

ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

Joe Smith, 22 years of age, had been drinking beer with some friends. While walking down the street, he saw a car parked on the side of the street with the keys in the ignition. Although he had no idea who owned the car, he decided to take it because he was tired of walking.

Smith began driving 60 miles per hour when the posted speed limit was 35 miles per hour. Smith also began weaving in and out of traffic, causing cars to swerve wildly to avoid him. One of the other drivers, Jane Doe, swerved completely off of the road because she was afraid Smith might crash into her and kill her. He overcorrected after passing one vehicle and crashed into an unoccupied parked car, bending the frame. The collision also smashed in the front of the car that he was driving, so he got out of the car and began staggering down the street. After a few hundred yards, a police officer stopped him.

Smith smelled like alcohol, had bloodshot watery eyes, and slurred his speech. A breath test taken three hours after the accident demonstrated that his breath contained .09 grams of alcohol per 210 liters of breath.

Discuss the crimes under Alaska state law which Smith committed.

GRADER'S GUIDE

*** QUESTION NO. 5 ***

SUBJECT: CRIMINAL LAW

1. Driving Under the Influence – 25%

There are two alternative methods for proving that a defendant committed the offense of Driving Under the Influence of alcohol. First, the state can prove that the defendant knowingly drove or operated a motor vehicle while under the influence an alcoholic beverage. AS 28.35.030(a) (1). Second, the state can prove that the defendant knowingly drove or operated a motor vehicle, that the defendant took a chemical test within four hours of the alleged offense, and that the chemical test showed that the defendants blood was .08% or more alcohol by weight or contained 80 milligrams or more alcohol per 100 milliliters or that the defendant's breath contained .08 grams or more of alcohol per 210 liters of breath. AS 28.35.030(a) (2).

Alaska Statute AS 28.35.030 does not prescribe the mental state applicable to the offense of driving under the influence, but the court of appeals has held that the offense requires proof that the defendant "knowingly ingested intoxicants and knowingly operated or assumed control of a motor vehicle." *State v. Simpson*, 53 P.3d 165, 167 (Alaska App. 2002). A person acts "knowingly" with respect to conduct when the person is aware that the conduct is of that nature. Alaska Statute 11.81.900(a) (2). An intoxicated person who is unaware of conduct acts knowingly with respect to that conduct if the person would have been aware had the person not been intoxicated. AS 11.81.900(a)(2).

A person is under the influence of alcohol 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 with the caution characteristic of a person of ordinary prudence who is not under the influence of alcohol. *Gundersen v. Municipality of Anchorage*, 762 P.2d 104, 115-16 n. 7 (Alaska 1988).

The facts demonstrate that Smith could be convicted under either theory. Smith was not driving with the caution of an ordinary prudent person. He was driving 60 mph in a 35 mph zone. He was also weaving in and out of traffic and prompting other cars to swerve wildly to avoid him. Further, he overcorrected after passing one vehicle and crashed into another. The facts also indicate that he was under the influence of alcohol. He had been drinking beer, and when the police stopped him, he smelled like alcohol, had bloodshot, watery eyes, and slurred his speech.

His wild driving is also indicative of being under the influence. Alternatively, the state could show that Smith had a chemical test within four hours of the alleged offense and that his blood exceeded .08 grams of alcohol per 210 liters of breath. A breath test was taken three hours after the accident and his breath alcohol level was .09 grams per 210 liters of breath.

2. Failure to Remain at the Scene of an Accident – 20%

There are four elements to the offense of Failure to Remain at the Scene of an Accident. The first three elements are (1) the defendant was involved in an accident while driving a vehicle, (2) the accident resulted in damage to an unattended vehicle, and (3) at the time of the accident, the defendant knew that his vehicle was involved in an accident. AS 28.35.050(c). The fourth element varies because there are three alternative legal theories for committing the offense. The state needs to establish one of the following: (1) the defendant did not immediately stop at the scene of the accident; (2) after stopping, the defendant did not make reasonable efforts to locate and notify the owner or operator of the vehicle of the defendant's name and address; and (3) after stopping and unsuccessfully trying to locate the owner or operator of the vehicle, the defendant did not leave a writing in or on the vehicle stating the defendant's name and address. A person acts knowingly when knowledge of a specific fact is an element of the offense if the person is aware of a substantial probability of the fact's existence unless the person actually does not believe it exists. AS 11.81.900(a) (2). An intoxicated person acts knowingly with respect to the existence of a fact if the person would have been aware of the fact had the person been sober. AS 11.81.900(a) (2).

The facts indicate that Smith could be convicted of Failure to Remain at the Scene of an Accident. Smith satisfies the first element because he was driving a vehicle that was involved in an accident. He ran into the parked car. The accident satisfies the second element because he stove in the side of the car, bending the frame. He damaged an unoccupied car. Smith satisfies the third element because he was most likely aware that he was in an accident. The collision smashed in the front of his car, and he got out and began **staggering away**. In any event, he certainly would have been aware that he was in an accident if had been sober. Finally, Smith satisfies the fourth element because he made no effort to locate the owner of the vehicle that he hit.

3. Reckless Driving, Negligent Driving - 20%

a. Reckless Driving -

A person is guilty of reckless driving if that person drives a motor vehicle in Alaska in “a manner that creates a substantial and unjustifiable risk of harm to person or to property.” AS 28.35.400(a). “A substantial and unjustifiable risk is a risk of such a nature and degree that the conscious disregard of it or a failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.” AS 28.35.400(a). An intoxicated person who is unaware of a risk acts recklessly with respect to that risk if the person would have been aware of the risk had the person not been intoxicated. AS 11.81.900(a)(3).

Smith could be convicted of Reckless Driving. Smith’s actual driving could be considered a gross deviation from the standard of care that a reasonable person would have observed. He was driving 60 mph in a 35 mph zone. He was also weaving in and out of traffic and prompting other cars to swerve wildly to avoid him. Further, he overcorrected after passing one vehicle and crashed into another. Smith’s driving while under the influence could also be considered a gross deviation. Moreover, Smith either consciously disregarded the risk that his driving was creating or he failed to perceive it.

b. Negligent Driving -

A person is guilty of negligent driving if that person drives a motor vehicle in Alaska in a “manner that creates an unjustifiable risk of harm to a person or to property and who, as a result of the creation of the risk, actually endangers a person or property.” AS 28.35.410(a). An unjustifiable risk is one such that the failure to avoid it constitutes a deviation from the standard of care that a reasonable person would observe. AS 28.35.410(a). Evidence that an accident occurred or that someone took evasive action is proof that the defendant’s conduct actually endangered a person or property. AS 28.35.410(a).

Smith could also be convicted of Negligent Driving. The conduct that sufficed to make him guilty of Reckless Driving would also make him guilty of Negligent Driving because the conduct would constitute a deviation from the standard of care of the reasonable person. Negligent driving requires proof that the driving actually endangered a person or property. Smith’s conduct satisfies this requirement because other drivers took evasive action to avoid him and he caused an accident.

4. Vehicle Theft, Theft – 15%

Vehicle Theft in the First Degree has three elements: (1) the defendant knowingly drove away a car, truck, motorcycle, motor home, bus,

aircraft, or watercraft of another; (2) the defendant had no right to do so, and (3) the defendant had no reasonable ground to believe that he had the right to do so.

Smith could be convicted of Vehicle Theft in the First Degree. He knowingly drove away a car belonging to another. Smith saw a car parked on the side of the street with the keys in the ignition. Smith did not know who owned the car, but he decided to take it anyway. Moreover, Smith had no right to take the car or any reasonable belief that he had the right to take the car. He merely took it because he was tired of walking.

The facts potentially indicate that Smith could be convicted of theft under AS 11.46.100 – 150. However theft would require an intent to permanently deprive the car's owner of the car. AS 11.46.100(1). The facts do not establish that Smith had that intent. The facts only indicate that Smith took the car because he was tired of walking. There is nothing to indicate that he intended to keep the car after driving it for awhile. Moreover, evidence that a person was intoxicated can be used to negate the claim that the person intentionally caused a result. The fact that Smith was intoxicated is evidence that negates the claim that he intended to permanently deprive the car's owner of the car.

5. Assault and Reckless Endangerment – 20%

a. Assault in the Third Degree

A person commits Assault in the Third Degree if the person recklessly places another in fear of imminent serious physical injury by means of a dangerous instrument. AS 11.41.220(a)(1). "Serious physical injury" means "physical injury performed under circumstances that create a substantial risk of death; 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). "Dangerous instrument" means "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). Because of its solidity and mass, an automobile is normally easily capable of inflicting death or serious physical injury, and an automobile constitutes a "dangerous instrument" within the definition provided in this section. *State v. Waskey*, 834 P.2d 1251 (Alaska Ct. App. 1992).

As noted above, Smith was acting recklessly when he drove drunk and sped down the road, weaving in and out of traffic. The car qualified as a

dangerous instrument because of its mass and solidity and the way in which Smith was driving. Jane Doe was placed in fear of serious physical injury because she was afraid that Smith would crash into her and kill her.

b. Reckless Endangerment

A person commits Reckless Endangerment if the person recklessly engages in conduct that creates a substantial risk of serious physical injury to another. AS 11.41.250(a). Smith acted recklessly by driving drunk, speeding, and weaving in and out of traffic. His conduct created a substantial risk of serious physical injury to another person because he drove in a manner that created a substantial risk of a collision. Smith could have collided with another car or one of the other drivers could have got into an accident while taking evasive action. Car accidents, especially those involving high speed collisions, are capable of causing serious physical injury or death.