

ST. MARY'S UNIVERSITY SCHOOL OF LAW

CRIMINAL LAW  
Professor Schmolesky

Fall 1984

This is a three hour, open book test consisting of two essay questions. Question I is worth a total of 70 points divided into 5 parts:

- Question A (20 points)
- B (10 points)
- C (10 points)
- D (10 points)
- E (20 points)

Question II is a single essay question worth 30 points.

I suggest that you read all of the exam (or at least all of Question I) before you begin to answer any part of it, so that you will know how to structure your answer. An appendix of relevant statutory offenses is included for your reference. The appendix contains all of the statutory offenses named in the exam but it is not intended to be an exhaustive compendium of all statutes in the Texas Penal Code or Code of Criminal Procedure that may be relevant to your answer.

Good luck.

I. (70 points total) All of the following events occurred in Texas.

Bobby Bully, age 18 asked his 16 year old friend, David Dull to help him steal money from old man Ebenezer who owned and operated Ebenezer's hardware store. Dull, who was still in the seventh grade, probably due to his low IQ, refused. Bully grabbed Dull by the collar, pushed him against the wall and threatened him:

"I'll kill you if don't help me," Bully said taking a gun out of his pocket and holding it to Dull's head. Dull quickly agreed to cooperate. Bully outlined the simple plan. Dull, who unlike Bully, would not be suspected of a criminal purpose by Ebenezer, would go into the hardware store and select a small item, like a light bulb. Dull would take the item to the cash register that Ebenezer jealously guarded. Dull would produce a \$20 bill (supplied by Bully) and when Ebenezer opened the cash drawer, Dull was to pull out an unloaded gun (also supplied by Bully) and demand the money. Bully did not trust Dull to handle a loaded gun and Bully told him so. Bully was to wait outside the store with the car running and the two would escape. Bully made it clear that the gun that he gave to Dull was only to scare Ebenezer and that it was unloaded but the gun that Bully carried was loaded. Bully warned Dull that he would watch Dull carefully while he was in the hardware store. "If you do anything except what I've told you to do---I'll be watching through the picture window in the front of the store. I'll kill you---understand?" Dull agreed to do exactly as Bully had told him.

Bully and Dull drove to the hardware store and Bully motioned for Dull to go inside. Dull went in and selected a light bulb and went to the counter where Ebenezer stood. Dull produced the \$20 bill and placed it on the counter next to the light bulb. When the cash drawer opened Dull produced the gun and said:

"This is a hold-up!" Dull became flustered however, and dropped the unloaded gun before Ebenezer could do anything. Dull grabbed the cash drawer and began to run from the store leaving the \$20 bill and the light bulb on the counter. Ebenezer yelled: "Stop or I'll shoot" as he reached under the counter and picked up a loaded gun that he kept there for security. Dull stopped for an instant but as he looked around he saw a classmate, Fred Friendly, who worked at Ebenezer's hardware. Friendly shoved Ebenezer from behind knocking him to the ground and sending his eyeglasses flying across the floor. Ebenezer's gun fired as he hit the floor and a bullet caromed off the ceiling, striking Godfrey Glum, causing "serious bodily injury" to him. While sprawled on the floor, Ebenezer fired desperately at Dull but the bullet missed Dull and struck Harry Hit, causing him "serious bodily injury".

Ebenezer had no more bullets in his gun but he had another weapon in his arsenal. A small button behind the counter activated a spring gun that was hidden behind the exit sign above the door. Ebenezer crawled over to the button and pushed it just as Dull raced through the door. The gun went off and Dull was struck. (Again, assume that Dull's injuries constitute "serious bodily injury" under Texas law.)

Bully dragged the bleeding Dull and the cash drawer that had fallen from Dull's hands to the car. Bully drove off quickly. Two police cars that had been dispatched to the scene saw the speeding car and followed in pursuit. About a block from the hardware store, one of the squad cars went out of control and crashed. The 2 officers in the car were both killed instantly. The other squad car eventually caught up with Bully and Dull and they were arrested. The cash drawer taken from the hardware contained one \$10 bill, one \$5 bill, two \$1 bills, six quarters, five dimes, six nickels, and 20 pennies for a total of \$19.50--a net loss of fifty cents because Dull, in his haste had left the \$20 on the counter at the hardware store.

A. (20 points) A young assistant prosecutor who has been assigned to the case has decided that both Bully and Dull may be charged with the following offenses:

- assault (22.01);
- reckless conduct (22.05);
- robbery (29.02);
- theft (31.03);
- attempted theft (15.01 and 31.03);
- conspiracy to commit all of the above offenses (15.03 and all of the above);
- 2 counts of felony murder (19.02(3) naming the two police officers as victims).

In a memo to the D.A., point out the possible problems to obtaining a conviction for both of the defendants (Bully and Dull) for these offenses.

B. (10 points) In the same memo discuss how many of the offenses listed in question IA may result in separate convictions. May any of the offenses listed be submitted as lesser included offenses without being named in an indictment or information.

C. (10 points) Assume that the hardware store owner, Ebenezer has been indicted for 3 counts of aggravated assault. The indictments name Godfrey Glum, Harry Hit, and David Dull as victims.

Assume that you have been retained to represent Ebenezer. Describe the defense arguments that you plan to develop.

D. (10 points) The District Attorney has asked your advice about whether Fred Friendly, the store clerk could be included as a defendant in any of the crimes listed in question IA. Advise the D.A. Are there any other offenses that Friendly could or should be charged with?

E. (20 points) At the trial of David Dull, the trial court charged the jury that:

"If the defendant has persuaded you by a preponderance of the evidence that he committed the crime of robbery (29.02) because he was compelled to do so by the unlawful threat of imminent death or serious bodily injury, you will find the Defendant, David Dull, not guilty."

At the same trial, the trial judge instructed the jury concerning the elements of reckless conduct (22.05) and the requirement that the state prove each of these elements beyond a reasonable doubt. The judge then instructed the jury that: "If you find, beyond a reasonable doubt, that the defendant knowingly pointed a firearm at Ebenezer, then you may, but need not find that the defendant, David Dull, recklessly placed Ebenezer in imminent danger of serious bodily injury, whether or not the defendant believed that the gun was loaded. If you have a reasonable doubt as to whether David Dull pointed the firearm at Ebenezer, the presumption fails and you shall not consider the presumption for any purpose. Remember also all of the elements of the offense of reckless conduct that I have previously instructed you about, and remember that the state must prove each of these elements beyond a reasonable doubt."

On appeal, Dull's appellate counsel argued that these instructions violated defendant's due process rights by unconstitutionally shifting the burden of proof to the defendant. As an appellate judge, write a brief opinion evaluating these claims.

II. (30 points)

Maude, Nan and Olivia were elderly women who lived together in Metropolis, Texas. Olivia was mildly senile, and she complained bitterly of her arthritic pains and headaches. One day, Maude said to Nan, "I wish I knew a good way to kill that biddy. It would be a clear case of self-defense, since her constant complaining is killing both of us by degrees." Nan replied, "I have felt the same way for years, but I was always afraid to say so. If we ever have a chance, let's do it."

Maude was the only member of the threesome who followed the news. Approximately two weeks after her conversation with Nan, Maude's newspaper reported that seven people in Metropolis had died after taking Extra-Strength Tylenol to which someone had added cyanide. Two of the fatal bottles had been purchased at Bill's Drugs, and Maude herself had purchased a bottle of Tylenol at Bill's a few days before. Of course, not all bottles of Tylenol had been altered, and even the altered bottles contained mostly harmless pills. Maude read urgent pleas in the newspaper to return unused Tylenol to the place of purchase for a full refund.

Maude described the situation to Nan and said, "I've decided not to return the Tylenol but to leave it right where it is on the bathroom shelf. The two of us need not kill Olivia after all. Instead, God can decide whether she lives or dies, and I will happily abide God's judgment. I have told Olivia not to touch my medicine. If she disobeys my instructions the way she has in the past and if someone has tampered with the pill that she takes, she will be out of our way forever. It will be God's just punishment for stealing my pill." Nan replied, "I shall pray that Divine Providence will indeed rid us of that harpie"; and that night she did. Unbeknownst to Maude, Nan also telephoned her friend Phyllis, who purported to be a witch, and asked Phyllis to urge the dark spirits to bring about Olivia's death. Phyllis agreed and later performed an occult ritual that involved crumbling Extra-Strength Tylenol over a lifelike paper doll.

**Sec. 18.01. Criminal Attempt.** (a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

(b) If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.

(c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

(d) An offense under this section is one category lower than the offense attempted, and if the offense attempted is a felony of the third degree, the offense is a Class A misdemeanor.

**Sec. 18.02. Criminal Conspiracy.** (a) A person commits criminal conspiracy if, with intent that a felony be committed:

(1) he agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and  
 (2) he or one or more of them performs an overt act in pursuance of the agreement.

(b) An agreement constituting a conspiracy may be inferred from acts of the parties.

(c) It is no defense to prosecution for criminal conspiracy that:

(1) one or more of the coconspirators is not criminally responsible for the object offense;

(2) one or more of the coconspirators has been acquitted, so long as two or more coconspirators have not been acquitted;

(3) one or more of the coconspirators has not been prosecuted or convicted, has been convicted of a different offense, or is immune from prosecution;

(4) the actor belongs to a class of persons that by definition of the object offense is legally incapable of committing the object offense in an individual capacity; or

(5) the object offense was actually committed.

(d) An offense under this section is one category lower than the most serious felony that is the object of the conspiracy, and if the most serious felony that is the object of the conspiracy is a felony of the third degree, the offense is a Class A misdemeanor.

**Sec. 18.03. Criminal Solicitation.** (a) A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

(b) A person may not be convicted under this section on the uncorroborated testimony of the person allegedly solicited and unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act on the solicitation.

(c) It is no defense to prosecution under this section that:

(1) the person solicited is not criminally responsible for the felony solicited;

(2) the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution;

(3) the actor belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity; or

(4) the felony solicited was actually committed.

(d) An offense under this section is:

(1) a felony of the first degree if the offense solicited is a capital offense; or

(2) a felony of the second degree if the offense solicited is a felony of the first degree.

**Sec. 18.01. Types of Criminal Homicide.** (a) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual.

(b) Criminal homicide is murder, capital murder, voluntary manslaughter, involuntary manslaughter, or criminally negligent homicide.

**Sec. 18.02. Murder.** (a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

**Sec. 18.03. Capital Murder.** (a) A person commits an offense if he commits murder as defined under Section 18.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from the penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

**Sec. 18.04. Voluntary Manslaughter.** (a) A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 18.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.

(b) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(c) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(d) An offense under this section is a felony of the second degree.

**Sec. 18.05. Involuntary Manslaughter.** (a) A person commits an offense if he:

(1) recklessly causes the death of an individual; or

(2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.

(b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body.

(c) An offense under this section is a felony of the third degree.

(Note: S.B. 1, Section 24, 68th Legislature, Regular Session, 1983, provided "(a) Each county with a population of 25,000 or more according to the most recent federal census shall purchase and maintain electronic devices capable of visually recording a person arrested within the county for an offense under Article 6701+1, Revised Statutes, or Subchapter (2), Subsection (a), Section 18.05, Penal Code.

"(b) The sheriff of the county shall determine upon approval by the county commissioners court the number of devices necessary to ensure that a peace officer arresting a defendant for an offense listed in Subsection (a) of this section may visually record the defendant's appearance within a reasonable time after the arrest.

"(c) The fact that an arresting officer or other person acting on behalf of the state failed to visually record a person arrested for an offense listed in Subsection (a) of this section is admissible at the trial of the offense if the offense occurred in a county required to purchase and maintain electronic devices under this section.")

**Sec. 18.06. Evidence.** In all prosecutions for murder or voluntary manslaughter, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

**Sec. 18.07. Criminally Negligent Homicide.** (a) A person commits an offense if he causes the death of an individual by criminal negligence.

(b) An offense under this section is a Class A misdemeanor.

**Sec. 22.01. Assault.** (a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; or

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under Subsection (a)(1) of this section is a Class A misdemeanor unless the offense is committed by the owner or an employee of an institution described in Subsection (a), Section 2, Chapter 413, Acts of the 53rd Legislature, Regular Session, 1963, as amended (Article 4442c, Vernon's Texas Civil Statutes), or a person providing medical or psychiatric treatment at an institution described in that subsection, and the offense is committed by causing bodily injury to a patient or resident of an institution described in that subsection, in which event the offense is a felony of the third degree.

(c) An offense under Subsection (a)(2) of this section is a Class C misdemeanor unless:

(1) the offense is committed by the owner or an employee of an institution described in Subsection (a), Section 2, Chapter 413, Acts of the 53rd Legislature, Regular Session, 1963, as amended (Article 4442c, Vernon's Texas Civil Statutes), or a person providing medical or psychiatric treatment at an institution described in that subsection, and the offense is committed by threatening a patient or resident of an institution described in that subsection with bodily injury, in which event the offense is a Class B misdemeanor; or

(2) the offense is committed against a classroom teacher, counselor, principal, or other similar instructional or administrative employee of a primary or secondary school accredited by the Texas Education Agency while engaged in performing his educational duties, in which event the offense is a Class B misdemeanor.

(d) An offense under Subsection (a)(3) of this section is a Class C misdemeanor unless the offense is committed against a classroom teacher, counselor, principal, or other similar instructional or administrative employee of a primary or secondary school accredited by the Texas Education Agency while engaged in performing his educational duties, in which event the offense is a Class B misdemeanor.

**\*Sec. 22.02. Aggravated Assault.** (a) A person commits an offense if the person commits assault as defined in Section 22.01 of this code and the person:

(1) causes serious bodily injury to another, including the person's spouse;

(2) causes bodily injury to a peace officer or a jailer or guard employed at a municipal or county jail or by the Texas Department of Corrections when the person knows or has been informed the person assaulted is a peace officer, jailer, or guard:

(A) while the peace officer, jailer, or guard is lawfully discharging an official duty; or

(B) in retaliation for or on account of an exercise of official power or performance of an official duty as a peace officer, jailer, or guard; or

(3) causes bodily injury to a participant in a court proceeding when the person knows or has been informed the person assaulted is a participant in a court proceeding:

(A) while the injured person is lawfully discharging an official duty; or

(B) in retaliation for or on account of the injured person's having exercised an official power or performed an official duty as a participant in a court proceeding; or

(4) uses a deadly weapon.

(b) The actor is presumed to have known the person assaulted was a peace officer if he was wearing a distinctive uniform indicating his employment as a peace officer.

(c) An offense under this section is a felony of the third degree.

**Sec. 22.06. Reckless Conduct.** (a) A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.

(b) Recklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded.

(c) An offense under this section is a Class B misdemeanor.

**Sec. 29.02. Robbery.** (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

**Sec. 31.02. Theft.** (a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent; or

(2) the property is stolen and the actor appropriates the property knowing it was stolen by another.

(c) For purposes of Subsection (b)(2) of this section:

(1) evidence that the actor has previously participated in recent transactions other than, but similar to, that which the prosecution based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the actor's plea, not guilty;

(2) the testimony of an accomplice shall be corroborated by proof that tends to connect the actor to the crime, but the actor's knowledge or intent may be established by the uncorroborated testimony of the accomplice;

(3) an actor engaged in the business of buying and selling used or secondhand personal property, or lending money on the security of personal property deposited with him, is presumed to know upon receipt by the actor of stolen property (other than a motor vehicle subject to Article 6687-1, Vernon's Texas Civil Statutes) that the property has been previously stolen from another if the actor pays for or loans against the property \$25 or more (or consideration of equivalent value) and actor knowingly or recklessly:

(i) fails to record the name, address, and physical description or identification number of the seller or pledgor;

(ii) fails to record a complete description of the property, including the serial number, if reasonably available, or other identifying characteristics; or

(iii) fails to obtain a signed warranty from the seller or pledgor that the seller or pledgor has the right to possess the property. It is the express intent of this provision that the presumption arises unless the actor complies with each of the numbered requirements.

(4) for the purposes of Subparagraph (i) above, "identification number" means driver's license number, military identification number, identification certificate, or other official number capable of identifying an individual.

(d) Except as provided by Subsection (e) of this section, an offense under this section is:

(1) a Class C misdemeanor if the value of the property stolen is less than \$20;

(2) a Class B misdemeanor if:

(A) the value of the property stolen is \$20 or more but less than \$200; or

(B) the value of the property stolen is less than \$20 and the defendant has previously been convicted of any grade of theft;

(3) a Class A misdemeanor if the value of the property stolen is \$200 or more but less than \$750;

(4) a felony of the third degree if:

(A) the value of the property stolen is \$750 or more but less than \$20,000, or the property is one or more head of cattle, horses, sheep, swine, or goats or any part thereof under the value of \$20,000;

(B) regardless of value, the property is stolen from the person or another or from a human corpse or grave; or

(C) the value of the property stolen is less than \$750 and the defendant has been previously convicted two or more times of any grade of theft; or

(5) a felony of the second degree if:

(A) regardless of the value, the property is:

(i) combustible hydrocarbon natural or synthetic natural gas or crude petroleum oil; or

(ii) equipment designed for use in exploration for or production of natural gas or crude petroleum oil; or

(iii) equipment designed for use in remedial or diagnostic operations on gas or crude petroleum oil wells;

(B) the value of the property stolen is \$20,000 or more; or

(C) regardless of the value, the property was unlawfully appropriated or attempted to be unlawfully appropriated by threat to commit a felony offense against the person or property of the person threatened or another or to withhold information about the location or purported location of a bomb, poison, or other harmful object that threatens to harm the person or property of the person threatened or another person.

(e) An offense described for purposes of punishment by Subsection (d) of this section is increased to the next higher category of offense if it is shown on the trial of the offense that:

(1) the actor was a public servant at the time of the offense; and

(2) the property appropriated came into the actor's custody, possession, or control by virtue of his status as a public servant.