5 10

Criminal Law Question

Customer went to Star Computers (Star) to buy a refurbished computer. Upon arrival, Customer was approached by Owner, who identified himself as the owner of Star. Owner directed Customer to a refurbished desktop computer and told Customer, "We have the best refurbished computers in town. We send used computers to a computer technician who always installs new hard drives and replaces any defective parts." Owner made these claims because Owner believed that they would be effective in persuading Customer to buy a refurbished computer. In fact, Customer was persuaded by Owner's claims and purchased a computer for $250 cash.

At the time of this transaction, Owner did not believe that Star had the best refurbished computers in town. Owner was aware of at least two other computer stores in town and believed that the refurbished computers sold by these other stores were better than those sold by Star. Owner also thought it was very likely that the computer technician used by Star did not actually install new hard drives in the refurbished computers. Owner had never raised the issue with the technician because the technician offered much faster service and lower rates than those of any other technician in the area.

After Customer's purchase, a local news station conducted an investigation into the computer technician used by Star and reported that the technician did not install new hard drives in any of the computers she refurbished. After the report aired, the computer technician acknowledged that no new hard drives had been installed in the computers she had refurbished for Star.

Owner has been charged with larceny by false pretenses in connection with the computer sale to Customer.

Is Owner guilty of larceny by false pretenses? Explain.

Criminal Law Analysis

(Criminal Law II.A.3; IV.B.1.)

Legal Problems:

(1) What are the elements of the crime of larceny by false pretenses?

(2) Did Owner make a false representation of a material present or past fact that caused Customer to pass title to the property (the $250) to Owner?

(3) Did Owner act with the *mens rea* required to be found guilty of false pretenses?

DISCUSSION

Summary

To be guilty of larceny by false pretenses in most jurisdictions, Owner must have made a false representation of a material fact that caused Customer to pass title to property to Owner. Owner must have acted with knowledge of the falsity of the fact and with an intent to defraud.

While Owner did not believe that Star had the best refurbished computers in town, his claim to the contrary was a false representation of opinion, not fact, and could not support a conviction for larceny by false pretenses. However, Owner's statement that the computer technician installed a new hard drive in each refurbished computer was a false statement of a material fact because the technician did not install new hard drives. Owner obtained title to Customer's property when Customer paid Owner $250 for the computer. The fact that Customer purchased the computer after being satisfied by Owner's claims suggests that Customer relied upon Owner's false representation of fact in passing title to property.

A court would likely find that Owner knowingly made the false representation about new hard drives because Owner believed that it was very likely that the computer technician used by Star did not install new hard drives, and Owner deliberately decided not to question the technician. Owner also had the requisite intent to defraud because Owner made the false claim about the new hard drives based upon the belief that it was one of the most important factors that would lead to a purchase by Customer.

Point One (25%)

To be guilty of larceny by false pretenses, a defendant must knowingly make a false representation of material fact to a person, with the intent to defraud, and the false representation must cause the victim to pass title to something of value to the defendant.

The crime of "larceny by false pretenses" or, as it is sometimes called, "obtaining property by false pretenses" or just "false pretenses," is a type of theft offense. In most jurisdictions, the *actus reus* elements of false pretenses are (i) a false representation of material fact (ii) that causes another person to transfer title to property (including money) to the defendant. The *mens rea* required is knowledge that the representation of fact is false and an

intent to defraud. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 32.10 (5th ed. 2009). *See, e.g.*, MODEL PENAL CODE § 223.3 (theft by deception).

Here, Owner is charged with the crime of false pretenses on the theory that Owner stole Customer's money (the $250 that Customer paid for the computer) by lying to Customer in order to induce Customer to give the money to Owner in exchange for the computer.

Point Two (35%)

The *actus reus* elements of the crime of false pretenses are met because Owner made a false representation of a material present or past fact that caused Customer to pass title to something of value (the $250) to Owner.

As noted above, to be guilty of false pretenses in most jurisdictions, Owner must have made a false representation of a material present or past fact that caused Customer to pass title to property to Owner. *See State v. Agosta*, 787 A.2d 1252, 1254 (Vt. 2001). The false representation must be one of fact, not opinion. *See McMurphy v. State*, 455 So. 2d 924, 927 (Ala. Crim. App. 1984). Commercial puffery is not generally considered "false pretenses." *See* DRESSLER, *supra*, § 32.10[C][2][a]. While Owner did not believe that Star had the best refurbished computers in town, his claim to the contrary was a false representation of opinion, not of fact, and could not support a conviction for larceny by false pretenses. *See id.*

On the other hand, Owner's statement that the technician had installed a new hard drive in each refurbished computer was a false statement of a material fact. *See People v. Taurianen*, 300 N.W.2d 720, 725 (Mich. Ct. App. 1980) (per curiam) (misrepresentation of fact where defendants accepted payment for repair work that was not performed). Owner claimed that the technician had installed a new hard drive in every refurbished computer when no such installation had occurred.

Through this false representation, Owner succeeded in obtaining title to Customer's property when the purchase of the computer was completed and Customer gave Owner $250. *See People v. Long*, 294 N.W.2d 197, 200 (Mich. 1980).

It does not matter that Customer may have had additional reasons for purchasing the computer—reasons that had nothing to do with Owner's false representation. It is enough that Owner's false representation contributed to Customer's parting with property. *See State v. Handke*, 340 P.2d 877, 883 (Kan. 1959). The fact that Customer purchased the computer after being satisfied by Owner's claims, including the claim that the computer technician installed a new hard drive in every refurbished computer, suggests that the false representation contributed to Customer's parting with $250, thus establishing the causal link between Owner's false representation and the transfer of title to the property. *See id.*

Point Three (40%)

The *mens rea* element of the crime of false pretenses is likely met because Owner made the false representation knowingly and with the intent to defraud Customer.

To be guilty of false pretenses, Owner must have made the false representation knowingly and with the intent to defraud Customer. *See Trevino v. State*, 142 P.3d 214, 216 (Wyo. 2006). Most courts find that a defendant acts knowingly and has knowledge of a particular fact when, *inter alia*, the defendant is aware of a high probability of the fact's existence and deliberately avoids learning the truth. *See United States v. Guay*, 108 F.3d 545, 551 (4th Cir. 1997); MODEL PENAL CODE § 2.02(7). A court would likely find that Owner knowingly made the

false representation based upon both Owner's belief that it was very likely that the computer technician used by Star did not install new hard drives and Owner's deliberate decision not to question the technician. *See Guay*, 108 F.3d 545 at 551. The markedly low rates and fast service provided by the technician would provide additional evidence that Owner knew or should have known that the technician was not installing new hard drives. *See Commonwealth v. Franks*, 340 A.2d 456, 459–60 (Pa. Super. Ct. 1975) (Price, J., dissenting).

A few states, however, reject this "willful blindness" standard and require actual knowledge. *See Love v. Commonwealth*, 55 S.W.3d 816, 825 (Ky. 2001) (actual knowledge of each element of offense required, but such knowledge may be proved by circumstantial evidence). In these states, Owner would lack actual knowledge that the technician failed to install new hard drives and could not be found guilty of false pretenses. *See id.*

With respect to the second element, a defendant has the intent to defraud required to establish false pretenses when the defendant intends that the person to whom the false representation is made will rely upon it. *See Commonwealth v. Cheromcka*, 850 N.E.2d 1088, 1094 (Mass. App. Ct. 2006). Because Owner made the claim about the new hard drives based upon the belief that it would help persuade Customer to buy a computer, Owner also had the requisite intent to defraud.

CRIMINAL LAW AND PROCEDURE QUESTION F14

A defendant was charged under state law with felony theft (Class D) and felony residential burglary (Class C). The indictment alleged that the defendant entered his neighbors' home without their consent and stole a diamond ring worth at least $2,500.

Defense counsel filed a pretrial motion to dismiss the charges on the ground that prosecuting the defendant for both burglary and theft would constitute double jeopardy. The trial court denied the motion, and the defendant was prosecuted for both crimes. The only evidence of the ring's value offered at the defendant's jury trial was the owner's testimony that she had purchased the ring two years earlier for $3,000.

At trial, the judge issued the following jury instruction on the burglary charge prior to deliberations:

> If, after consideration of all the evidence presented by the prosecution and defense, you find beyond a reasonable doubt that the defendant entered the dwelling without the owners' consent, you may presume that the defendant entered with the intent to commit a felony therein.

The jury found the defendant guilty of both offenses.

At the defendant's sentencing hearing, an expert witness called by the prosecutor testified that the diamond ring was worth between $7,000 and $8,000. Over defense objection, the judge concluded, by a preponderance of the evidence, that the value of the stolen ring exceeded $5,000. The judge sentenced the defendant to four years' incarceration on the theft conviction. On the burglary conviction, the defendant received a consecutive sentence of seven years' incarceration.

In this state, residential burglary is defined as "entry into the dwelling of another, without the consent of the lawful resident, with the intent to commit a felony therein." Residential burglary is a Class C felony for which the minimum sentence is five years and the maximum sentence is ten years of incarceration.

In this state, theft is defined as "taking and carrying away the property of another with the intent to permanently deprive the owner of possession." Theft is a Class D felony if the value of the item(s) taken is between $2,500 and $10,000. The sentence for a Class D felony theft is determined by the value of the items taken. If the value is between $2,500 and $5,000, the maximum sentence is three years' incarceration. If the value of the items exceeds $5,000, the maximum sentence is five years' incarceration.

This state affords a criminal defendant no greater rights than those mandated by the United States Constitution.

1. Did the trial court err when it denied the defendant's pretrial motion to dismiss on double jeopardy grounds? Explain.

2. Did the trial court err in its instruction to the jury on the burglary charge? Explain.

3. Did the trial court err when it sentenced the defendant to an additional year of incarceration on the theft conviction based on the expert's testimony? Explain.

CRIMINAL LAW AND PROCEDURE ANALYSIS

(Criminal Law and Procedure II.A. & D.; V.E. & F.)

ANALYSIS

Legal Problems

(1) Did charging the defendant with both theft and burglary constitute double jeopardy?

(2) Did the jury instruction violate the due process clause either by relieving the prosecution of the burden of proving the element of intent or by shifting the burden to the defendant to disprove that element?

(3) Did the sentence imposed in this case for the theft conviction unconstitutionally deprive the defendant of his right to a jury trial on the issue of the value of the stolen item?

DISCUSSION

Summary

The trial court properly denied the defendant's pretrial motion to dismiss the charges on double jeopardy grounds. The defendant may be charged with, and convicted of, both theft and burglary. Each of the charges has an element that the other does not. Neither charge is a lesser-included offense, nor are they multiplicitous. Thus, charging both theft and burglary does not violate double jeopardy.

The jury instruction on the burglary charge was constitutionally flawed. It could have been reasonably understood by the jury as either (1) an irrebuttable conclusive presumption (which relieved the prosecution of proving the element of intent and removed the issue from the jury) or (2) a rebuttable mandatory presumption (which unconstitutionally shifted the burden of proof on an element of a charged offense from the prosecution to the defendant).

Because the four-year sentence imposed by the judge was based on the judge's finding, by a preponderance of the evidence, that the value of the stolen ring exceeded $5,000, the sentence violates the defendant's right to a jury determination, beyond a reasonable doubt, of the value of the ring.

Point One (30%)

Charging the defendant with theft and burglary did not constitute double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment provides that a person shall not be twice put in jeopardy for the "same offense." Thus, the question is whether the elements of the theft charge are wholly contained in the burglary charge or vice versa. If the elements of the lesser charge (theft) are not wholly contained in the greater charge (burglary)—i.e., if each charge requires proof of a fact that the other does not—then convicting the defendant of both crimes would not violate double jeopardy even when the two offenses occurred at the same time and are thus arguably part of the "same transaction." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See also Albernaz v. United States*, 450 U.S. 333, 344 n.3 (1981); *United States v. Dixon*, 509 U.S. 688, 704 (1993).

Here, theft and burglary each require proof of an element not required for the other crime. Burglary may be defined differently in different jurisdictions. However, it almost invariably requires entry into a building or dwelling of another with the specific intent to commit a felony therein, and the crime of burglary is complete upon the entry into the building or dwelling with such intent. *See, e.g., Cannon v. Oklahoma*, 827 P.2d 1339, 1342 (Okla. Crim. App. 1992). In contrast, theft, which also may be defined differently in different states, almost invariably requires the taking and carrying away of an item of personal property belonging to another with the intent to steal or permanently deprive the owner of possession.

Here, the "taking" or "stealing" element is not contained in the definition of burglary, and the "entry" element of burglary is not contained in the definition of theft. Because theft is not a lesser-included offense of burglary and burglary is not a lesser-included offense of theft, charging the defendant for both burglary and theft did not violate double jeopardy and the court properly denied the defense motion on those grounds. *Yparrea v. Dorsey*, 64 F.3d 577, 579–80 (10th Cir. 1995), *citing Blockburger*, 284 U.S. at 304.

Finally, the defendant's motion to dismiss all the charges on double jeopardy grounds was improper because, if both charges were for the same offense, the motion should have requested dismissal of one charge, not both.

Point Two (35%)

The jury instruction on the burglary charge violated the Due Process Clause because it created either (1) an irrebuttable conclusive presumption (which relieved the prosecution of proving the element of intent and removed that issue from the jury) or (2) a rebuttable mandatory presumption (which unconstitutionally shifted the burden of proof on an element of a charged offense to the defendant).

The Supreme Court has interpreted the Due Process Clause of the U.S. Constitution to require that the prosecution prove all elements of an offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). The burden of proof cannot be shifted to the defendant by presuming an essential element upon proof of other elements of the offense, because shifting the burden of persuasion with respect to any element of a criminal offense is contrary to the Due Process Clause. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The crime of burglary includes entry into a building or dwelling with the specific intent to commit a felony therein. The requirement that the prosecutor prove, beyond a reasonable doubt, that the defendant had this specific intent distinguishes burglary from general-intent crimes like trespass. *See Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).

Here, the jury was instructed that if, "after consideration of all the evidence presented by the prosecution and defense, you find beyond a reasonable doubt that the defendant entered the dwelling without the owners' consent, you may presume that the defendant entered with the intent to commit a felony therein." This instruction was unconstitutional because it created either an irrebuttable conclusive presumption or a rebuttable mandatory presumption.

A conclusive presumption is "an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption." *Id.* at 517. Here, the jurors were instructed that once the prosecutor established that the defendant entered the neighbors' house without consent, they "may presume" that he intended to commit a felony therein. The jurors may have reasonably concluded from this instruction that if they found that the defendant intended to enter his neighbors' home without permission, they must further find that he entered with the specific intent to commit a felony therein. Because this instruction could operate as a conclusive

irrebuttable presumption by eliminating intent "as an ingredient of the offense," it violated due process by relieving the prosecution of the burden of proof for this element. *Id.* at 522.

In the alternative, the jury instruction could have been reasonably understood to create a rebuttable mandatory presumption, which "tells [the jury] they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979). The due process problem created by rebuttable mandatory presumptions is that "[t]o the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases." *Id.* at 159.

Unlike irrebuttable conclusive presumptions, rebuttable mandatory presumptions are not always *per se* violations of the Due Process Clause. However, the Supreme Court of the United States has held that jury instructions that could reasonably be understood as shifting the burden of proof to the defendant on an element of the offense are unconstitutional. *Francis v. Franklin*, 471 U.S. 307 (1985). Here, the argument that the jury instruction operated as a rebuttable mandatory presumption is supported by the fact that the judge also instructed the jury to "consider[ ] . . . all the evidence presented by the prosecution and defense." However, even if the instruction created a rebuttable mandatory presumption, it would be unconstitutional because it shifted the burden to the defense on an *element* of the offense. *Sandstrom*, 442 U.S. at 524; *Mullaney*, 421 U.S. at 686.

[NOTE: Whether an examinee identifies the jury instruction as containing a "conclusive" or "mandatory" presumption is less important than the examinee's analysis of the constitutional infirmities.]

Point Three (35%)

The trial court violated the defendant's Sixth Amendment right to a jury trial on an essential element of the offense when it found, by a preponderance of the evidence, that the ring was worth over $5,000 and increased the defendant's sentence based on this finding.

In the statutory scheme under which the defendant was tried and convicted, a Class D felony theft is defined as theft of item(s) with a value between $2,500 and $10,000. The jury found that the value of the diamond ring was at least $2,500 and convicted the defendant of felony theft. However, at sentencing, the trial court made a separate finding, by a preponderance of the evidence, that the value of the ring was greater than $5,000. Following the statute's two-tiered sentencing scheme, the judge then imposed on the defendant a sentence that was one year longer than the maximum that would otherwise have been allowed.

The judge's sentence was unconstitutional because it violated the defendant's Sixth Amendment right to a jury trial on this question. The Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" because "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed [because] such facts must be established by proof beyond a reasonable doubt." *Id.* The Court reaffirmed *Apprendi* in *Blakely v. Washington*, 542 U.S. 296 (2004), holding that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 303 (emphasis in original). In *United States v. Booker*, 543 U.S. 220 (2005),

the Court relied on *Blakely* and *Apprendi* to conclude that protecting a defendant's Sixth Amendment right to a jury trial required that "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244.

Thus, in order to constitutionally increase a sentence above the statutory maximum of three years, the *jury* must have found beyond a reasonable doubt that the value of the ring exceeded $5,000. Here, the court made the finding based on an appraisal proffered by the prosecutor only at sentencing, and the judge's finding was by a preponderance of the evidence rather than beyond a reasonable doubt.

CRIMINAL LAW AND PROCEDURE QUESTION 512

At 9:00 p.m. on a Sunday evening, Adam, age 18, proposed to his friend Bob, also age 18, that they dump Adam's collection of 2,000 marbles at a nearby intersection. "It'll be funny," Adam said. "When cars come by, they'll slip on the marbles and they won't be able to stop at the stop sign. The drivers won't know what happened, and they'll get really mad. We can hide nearby and watch." "That's a stupid idea," Bob said. "In the first place, this town is deserted on Sunday night. Nobody will even drive through the intersection. In the second place, I'll bet the cars just drive right over the marbles without any trouble at all. It'll be a total non-event." "Oh, I'll bet someone will come," Adam replied. "And I'll bet they'll have trouble; maybe there will even be a crash. But if you're not interested, fine. You don't have to do anything. Just give me a ride to the intersection—these bags of marbles are heavy."

At 10:00 p.m. that same night, Bob drove Adam and his bags of marbles to the intersection. Adam dumped several hundred marbles in front of each of the two stop signs at the intersection. Adam and Bob stayed for 20 minutes, waiting to see if anything happened. No one drove through the intersection, and Adam and Bob went home.

At 2:00 a.m., a woman drove through the intersection. Because of the marbles, she was unable to stop at the stop sign. Coincidentally, a man was driving through the intersection at the same time. The woman crashed into the side of the man's car. The man's eight-year-old child was sitting in the front seat without a seat belt, in violation of state law. The child was thrown from the car and killed. If the child had been properly secured with a seat belt, as required by state law, he would likely not have died.

Adam has been charged with involuntary manslaughter as defined at common law, and Bob has been charged with the same crime as an accomplice. State law does not recognize so-called "unlawful-act" involuntary manslaughter.

1. Could a jury properly find that Adam is guilty of involuntary manslaughter? Explain.

2. If a jury did find Adam guilty of involuntary manslaughter, could the jury properly find that Bob is guilty of involuntary manslaughter as an accomplice? Explain.

CRIMINAL LAW AND PROCEDURE ANALYSIS

(Criminal Law and Procedure I.B.1. & 2.; III.B.; IV.B.1., D.)

ANALYSIS

Legal Problems

(1)(a) What are the elements of involuntary manslaughter?

(1)(b) Did Adam act with mens rea required to be guilty of involuntary manslaughter?

(1)(c) Were Adam's actions the legal cause of the child's death?

(2) Can Bob be liable as an accomplice for the child's death?

DISCUSSION

Summary

A jury could find Adam guilty of involuntary manslaughter both in a jurisdiction that requires recklessness and in one that requires only gross negligence (sometimes referred to as criminal or culpable negligence). In a jurisdiction that requires recklessness, Adam's statements indicate that he was aware that his conduct created an unreasonable (or high and unreasonable) risk of death or serious bodily injury and that he consciously disregarded that risk. In a jurisdiction that requires gross negligence, a jury could find Adam guilty because a reasonable person under similar circumstances would have been aware that his conduct created an unreasonable (or unreasonable and high) risk of death or serious bodily injury.

Adam's conduct was the cause of the child's death. Adam's conduct was the but-for cause of the child's death because if Adam had not placed the marbles on the road, the child would not have died. The fact that the child was not properly secured in the vehicle does not break the chain of causation because this outcome was foreseeable.

Bob did not commit an act that resulted in the death of the child, nor did he have a duty to stop Adam from committing that act. However, a jury could find Bob liable as an accomplice to Adam's involuntary manslaughter if he assisted in the act with the required mental state. Here, Bob intentionally assisted Adam in the act by driving him to the scene of the crime. In a jurisdiction that requires recklessness, Bob's statements indicate that he was not aware that his assistance created an unreasonable (or high and unreasonable) risk of death or serious bodily injury. Bob is more likely to be found guilty as an accomplice in a state that requires gross/criminal/culpable negligence, if a reasonable person under similar circumstances would have been aware of this risk.

Point One(a) (25%)

To be guilty of involuntary manslaughter, a person must cause the death of another human being by conduct that creates an unreasonable (or high and unreasonable) risk of death or serious bodily injury. The precise mens rea requirement will vary from jurisdiction to jurisdiction.

In most jurisdictions, a defendant is guilty of involuntary manslaughter when the defendant causes the death of another human being by engaging in conduct that creates an unreasonable (or high and unreasonable) risk of death or serious bodily injury. WAYNE R. LAFAVE, CRIMINAL LAW § 15.4(a) (5th ed. 2010).

The modern and majority view is that the defendant must have acted "recklessly" to be convicted of involuntary manslaughter (i.e., the defendant must have been aware of the unreasonable (or unreasonable and high) risk of death or serious bodily injury that his conduct created). Recklessness is typically defined as conscious disregard of a known risk, *see, e.g.*, MODEL PENAL CODE § 2.02(c).

In other jurisdictions it is enough if the defendant acted with greater than ordinary negligence, which some states call "gross," "criminal," or "culpable" negligence. *See* C.T. Foster, Annotation, *Test or Criterion of Term "Culpable Negligence," "Criminal Negligence," or "Gross Negligence," Appearing in Statute Defining or Governing Manslaughter*, 161 A.L.R. 10 (1946). In these states, even if the defendant was unaware of the risk, the defendant could be found guilty if an ordinary person in the defendant's situation would have been aware that her conduct created an unreasonable (or unreasonable and high) risk of death or serious bodily injury.

Adam will be guilty of involuntary manslaughter only if he acted with the requisite degree of culpability and his conduct was the legal cause of the child's death.

Point One(b) (25%)

A jury could conclude from Adam's statements and actions that he acted with a mens rea of recklessness or gross negligence.

In order to determine whether Adam has committed involuntary manslaughter, his mens rea with regard to the result must be assessed.

In most jurisdictions, Adam can only be convicted of involuntary manslaughter if the fact finder concludes that he acted "recklessly" by consciously disregarding the unreasonable (or high and unreasonable) risk of death or serious bodily injury that his conduct created. In these jurisdictions, the prosecution will argue that Adam's statements indicating that he knew that the marbles could cause an accident, including his statements that "When cars come by, they'll slip on the marbles and they won't be able to stop," and that "They'll have trouble; maybe there will even be a crash," demonstrate that Adam was aware of the risk. The prosecution will also argue that Adam (like everyone else) knows that serious bodily injury and death are frequent outcomes of car crashes.

Adam will likely respond in several ways. First, he will contend that he was not reckless because he did not consciously disregard an unreasonable (or unreasonable and high) risk of death or serious bodily injury resulting from the accident. His statements indicated, he will argue, that he believed that drivers would lose control of their vehicles and would get mad and that there might be a crash, but did not suggest any awareness of the risk that someone would die or suffer serious bodily injury. He could also argue that no crash occurred while he watched the intersection, that traffic at the intersection was usually light, and that he was not aware of the risk that two cars would crash into each other, particularly at 2 a.m.

On the whole, a jury could conclude that Adam's statements indicate that he was clearly aware that his actions could cause a car crash and every reasonable person knows that car crashes can cause death or serious bodily injury. Adam's statement "I'll bet someone will come" specifically suggests that he believed that cars would drive through the intersection that evening.

To prove that Adam had a mens rea of recklessness, the prosecution does not need to prove that Adam knew the precise time or circumstances of the resulting crash. If, however, the fact finder accepts that Adam did not consciously disregard an unreasonable (or unreasonable and high) risk of death or serious bodily injury from the resulting crash, he would not be guilty of involuntary manslaughter in a jurisdiction that requires recklessness for the crime.

In some jurisdictions, Adam can be convicted of involuntary manslaughter if the fact finder concludes that he acted with "gross," "criminal," or "culpable" negligence. In these jurisdictions, Adam can be convicted if a reasonable person in his situation would have been aware that his conduct created an unreasonable (or unreasonable and high) risk of death or serious bodily injury. It is highly likely that a fact finder would conclude that a reasonable person would be aware that conduct likely to cause vehicles to slip at an intersection creates an unreasonable (or unreasonable and high) risk of car crashes and death or serious bodily injury as a result of the crashes.

Point One(c) (25%)

Adam's conduct was the but-for cause of the child's death. His conduct was also the legal cause because no intervening event occurred that would be sufficient to break the chain of causation.

The state will need to prove that Adam caused the child's death in order for Adam to be found guilty of involuntary manslaughter. Causation requires a showing of both causation in fact—otherwise known as but-for causation—and proximate causation. "[A] defendant's conduct is a cause-in-fact of the prohibited result if the said result would *not* have occurred 'but for' the defendant's conduct." *Velazquez v. State*, 561 So. 2d 347, 350 (Fla. Dist. Ct. App. 1990) (emphasis in original). Adam was plainly the but-for cause of the child's death. If Adam had not dumped the marbles at the intersection, the child would not have died.

The next question is whether Adam's conduct was also the "proximate" cause of the child's death. Proximate cause under the criminal law is complex to define (Prof. Joshua Dressler, in his hornbook UNDERSTANDING CRIMINAL LAW § 14.03[A] (5th ed. 2009), calls it "obscure"), but its core is foreseeability. *Kibbe v. Henderson*, 534 F.2d 493, 499 (2d Cir. 1976). Adam may argue that the child would not have died but for the fact that the man did not have his child properly secured in the vehicle. He may argue that this failure was an unforeseeable intervening cause—another but-for cause of the child's death—and that in this case it should be treated as a superseding cause that should cut off his liability for the result. He may bolster this argument by noting that seat belts are required under state law. This argument should fail. It is true that the man's failure to properly secure the child was an intervening cause of the child's death. However, this intervening cause was not unforeseeable. Adam should have anticipated that some people, including children, who ride in cars are not properly secured by seat belts or child restraints.

Adam might also argue that the resulting car crash was such an extraordinary consequence of his action of dumping the marbles at the intersection that it would be unfair to hold him

accountable. This argument should also fail because in these circumstances a car crash resulting in the death of a child who was not wearing a seat belt is not such an unusual or extraordinary consequence of Adam's act as to justify relieving him of liability. *See State v. Hallett*, 619 P.2d 335, 339 (Utah 1980) ("[W]here a party by his wrongful conduct creates a condition of peril, his action can properly be found to be the proximate cause of a resulting injury, even though later events which combined to cause the injury may also be classified as negligent, so long as the later act is something which can reasonably be expected to follow in the natural sequence of events.").

Point Two (25%)

Bob intentionally assisted Adam in his act of dumping the marbles on the road, but Bob may not have acted with the mens rea required to be held liable as an accomplice to involuntary manslaughter.

Two elements are necessary for Bob to be found guilty of involuntary manslaughter on a theory of accomplice liability. First, Bob must have assisted Adam in the commission of the crime. DRESSLER, *supra*, § 30.04[A][1]. Second, Bob must have acted with dual intentions: (1) "the intent to assist the primary party" and (2) "the intent that the primary party commit the offense charged." *Id.* § 30.05[A]. In cases where the primary party's crime is one involving recklessness or negligence, most jurisdictions hold that the second intent element is satisfied if the defendant intended to assist the primary party and otherwise acted with the mens rea required for the underlying offense (i.e., recklessness or negligence, as the jurisdiction requires). *Id.* § 30.05[B][3].

Here, Bob assisted Adam by driving him to the intersection. Even a small amount of assistance can suffice to create accomplice liability.

[NOTE: An examinee might also argue that Bob assisted Adam by staying with him and watching, on the theory that he provided some kind of encouragement to Adam. However, mere presence at a crime scene is not sufficient to constitute assistance, so accompanying Adam is probably not enough. *See State v. Noriega*, 928 P.2d 706, 708 (Ariz. Ct. App. 1996).]

Bob also appears to have acted with the intent of assisting Adam. When Bob drove Adam to the intersection, he knew that it was for the purpose of bringing Adam to that place so that Adam could dump the marbles in the intersection. Bob had no other purpose.

The next question is whether Bob's mens rea with regard to the child's death was sufficient for involuntary manslaughter. Bob will argue that he had no mens rea at all with regard to the child's death and therefore can be guilty of no offense. He will also argue that his statements to Adam suggest that he believed (1) that no one was likely to drive through the intersection and (2) that the marbles would not cause any danger to any drivers who would simply drive over them. Accordingly, Bob will argue that he did not act with the culpability required to be held liable as an accomplice to involuntary manslaughter.

In most jurisdictions, Bob must have acted "recklessly" to be convicted as an accomplice to involuntary manslaughter (i.e., he must have been aware of the unreasonable (or unreasonable and high) risk of death or serious bodily injury that his conduct created). Based on Bob's statements, he does not appear to have been reckless. The prosecution's best argument would be that Bob knew

about the risk because Adam told him that cars might crash. In response, Bob can argue that his statements demonstrate that he thought Adam was wrong about the risks of dumping the marbles.

In some jurisdictions, Bob can be convicted if he demonstrated "gross," "criminal," or "culpable" negligence (i.e., if an ordinary person in his situation would have been aware that his conduct created an unreasonable (or unreasonable and high) risk of death or serious bodily injury). In these states, Bob could be found guilty of involuntary manslaughter on a theory of accomplice liability if the fact finder believes that an ordinary person would have realized that placing 2,000 marbles on a road would interfere with the ability of cars to stop when they drove over the marbles, thereby creating an unreasonable (or unreasonable and high) risk of death or serious bodily injury.

In a few jurisdictions, Bob cannot have accomplice liability for involuntary manslaughter as a matter of law. In these jurisdictions, the courts adhere strictly to the requirement that an "accomplice must want the crime to be committed by the other party," and they reason that it is "logically impossible" for a person to be an accomplice to a crime of recklessness or negligence because one cannot "intend" a negligent or reckless killing. DRESSLER, *supra,* § 30.05[B][3]. In most jurisdictions, however, courts hold an accomplice responsible for a crime like manslaughter if the accomplice intentionally provided assistance to the principal and acted with recklessness or negligence, as the case may be, with respect to the risk that the principal's behavior would cause death.

[NOTE: With respect to the "dual intent" issue, the key is whether examinees recognize that accomplice liability requires two levels of culpability. It is less important which approach examinees adopt than that they see the problem—Bob cannot be guilty as an accomplice unless he was culpable with respect to the underlying crime, and Bob, in fact, not only did not intend any car crash or resulting death, he actually did not believe that such an event would occur.]

February 2019 MEE Question 6- CRIMINAL LAW & PROCEDURE

One evening, Ben received a visit from his neighbor. Hanging on Ben's living room wall was a painting by a famous artist. "I love that artist," the neighbor said. "I've collected several of her paintings." Ben remarked that the famous artist was his ex-wife's mother and that whenever his new girlfriend visited, the fact that the painting still hung in his house made her jealous. The neighbor said, "I have a solution. Why don't you give the painting to me for safekeeping? I have an unsigned print by the same artist that you can hang in its place. The print is not in the artist's usual style, so your girlfriend will not get jealous and your living room will still have great art."

Ben thought this was a good idea. He and his neighbor carried the painting to the neighbor's house and hung it in the neighbor's dining room. Ben then took the neighbor's unsigned print home and hung it in his living room.

The next day, Ben decided that he really didn't like the print, and he took it off the wall. Then, around 10:00 p.m., he decided to retrieve the painting from his neighbor.

Ben went to his neighbor's house and knocked on the door, but there was no answer. Just as he was about to leave, he noticed that a ground-floor window was ajar. Ben pushed the window fully open and began to climb into the house to retrieve the painting. The neighbor, who had been asleep upstairs, was awakened by the noise and ran downstairs to find Ben halfway through the window. The neighbor became enraged. Ben tried to explain, but the neighbor would not stop yelling. Ben decided that it would be better to return to his home and retrieve the painting later, after the neighbor had a chance to cool off. But the neighbor followed him outside and across the lawn, yelling, "How dare you sneak into my house!" The yelling attracted the attention of a police officer who was passing in her patrol car. The officer stopped to investigate, and Ben was arrested, questioned, and released.

Two days later, the neighbor returned the painting to Ben, saying "Here's your painting. Give me back the print that I loaned you and we'll forget the whole thing." However, the previous day Ben had been so angry with the neighbor about his arrest that he had contacted an art dealer and had sold her the print. Ben did not tell the art dealer that the unsigned print was by the famous artist. Ben simply offered to sell the print at a very low price and told the art dealer, "I can sell this print to you at such a good price only because I shouldn't have it at all." Although the art dealer often investigated the ownership history of her purchases, she bought the print without further discussion. An hour after the sale, the art dealer contacted a foreign art collector famously uninterested in exploring the ownership history of his acquisitions, and sold him the print for 10 times what she had paid for it.

The prosecutor is considering bringing the following charges: (i) a charge of burglary against Ben in connection with the incident at the neighbor's house, (ii) a charge of larceny or embezzlement against Ben for his actions involving the unsigned print, and (iii) a charge of receiving stolen property against the art dealer for her actions involving the print.

The jurisdiction where these events occurred has a criminal code that defines burglary, larceny, embezzlement, and receiving stolen property in a manner consistent with traditional definitions of these crimes.

With what crimes listed above, if any, should Ben and the art dealer be charged? Explain.

ANALYSIS 6—CRIMINAL LAW & PROCEDURE

This February 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Does someone who unlawfully enters the dwelling of another commit burglary when the purpose of the entry was to retrieve property that the person owns?

(2)(a) Does someone who sells property that has been temporarily entrusted to him by its owner commit the crime of larceny when he acts without authorization and with the intention of depriving the owner of his property?

(2)(b) Does someone who sells property that has been temporarily entrusted to him by its owner commit the crime of embezzlement when he acts without authorization and with the intention of depriving the owner of his property?

(3) Does a purchaser of property commit the crime of receiving stolen property when the surrounding circumstances suggest that a reasonable person should have been alerted to the fact that the property she received was stolen?

DISCUSSION

Summary

Ben, who intended only to retrieve his own painting from the neighbor's house, did not have an intent to commit a felony therein. Therefore, he should not be charged with burglary.

The facts do not support a charge of larceny against Ben for his acts in connection with the print. Larceny is typically defined under the common law as the misappropriation of another's property by means of taking it from his possession without his consent. With respect to the print, Ben did not take it from its owner without his consent. To the contrary, the neighbor voluntarily loaned the print to Ben. Ben's subsequent sale of the print, while wrongful, was not larceny.

On the other hand, Ben may be charged with the theft crime of embezzlement for his acts in connection with the print. A person in lawful possession of another's property commits embezzlement when he wrongfully converts the property with the intent to deprive the owner of it. Ben's sale of the print to the art dealer constituted an embezzlement because Ben's intent was to permanently deprive the neighbor of the print.

Whether the art dealer should be charged with receiving stolen property for her acts in connection with the print depends on whether there is sufficient evidence that she knew the print was stolen. The crime of receiving stolen property typically has two elements: (1) the actus reus of the receipt of stolen property and (2) the simultaneous mens rea of the defendant's knowledge that the property was stolen. Here, the art dealer "received" the print when she took physical possession of it following the sale by Ben. The central question is whether the art dealer satisfies the mens rea requirement of knowledge that the print was stolen. Proof of the requisite knowledge can be inferred from the surrounding circumstances, including (1) the low price; (2) Ben's statement to the art dealer, "I can sell this print to you at such a good price only because I shouldn't have it at all"; (3) the art dealer's failure to investigate the provenance of the print; (4) the fact that the art dealer contacted, on the same day she acquired the print, a foreign art collector famously uninterested in exploring the ownership history of his acquisitions; and (5) the sale of the print by the art dealer to the collector for 10 times what she had paid for it. Given these circumstances, the art dealer likely had knowledge that the print was stolen.

Point One (20%)

Ben should not be charged with burglary based on his attempt to recover the painting because he did not act with the necessary mens rea.

At common law, burglary was defined as the "breaking and entering of the dwelling house of another in the night with the intent to commit a felony" therein. *See* Wayne R. LaFave, *Criminal Law, Chapter 21: Real Property Crimes* § 21.1 (5th ed. 2010).

Ben's acts clearly satisfy three of the elements of burglary as defined by the common law and in statutes based on the common law: (1) Ben illegally entered the neighbor's home by using force to push open the neighbor's ground-floor window and starting to climb inside; (2) the neighbor's house is a "dwelling," a "structure," or an "occupied structure" (it would even satisfy the common law requirement of a "dwelling"); and (3) Ben's acts occurred at night.

Here, the only question is whether Ben satisfies the mens rea requirement. The evidence suggests that Ben did not intend to commit a felony in the neighbor's home because he intended only to retrieve his own painting. On these facts, Ben should not be charged with burglary.

Point Two(a) (20%)

Ben should not be charged with the theft crime of larceny of the print because he did not take possession of the print without the neighbor's consent with the intent to steal it from the neighbor.

The crime of "theft" was traditionally three separate crimes: larceny, embezzlement, and false pretenses. *See* LaFave, *supra*, *Chapter 19: Theft* § 19.1. Here, Ben should not be charged with larceny, although he should be charged with embezzlement (*see* Point Three).

At common law, larceny was defined as the misappropriation of another's personal property by means of taking it from his possession without his consent. *See id.* Larceny requires an intent to

steal. *See Binnie v. State*, 583 A.2d 1037, 1041–42 (Md. Ct. App. 1991) (noting that intent to steal not established by the defendant's honest belief, even if such belief was mistaken, that the property belonged to him). Moreover, under the common law, the intent to retain property temporarily and then return it to its rightful owner has long provided a defense to larceny. *See, e.g., Impson v. State*, 58 P.2d 523, 524 (Ariz. 1936).

Here, Ben should not be charged with larceny because (a) he did not take the print from the neighbor without the neighbor's consent, and (b) there are no facts showing that he had the requisite intent to steal when he took the print from the neighbor. It was the neighbor who had proposed swapping the artworks. Thus, when Ben took possession of the neighbor's print he had the neighbor's permission to take it, and there are no facts supporting an inference that Ben intended to steal it from the neighbor at that time.

Point Two(b) (30%)

Ben should be charged with the theft crime of embezzlement because his sale of the neighbor's print to the art dealer was a wrongful conversion of that property done with the intent to permanently deprive the neighbor of his property.

To cover the case where someone in lawful possession of another person's property wrongfully misappropriates such property, the English parliament and U.S. legislatures developed the theft crime of embezzlement. Although precise statutory definitions vary, embezzlement generally occurs when a person unlawfully converts property owned by another to his own use with the intent to permanently deprive the lawful owner of the property. LaFave, *supra,* § 19.6.

Here, Ben should be charged with embezzlement. The neighbor loaned the print to Ben so that Ben could hang it in his living room temporarily. *See id.* § 19.6(e). When Ben, in a fit of anger following his arrest, sold the print to the art dealer, he wrongfully converted the neighbor's property. Ben's actions suggest strongly that he acted with the requisite intent to permanently deprive the neighbor of the print.

Point Three (30%)

The art dealer probably should be charged with receiving stolen property because the surrounding circumstances suggest that she had the requisite knowledge that the print was stolen.

Receiving stolen property typically has two elements: (1) the actus reus of the receipt of stolen property and (2) the simultaneous mens rea of knowledge that the property was stolen. Most jurisdictions include the further requirement that the defendant intend to deprive the owner of her property. LaFave, *supra*, § 20.2. "Stolen property" typically includes property unlawfully obtained using larceny, embezzlement, or false pretenses, because "it is inappropriate to make the liability of the receiver turn on the method by which the original thief acquired the property." *See id.* at n. 57 (quoting Model Penal Code § 223.6, comment at 241).

Here, the facts support charging the art dealer with receiving stolen property. The art dealer "received" the print. Assuming that Ben embezzled the print, *see* Point Two(b), it would constitute stolen property.

The central question is therefore whether the facts establish that the art dealer had the requisite mens rea of knowledge that the print was stolen. Normally, a person is not guilty of receiving stolen property unless the person knew it was stolen "at the moment of receiving it." *State v. Caveness,* 78 N.C. 484, 491 (1878); subsequent discovery that property is stolen is not sufficient. *But see State v. Post,* 286 N.W.2d 195, 202–03 (Iowa 1979) (subsequent knowledge is enough when crime is defined not as "receiving" stolen property but as "exercising control over" stolen property).

Some jurisdictions require proof of a defendant's actual subjective knowledge that the property was stolen. *See Sonnier v. State,* 849 S.W.2d 828 (Tex. App. 1992). In those jurisdictions, evidence that a reasonable person would have known that the property was stolen will not suffice. *See Gibson v. State,* 643 N.E.2d 885 (Ind. 1994).

Other jurisdictions follow the modern view in which mens rea can be inferred from all surrounding circumstances. *See* LaFave, *supra,* § 20.2, n. 71 (citing *United States v. Prazak,* 623 F.2d 152 (10th Cir. 1980) (noting that a low price can support the inference that the purchaser knew the property was stolen); *United States v. Werner,* 160 F.2d 438 (2d Cir. 1947) (same); *State v. Butler,* 450 P.2d 128 (Ariz. Ct. App. 1969) (same); *State v. Chester,* 707 So. 2d 973 (La. 1997) (same); *Russell v. State,* 583 P.2d 690, 699 (Wyo. 1978) (thieves "must rid themselves of stolen property as quickly as possible, and willingness to sell at a grossly reduced price betrays or should betray such a predicament").)

The art dealer probably should be charged with receiving stolen property. Under the modern view, or even in a jurisdiction that requires proof of subjective knowledge, the art dealer's mens rea of knowledge can be inferred from (1) the low price; (2) Ben's statement to the art dealer: "I can sell this print to you at such a good price only because I shouldn't have it at all"; (3) the art dealer's failure to investigate the provenance of the print; (4) the fact that the art dealer contacted, on the same day she acquired the print, a foreign art collector famously uninterested in exploring the ownership history of his acquisitions; and (5) the sale of the print by the art dealer to the collector for 10 times what she had paid for it. Given these circumstances, the art dealer likely had knowledge that the print was stolen.

CRIMINAL LAW AND PROCEDURE QUESTION /515

On his way to work one morning, a man stopped his car at a designated street corner where drivers can pick up passengers in order to drive in the highway's HOV (high-occupancy vehicle) lanes. When the man, who was driving alone, opened his car door and announced his destination, a woman (a stranger) jumped into the front seat.

As soon as the man drove his car onto the busy highway, the woman took a knife from her backpack and held it against the man's throat. She said to him, "I am being followed by photographers from another planet where I am a celebrity. Pictures of me are worth a fortune, so I never give them away for free. Forget the speed limit and get me out of here fast, or else."

With the woman holding the knife at his neck, the man sped up to 85 miles per hour (30 mph over the posted speed limit of 55 mph), weaving in and out of traffic to avoid other cars, while the woman urged him to drive faster. While attempting to pass a motorcycle at a curve in the highway, the man lost control of the car, which struck and killed the motorcyclist before crashing into a railing.

A police car arrived at the scene a few minutes later. The man and the woman were treated for minor injuries at the scene and then arrested and taken to the police station.

While in custody, the woman was examined by two psychiatrists. Both psychiatrists submitted written reports stating that the woman suffers from schizophrenia and that, at the time of the accident, her delusions about alien photographers were caused by her schizophrenia.

The State A prosecutor has charged the woman with felony murder for the motorcyclist's death based on her kidnapping of the man, but is not sure whether to charge the man with any crime.

In State A, the rules governing crimes and affirmative defenses follow common law principles. However, in State A the Not Guilty by Reason of Insanity ("NGRI") defense is defined by statute as follows:

> To establish the defense of NGRI, the defendant must show that, at the time of the charged conduct, he or she suffered from a severe mental disease or defect and, as a result of that mental disease or defect, he or she did not know that his or her conduct was wrong. The defendant has the burden to prove all elements of the defense by a preponderance of the evidence.

Assume that the two psychiatric reports will be admitted into evidence.

1. Can the woman establish an NGRI defense? Explain.
2. With what crimes, if any, can the man be charged as a result of the motorcyclist's death? Explain.
3. What defenses, if any, will be available to the man if he is charged with a crime related to the motorcyclist's death? Explain.

ANALYSIS

Legal Problems:

(1) Can the woman establish the affirmative defense of not guilty by reason of insanity by showing that, under the State A statute, at the time of the charged crime (a) she suffered from a severe mental disease or defect and (b) as a result of that mental disease or defect, she did not know that her actions were wrong?

(2) Do the facts support charging the man with manslaughter based on proof that (a) he caused the death of another person, (b) he should have been aware of a substantial risk that another human being could be killed by his conduct, (c) his actions were a gross deviation from the standard of care that a reasonable person would have exercised in the same situation, and (d) his actions were in violation of traffic laws?

(3) If the man is charged with manslaughter, do the facts support the affirmative defense of duress?

DISCUSSION

Summary

The defense of not guilty by reason of insanity ("NGRI") is not supported by the evidence and likely cannot be established by the woman. Under State A's NGRI statute, the woman must show that (1) she suffered from a severe mental disease or defect at the time of the charged crime and (2) as a result of that mental disease or defect, she did not know that her conduct was wrong. The two psychiatric reports support a finding that the woman suffered from a severe mental disease (schizophrenia) that caused her to experience delusional beliefs regarding alien photographers. But the evidence does not support a finding that the woman's delusions prevented her from knowing that it was wrong to kidnap the man and force him at knifepoint to drive 85 mph on a busy highway just to avoid having her picture taken without compensation.

The facts support charging the man with some form of involuntary manslaughter (e.g., criminal-negligence manslaughter or unlawful-act manslaughter). First, the man's actions caused the death of the motorcyclist. Second, anyone who drives 85 mph on a busy highway and tries to pass a motorcyclist (a relatively exposed and vulnerable highway user) on a curve while weaving in and out of traffic should be aware of a substantial and unjustifiable risk that another human being could be killed as a result of his conduct. Third, the man's actions were a gross deviation from the standard of care that a reasonable person would have exercised in the same situation. Fourth, the man's speeding and reckless driving were serious traffic violations sufficient to make the man criminally accountable for the resulting death in many jurisdictions.

However, if the man is charged with manslaughter, he will almost certainly raise the affirmative defense of duress. Here, the facts support a legal finding of duress. The man's conduct was

caused by his reasonable belief that obeying the woman's demand to drive faster was the only way for him to avoid imminent death or serious bodily injury. Moreover, because he was already driving the car on a busy highway when the woman pulled out the knife and placed it against his neck, he had no opportunity to extricate himself from the threatening situation. Finally, although duress generally cannot excuse a charge of intentional homicide, here the facts do not support a finding that the man's killing of the motorcyclist was intentional.

Point One (40%)

Even with the admission of the two psychiatric reports, the evidence does not support the affirmative defense of not guilty by reason of insanity.

State A, like most states that provide a not guilty by reason of insanity ("NGRI") defense, limits the defense to a defendant who can show that, at the time of the charged crime, she suffered from a "severe mental disease or defect," and that, as a result of that mental disease or defect, "she did not know that her conduct was wrong." *See generally* WAYNE R. LAFAVE, CRIMINAL LAW, CHAPTER 7: INSANITY DEFENSE (5th ed. 2010). This is essentially the *M'Naghten* version of the NGRI defense, derived from the opinion in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

Although there is no universal definition of mental illness that satisfies the legal requirement of a "severe mental disease or defect," a serious mental disease like schizophrenia should qualify, especially when accompanied by delusions or other significant impairments of a defendant's capacity to recognize reality. *See, e.g., Billiot v. State*, 515 So. 2d 1234, 1237 (Miss. 1987) (finding that a schizophrenic individual with a delusional thought process had a severe mental disease). Thus, if the jury finds that the woman was suffering from schizophrenia accompanied by delusional beliefs at the time of the charged crime, this finding should establish that she suffered from the type of severe mental disease or defect contemplated by the State A NGRI statute. *See* RICHARD J. BONNIE ET AL., A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY JR. 28–31 (3d ed. 2008) (discussing this famous case involving an insanity defense premised on evidence that the defendant suffered from schizophrenia). *See also State v. Becker*, 2011 WL 3925431 (Iowa Ct. App. 2011) (unpublished) (noting that expert testimony that defendant suffered from paranoid schizophrenia had been introduced to support his insanity defense).

However, a finding that the woman was suffering from a "severe mental disease or defect" at the time of the charged crime is necessary but insufficient to establish her NGRI defense. The jury must also find that, as a result of that mental disease or defect, the woman did not know that her conduct was "wrong." *See, e.g., State v. Milton,* 142 So. 3d 157 (La. Ct. App. 2014) (rejecting defendant's defense (under a similar NGRI statute) because the defendant had failed to prove that his mental disease left him unable to distinguish right from wrong and noting that a propensity to commit wrong acts does not necessarily entail an inability to differentiate right from wrong); *People v. Stoffel*, 794 N.Y.S.2d 230 (N.Y. App. Div. 2005) (affirming defendant's conviction, despite substantial defense proof that at the time of the charged crime he suffered from paranoid schizophrenia and delusional beliefs, because his delusions did not prevent him from knowing right from wrong).

States differ as to the definition of "wrong" for NGRI purposes. Some states provide the defense only if the defendant's severe mental disease or defect prevented her from knowing that her acts were criminal. Other states provide the defense even if the defendant knew that her actions were legally wrong (i.e., against the law) but did not know that her actions were morally wrong (i.e., the type of acts that society would condemn). Finally, other states have not explained whether they define "wrong" as legally or morally wrong. *See* LAFAVE, *supra*, § 7.2(b) at 406–07.

Here, there is no evidence that the woman's schizophrenia prevented her from knowing that it was legally wrong to kidnap the man and force him at knifepoint to drive well above the speed limit on a busy highway. As the woman explained, her actions were motivated by her concern that alien photographers might take her picture for profit without providing her with compensation. Moreover, the fact that she told the man to "forget the speed limit" provides evidence that she was aware that the speeding was illegal.

There is also no evidence that the woman's schizophrenia prevented her from knowing that her actions were morally wrong. The lack of evidence on this point is significant because, in some jurisdictions, a defendant can be found NGRI—even if she knows that her actions are illegal—if she does not know that they are morally wrong. *See, e.g., State v. Castillo*, 713 S.E.2d 190, 194–95 (N.C. Ct. App. 2011) (noting that North Carolina applies a version of *M'Naghten* under which a defendant can be exonerated if he did not think that his acts were morally wrong). Here, there is no evidence that the woman's schizophrenic delusion that celebrity-stalking aliens should pay for her photograph prevented her from recognizing the immorality of her decision to kidnap the man and force him at knifepoint to speed on a busy highway. *See id.*; *see also State v. Potter*, 842 P.2d 481, 486–87 (Wash. Ct. App. 1992) (rejecting defendant's defense (under a similar NGRI statute) that a defendant can be adjudged insane who has cognitive ability (the ability to know an act is wrong, legally and morally), but lacks volitional control (the ability to control one's behavior despite cognitive ability)).

[NOTE: Some jurisdictions provide that the insanity defense is available to a defendant who, as a result of a severe mental disease or defect, "lacks substantial capacity" to "appreciate" the wrongfulness of the behavior. *See* LAFAVE, *supra*, § 7.5(a) at 420, fn. 2. This test is not the rule in State A, and an examinee should receive no credit for analyzing it. This test is generally understood to broaden the insanity defense to cover cases where a mental disease results in a significant affective or emotional impairment. In these jurisdictions, unlike in State A, a defendant who knew that her behavior was wrong might still be found NGRI, if the defense proved that her mental disease prevented her from emotionally appreciating the wrongfulness of her conduct. In such a jurisdiction, the woman would have a somewhat higher likelihood of establishing the insanity defense on the facts of this problem, although she still might be unsuccessful.]

Point Two (40%)

The facts support charging the man with manslaughter.

In most jurisdictions, a person who recklessly causes the death of another can be charged with so-called "depraved-heart" murder if the person acted with "extreme indifference to the value of human life." MODEL PENAL CODE § 210.2(1)(b). Generally, however, reckless driving alone would not lead to a charge of depraved-heart murder. Such a charge would be appropriate only if the reckless driving was combined with intoxication or other aggravating factors. *See, e.g., Cook v. Commonwealth,* 129 S.W.3d 351 (Ky, 2004) (defendant was intoxicated and driving at an excessive speed); *State v. Woodall,* 744 P.2d 732 (Ariz. Ct. App. 1987) (intoxicated, driving almost 70 mph on a 40-mph double curve). Here, there are no additional aggravating factors, so it is unlikely that the man would be charged with depraved-heart murder.

A manslaughter charge, on the other hand, is quite possible. In most jurisdictions, a defendant whose conduct causes the death of another human being can be charged with manslaughter if the defendant acted with criminal negligence, which can include the criminally negligent operation of a motor vehicle. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW § 15.4 (5th ed. 2010).

The man likely satisfied the *actus reus* of criminally negligent manslaughter. He engaged in the act of driving his car in a manner that violated the traffic laws and his high speed and weaving through traffic created a substantial risk of an accident and serious injury to others. *See, e.g., McGuire v. State*, No. 01-11-01089-CR, 2012 WL 344952, at *2 (Tex. App. Houston (1st Dist.), Feb. 2, 2012) (unpublished) (citing cases in which courts found that driving automobiles in violation of traffic laws satisfied the *actus reus* requirement of negligent homicide). His conduct also was both the actual ("but for") and proximate cause of the motorcyclist's death. The death was the direct result of the man striking the motorcyclist with his car, and there were no unforeseeable superseding causes. *See, e.g., People v. Prue*, 779 N.Y.S.2d 271 (N.Y.A.D. 3 Dept. 2004) (finding that the defendant was the direct cause of the victim's death because the victim was alive before the accident and would not have died but for the accident).

The only question is whether the man acted with the requisite *mens rea* required for manslaughter. In some states, criminal negligence is present whenever a person's conduct creates a substantial risk of death and the defendant's actions were a gross deviation from the standard of care that a reasonable person would have exercised in the same situation. In other states, it is also necessary to prove that the defendant was aware of the fact that the conduct created a substantial risk of death. *See* LAFAVE, *supra*, § 15.4(a).

Here, the man was driving at the excessive speed of 85 mph on a busy highway, was weaving in and out of traffic, and tried to pass a motorcycle on a curve. Based on these facts, a fact-finder could conclude that the man had the requisite *mens rea* for criminal-negligence manslaughter. An ordinary person would have been aware that this kind of driving created a substantial and unjustifiable risk that a driver would lose control of the car, hit the motorcyclist or others on the highway, and cause death. The man's actions were also a gross deviation from the standard of care that a reasonable person would have exercised in the same situation. Courts have upheld jury verdicts finding that defendants acted with criminal negligence under similar circumstances. *See, e.g., State v. Donato*, No. IN89-06-0858, 1990 WL 140073, at *2 (Del. Super. Aug. 15,

1990) (denying defendant's motion for a judgment of acquittal when the jury found him guilty of negligent homicide after he struck and killed the victim while going 20 mph over the speed limit and not paying attention to the road). If State A requires actual awareness of a substantial risk of death, a manslaughter charge would still be warranted because the man must have been aware that his driving could easily cause a fatal accident.

In some states, manslaughter is also committed when a death occurs as a result of a defendant's commission of an unlawful act. Here, the man's excessive speeding and dangerous weaving through traffic were both serious traffic violations sufficient to serve as predicate offenses for a charge of unlawful-act manslaughter. *See* LAFAVE, *supra*, § 15.5.

Point Three (20%)

The facts support the affirmative defense of duress because the man's conduct was caused by his reasonable belief that obeying the woman's instructions to drive faster was the only way to avoid imminent death or serious bodily injury.

The typical affirmative defense of duress excuses defendants from criminal liability if their conduct was committed "under the pressure of an unlawful threat from another human being to harm" the defendant. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 9.7(a) (5th ed. 2010). The unlawful threat must cause the defendant to reasonably believe that "the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law." *Id.* § 9.7. The defendant must also prove that he engaged in the criminal behavior *because* of the threat and not for some other reason. The rationale for the duress defense is that "even though he has done the act the crime requires and has the mental state which the crime requires, his conduct violating the literal language of the criminal law is excused because he 'lacked a fair opportunity to avoid acting unlawfully.'" *Id.* § 9.7(a) at 520 (internal citation omitted).

Here, the man almost certainly will succeed with an affirmative defense of duress. His physical conduct (driving at an excessive rate of speed and in a reckless manner) was in response to the woman's direct threat of death or serious bodily harm. Under the circumstances, it was reasonable for him to fear for his life because his assailant was holding a knife to his throat in a car, and her behavior indicated that she was mentally unbalanced, making it more likely that she would carry out her threat. Because the man was already driving the car on a busy highway when the woman pulled out the knife and placed it against his neck, he had no opportunity to extricate himself from the threatening situation. *See United States v. Johnson*, 416 F.3d 464 (6th Cir. 2005).

The Model Penal Code defines the affirmative defense of duress as a threat such that a person of reasonable firmness would be unable to resist it. *See* MODEL PENAL CODE § 2.09(1). This standard, which is followed in several jurisdictions, is also satisfied here. A person of reasonable firmness of character would very likely be unable to resist the threat posed by the woman under these circumstances. At the common law, and in most jurisdictions today, duress is not available as a defense to any kind of intentional homicide. LAFAVE, *supra*, § 9.7(b). In this case, however, the man had no intention of killing the motorcyclist. Thus, there is no bar to his asserting the defense against a charge of negligent homicide.