

ESSAY QUESTION NO. 4

Answer this question in booklet No. 4

Twenty-four-year-old Danielle and her roommate, twenty-six-year-old Tanya, share an apartment in downtown Anchorage. The two were at home late one Friday night, drinking wine and celebrating Danielle's recent promotion at work. After Tanya and Danielle had each had several drinks, Tanya became angry with Danielle and starting screaming at her. As Danielle tried to quiet Tanya down, Tanya continued to yell and started to throw plates and glasses at her roommate. Tanya then grabbed a knife and approached Danielle with her arm raised as if to stab her. Danielle, afraid that she would be unable to control her taller and heavier roommate, grabbed her car keys and ran out to her car. As Tanya followed Danielle out of the apartment, Danielle quickly started her car and drove away.

Fifteen minutes later, Danielle continued to drive, well over the speed limit, away from her apartment. Still crying and upset, Danielle accidentally ran a red light and T-boned another car. Danielle pulled her cell phone out of her pocket and called the police, who promptly responded to the scene. Responding officers discovered that the driver of the other car, Vic, had suffered a broken leg. In talking with Danielle, officers noted that she had a strong odor of alcohol on her breath, bloodshot eyes, and heavily slurred speech. After Danielle performed poorly on several field sobriety tests, she was arrested and taken to a substation, where she provided a breath sample measuring .150, over the legal limit for breath and/or blood alcohol.

1. Please discuss the crimes with which Danielle can be charged.
2. As trial approaches, Danielle files a timely notice of a necessity defense to all crimes that she is charged with. Discuss whether or not Danielle can successfully assert the defense of necessity in her case.

GRADER'S GUIDE

*** QUESTION NO. 4 ***

SUBJECT: CRIMINAL LAW

1. Please discuss the crimes with which Danielle can be charged. (50%)

The facts established in the question provide probable cause for charging Danielle with two basic categories of offenses.

A. Driving Under the Influence (20%)

First, Danielle can be charged for driving under the influence. Alaska Statute 28.35.030(a) provides that:

A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or watercraft (1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance, singly or in combination; or (2) and if, as determined by a chemical test taken within four hours after the alleged operating or driving, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or if there is 0.08 grams or more of alcohol per 210 liters of the person's breath.

Here, where Danielle drove her motor vehicle after consuming several glasses of wine, she can be charged under either of the above theories of DUI. While the question does not provide much detail about Danielle's driving, it does reflect that she was speeding and ran a red light, and as a result, collided with another vehicle. Moreover, Danielle smelled strongly of alcohol, had bloodshot eyes and slurred speech, and performed poorly on field sobriety tests, further indicia that she was "under the influence" of alcohol while driving. Alaska law provides that a person is "under the influence of intoxicating liquor" when as a result of its use, the person's physical or mental abilities are impaired so that the person is no longer able to drive a vehicle, under the same or similar circumstances, with the caution characteristic of a person of ordinary prudence who is not under the influence of intoxicating liquor. See Criminal Pattern Jury Instruction on AS 28.35.030(a), added in 1999 (citing *Gunderson v. Municipality of Anchorage*, 762 P.2d 104, 115-16 n.7 (Alaska App. 1988)). Although Danielle could debate the strength of the evidence at trial, the facts

provide sufficient evidence to charge her with driving while under the influence of an alcoholic beverage or intoxicating liquor under AS 28.35.030(a)(1).

Further, Danielle clearly provided a breath sample measuring well beyond the legal limit of .08 grams of alcohol per 210 liters of breath. Examinees might point out that the question does not indicate when Danielle provided her breath sample in relation to driving, and that she could have provided the sample over four hours after driving (four hours being the benchmark provided in the statute). The facts indicate, however, that police arrived promptly at the scene of the accident, and there is no suggestion of long delays prior to Danielle's processing for DUI. Danielle's driving of her vehicle, and then provision of a breath sample measuring .15, constitute sufficient evidence to charge her with DUI under AS 28.35.030(a)(2).

B. Assault/Reckless Endangerment (30%)

Given her manner of driving, and the fact that she caused a car accident in which another was injured, Danielle can also be charged with various degrees of assault, as well as reckless driving and reckless endangerment. Examinees may or may not be able to identify actual degrees of assault to be charged; however, even without referring to specific degrees of assault, examinees generally should discuss the elements necessary to determining assault charges: 1) the mental state with which Danielle acted; 2) the seriousness of Vic's injury; and 3) the presence or absence of a dangerous instrument.

The assault charges and theories most applicable to this context are: Assault in the First Degree (recklessly causing serious physical injury by means of a dangerous instrument); Assault in the Second Degree (recklessly causing serious physical injury to another); Assault in the Third Degree (recklessly placing another in fear of physical injury by means of a dangerous instrument or recklessly causing another physical injury by means of a dangerous instrument); and/or Assault in the Fourth Degree (recklessly causing another physical injury; negligently causing another physical injury by means of a dangerous instrument; or recklessly placing another in fear of physical injury). Depending on the prosecution's evaluation of the seriousness of Vic's injury, Danielle is likely to be charged at a maximum with Assault in the First Degree or Assault in the Second Degree. These crimes necessarily include lesser theories and degrees of assault, and Danielle could simultaneously be charged with those lesser included offenses.

Danielle could also be charged with reckless endangerment – recklessly engaging in conduct creating a substantial risk of serious physical injury to another – and/or reckless driving. See AS 11.41.200-.230; AS 11.41.250; AS 28.35.400. While Danielle's conduct also consisted of several moving violations such as running a red light, speeding, and negligent driving, those infractions

are not punishable by any term of imprisonment and thus do not rise to the level of crimes. AS 11.81.900(b)(11).

1. Mental State

With respect to Danielle's mental state, the facts likely demonstrate that Danielle was reckless with respect to causing injury to another. Not only did she speed and run a red light, causing her to hit Vic's vehicle, she made the decision to drive (and continue driving) after she had consumed several glasses of wine and was – at least arguably – under the influence of alcohol. In Alaska, a person acts “recklessly” with respect to a result or a circumstance “when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.” AS 11.81.900(a)(3). In order to find that a person acted recklessly, the risk perceived and disregarded must be “of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” *Id.* Importantly, in Alaska, intoxication cannot be used to excuse reckless behavior. *Id.* (stating that “[a] person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk”).

Assuming Danielle acted recklessly with respect to the risk of injuring someone else while she was driving, she could also be said to have acted with the lesser mental state of criminal negligence. There are no facts, however, that Danielle “knew” she was injuring another or “intended” to injure another as she drove – even as she drove through the red light; thus, Danielle cannot be charged with knowingly or intentionally assaulting Vic.

2. Level of Injury

There is no doubt that Danielle's conduct injured another person – namely, Vic. Vic's leg was broken as a result of the collision caused by Danielle. The level of assault Danielle could potentially be charged with, however, depends in part on whether that broken leg constitutes a “physical injury” or “serious physical injury.”

Under Alaska law, “physical injury” means “a physical pain or an impairment of physical condition.” AS 11.81.900(b)(46). Vic's broken leg doubtless qualifies at least as a physical pain or impairment of physical condition. To reach the level of “serious physical injury,” Vic's injury must be a “physical injury caused by an act performed under circumstances that create a substantial risk of death,” AS 11.81.900(b)(56)(A), or “physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or

that unlawfully terminates a pregnancy.” AS 11.81.900(b)(56)(B). In discussing Danielle’s potential assault charges, examinees may make arguments for or against deeming Vic’s broken leg a “serious physical injury,” but should recognize that the severity of Vic’s injury will help to determine the level of assault charged.

3. Dangerous Instrument

Danielle’s car likely qualifies as a “dangerous instrument” in the scenario at issue. A “dangerous instrument” is “any deadly weapon or anything that, under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury.” AS 11.81.900(b)(15)(A). One could certainly make the case that the manner in which Danielle was using her car – driving it while under the influence of alcohol, speeding, and running a red light – in a manner that made it capable of causing death or serious physical injury. *See, e.g., Nelson v. State*, 927 P.2d 331 (Alaska App. 1996) (involving felony assault charges in which dangerous instrument used was a motor vehicle).

2. As trial approaches, Danielle files notice of a necessity defense to all crimes that she is charged with. Discuss whether or not Danielle can successfully assert the defense of necessity in her case. (50%)

The defense of “necessity” is an affirmative defense available to all criminal defendants “except where preempted or excluded by the legislature.” *State v. Garrison*, 171 P.3d 91, 94 (Alaska 2007) (citing AS 11.81.320 and *Bird v. Municipality of Anchorage*, 787 P.2d 119, 120-21 (Alaska App. 1990)). To establish the defense of necessity, a defendant must show:

(1) that they committed the charged offense to prevent a significant evil; (2) that there was no adequate, reasonably available alternative to committing the offense, and (3) that the harm caused by the charged offense was not disproportionate to the harm the defendant avoided by breaking the law.

Allen v. State, 123 P.3d 1106, 1108 (Alaska App. 2005). Moreover, if the defendant asserting a necessity defense is charged with a continuing offense – such as a driving offense – the defendant must show: “(4) that they stopped violating the law as soon as the necessity ended.” *Id.*

In order to properly assert a necessity defense, the defendant must have believed at the time of acting that elements (1), (2), and – if applicable – element (4) were present. *Garrison*, 171 P.3d at 94; *Seibold v. State*, 959 P.2d 780, 782 (Alaska App. 1998). If the defendant reasonably believed those elements were

present – that she was preventing a significant evil; that there was no adequate, reasonably available alternative to committing the offense at issue; and that she stopped violating the law as soon as the necessity ended – it does not matter if the defendant’s belief was actually mistaken. *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073, 1078 (Alaska 1981). Element (3), however, weighing the harm caused by the charged offense against the harm the defendant avoided by breaking the law, is not established by the defendant’s reasonable belief. *Seibold*, 959 P.2d at 782. Rather, the court makes “an objective determination . . . as to whether the defendant’s value judgment was correct, given the facts as [she] reasonably perceived them.” *Id.* (quoting *Bird*, 787 P.2d at 120-21).

Examinees may point out that a defendant is entitled to a jury instruction on the necessity defense only if she presents “some evidence” in support of each of the elements of the defense. *Id.* “Some evidence” is “evidence that, viewed in the light most favorable to the defendant, would allow a reasonable juror to find in the defendant’s favor on each element of the defense.” *McGee v. State*, 162 P.3d 1251, 1261 (Alaska 2007). In this case, if Danielle chooses to rely upon a necessity defense and is able to set forth some evidence of each element of that defense, she ultimately has the burden of proving the defense by a preponderance of the evidence in order to be acquitted of the crimes charged. *Garrison*, 171 P.3d at 95.

A. Driving Crimes – DUI/Reckless Driving

In this case, Danielle will argue that any criminal behavior she engaged in was excused, because she needed to drive away from her house in order to avoid being assaulted by her roommate, Tanya. *See, e.g., Cleveland*, 631 P.2d at 1078-79 (where harm being avoided emanates from a human source, the harm threatened must be unlawful in order to support necessity defense). Danielle can set forth facts demonstrating that her roommate Tanya actually assaulted her prior to her driving away (by throwing plates and glasses at her, and then threatening her with a knife), and was about to seriously assault her with a knife when she fled her apartment by car. Thus, Danielle was avoiding or preventing a significant harm in driving away from her home, even if intoxicated.

Whether Danielle should reasonably have recognized alternatives to her chosen course of action is debatable, and test-takers could argue this point either way. Some may suggest that Danielle had several alternatives, including simply running away from the apartment without driving and/or using the cell phone in her pocket to call the police or another friend. Danielle could likely argue in response that Tanya’s actions did not leave her with the time to stop and call anyone. She might also contend that she could not outrun her roommate, and needed the speed and protection of her car. The question does not reflect

whether Danielle and Tanya had neighbors; however, Danielle might argue that she was unable to outrun Tanya to contact neighbors. At least with respect to a DUI charge, Danielle could likely present some evidence that she lacked any reasonable alternatives to driving away from her apartment.

The relative weight of the harm attributable to Danielle's behavior and the harm that she avoided is also a questionable determination. Danielle can set forth evidence that she avoided a great harm by fleeing her home. Indeed, the facts suggest that she avoided being seriously assaulted by her roommate. On the other hand, Danielle's driving behavior caused a collision in which another person's leg was broken. Moreover, beyond Vic's broken leg, Danielle's driving (essentially speeding under the influence) could foreseeably have caused much greater injury or death to other motorists or pedestrians. Again, examinees could argue this balance either way, but should recognize the need to weigh the harm foreseeably caused by Danielle's actions against any harm avoided.

The undoing of Danielle's necessity defense likely lies in the fourth element of that defense, demanding that the criminal behavior be halted as soon as the necessity has ended. Here, Danielle is charged with a continuing offense, in that she is accused of committing DUI for the entire period during which she drove. While Danielle may be able to demonstrate that she needed to drive away from her home in order to avoid being seriously assaulted, she will not be able to successfully argue that she needed to keep driving for fifteen minutes, as the facts indicate that she did. Danielle's emergency arguably ended relatively quickly after she drove away from Tanya. Once she had gotten out of the immediate area, Danielle no longer needed to continue driving, but could have stopped at any number of places or contacted any number of people – including calling the police on her cell phone – to get help. Because Danielle's illegal driving behavior continued beyond the scope of any threat of harm, she will not likely get a necessity instruction at trial, and her assertion of the necessity defense will not excuse her driving-related crimes.

B. Assault/Reckless Endangerment Charges

For much the same reason that Danielle's necessity defense against driving-related charges would fail, Danielle cannot successfully assert a necessity defense to assault charges. At the time that Danielle caused the collision with Vic, giving rise to an assault charge, Danielle had already escaped the harm of her roommate's imminent attack. There are no facts indicating that Danielle was still in imminent danger of being assaulted by Tanya as she continued to drive and ran a red light fifteen minutes after leaving her apartment. Without facts suggesting a continued or renewed emergency, Danielle cannot establish that she reasonably believed she was avoiding a significant harm or that she lacked adequate alternatives when she continued to drive and collided with Vic's vehicle. Nor, for that matter, can she establish that the harm caused by

her behavior was outweighed by some harm avoided. Danielle will not be able to assert a necessity defense to excuse her assault-related conduct.