thing I was tried to do was get her to keep talking all that trash about me and, then, about me and Philip.”

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- Following the presentation of the evidence at trial in which the above facts were established, defense counsel moved for a directed verdict on the grounds that the evidence produced by the prosecution had been insufficient as a matter of law for a jury to find the defendant guilty of attempted murder. The trial court judge denied the defense motion for a directed verdict.

- The defense requested jury instructions on voluntary intoxication, extreme emotional

disturbance,¹ diminished capacity, and provocation/heat of passion.

- The trial court denied the defense request for a jury instruction on provocation/heat of passion on the grounds that provocation and heat of passion was recognized by the court as a mitigation of murder to manslaughter and therefore would not be applicable in a case in which the charge is attempted murder.
- The trial court denied jury instructions on diminished capacity on grounds that insufficient evidence had been produced by the defense to warrant such an instruction.
- The trial court judge expressed concern that extreme emotional disturbance and voluntary intoxication were inconsistent defenses, and that if the defendant was intoxicated he could not claim extreme emotional disturbance since the extreme emotional response could as equally be attributed to the intoxication as to his sober, emotional response to the situation. The judge decided that the defendant must elect either a voluntary intoxication jury instruction or an extreme emotional disturbance jury instruction but would not be allowed both. The defense contended that the evidence presented at trial entitled the defendant to both jury instructions and refused to elect one or the other. The prosecutor, concerned that the trial judge's decision, might result in reversal on appeal, requested the judge to give both instructions as defense had requested. The trial judge thereupon determined that a voluntary intoxication instruction should be limited to murder cases and not to cases where a finding of voluntary intoxication could result in total exoneration of the defendant and denied the defense/prosecution request for a voluntary intoxication jury instruction.
- Defense counsel, faced with the trial court's view of the conflicting nature of a voluntary intoxication and an extreme emotional disturbance defense, elected to press forward on an extreme emotional distress defense and requested a jury instruction as follows:

If you find, beyond a reasonable doubt, that the defendant committed the offense of attempted 1st degree murder, you must then determine whether, at that time, he was under the influence of an extreme emotional disturbance for which there was a reasonable explanation for his extreme emotional reaction. The reasonableness of the emotional response shall be determined from the viewpoint of the defendant, in the defendant's situation, under the circumstances of which he was aware of them.

The trial court refused to give the requested EED jury instruction and, at the prosecution's insistence, gave the following instruction:

If you find, beyond a reasonable doubt, that the defendant committed the offense of attempted 1st degree murder, you must then determine whether, at that time, he

¹ The jurisdiction recognizes "extreme emotional disturbance" as a defense.

was under the influence of an extreme emotional disturbance for which there was a reasonable basis. The reasonableness of the defendant's emotional disturbance shall be determined by what you the jury determine to be reasonable. If you find that the defendant's acts which would otherwise constitute attempted murder was conduct was the product of an extreme emotional disturbance and that extreme emotional disturbance had a reasonable basis, then you shall find the defendant guilty of attempted 2nd degree murder.

- The defense requested and the trial court judge gave a jury instruction on attempted 2nd degree murder but the trial court refused the defense request for a jury instruction on attempted manslaughter on the grounds that there is at present no such crime, and, that the appellate court should not recognize the crime of attempted manslaughter.
- The trial court judge gave, among other jury instructions, the following instruction.

A defendant who makes use of a deadly weapon, or by any means of any deadly instrumentality, is presumed to have intended the immediate direct and necessary consequences of his voluntary act. The Court instructs the jury that malice and intent can be inferred by the jury from the defendant's use of a deadly weapon under circumstances which you do not believe afforded the defendant excuse, justification or provocation for his conduct. The presumption of the law is that a defendant intends the consequences of his acts, and when he engages in acts that are likely to cause death he can be presumed to have intended the death that results from his acts.

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The defendant was convicted of attempted 1st degree murder. Write an opinion for an appellate court sustaining or overturning the conviction in this case based on issues which you think a knowledgeable lawyer would raise on appeal of Morbet's attempted murder conviction.

Double check to see that your examination number is placed on each Blue Book.