

ANSWER TO QUESTION NO. 10

1. Reasonable Doubt: Reasonable doubt is defined in CJI2d 3.2(3) as:

"A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that--a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case."

II. Armed Robbery:

A. Elements: To prove the charge of armed robbery (MCL 750.529 and 750.530) the prosecutor must establish each of the following four elements beyond a reasonable doubt.

1. The defendant used force or violence or assaulted or put the complainant in fear.

2. The defendant did so while he was in the course of committing a larceny. A "larceny" is the taking and moving of someone else's property or money with the intent to take it away from that person permanently.

"In the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property or money.

3. The complainant was present while defendant was in the course of committing the larceny.

4. That while in the course of committing the larceny the defendant:

a. Possessed a weapon designed to be dangerous and capable of causing death or serious injury; or

b. Possessed any other object capable of causing death or serious injury that the defendant used as a weapon; or

c. Possessed any object used or fashioned in a manner to

lead the person who was present to reasonably believe it was a dangerous weapon or,

d. Represented orally or otherwise that he was in possession of a weapon.

B. Discussion: The first element was fulfilled because Dan put Ronald Graham in fear when he announced he had a gun. The second element is fulfilled because Ronald was put in fear during the commission of a larceny. The larceny occurred when Dan took and moved Lynn Tracy's money from Ronald with the intent to keep it. Dan knowingly gave Lynn a lesser amount of money and kept the greater amount of money. Alternatively, Ronald was put in fear in Dan's flight after the larceny when he swung the stick at Ronald. The third element is satisfied because Ronald was present during the course of the larceny, and even though Ronald was not required to be either the owner or rightful possessor of the money, he had a superior interest in it because he possessed the money when it was taken by Dan. *People v Cabassa*, 249 Mich 543, 546-547 (1930); *People v Needham*, 8 Mich App 679, 684-685 (1967). The fourth element is also satisfied because Dan defendant orally represented to Ronald that he possessed a gun. It is alternately satisfied as Dan swung the stick at Ronald to effectuate his escape (flight) or to keep the stolen money.

III. Felonious Assault:

A. Elements: CJI 2d 17.9 (MCL 750.82) provides the state has the duty to prove each of the following elements beyond a reasonable doubt:

1. The defendant either attempted to commit a battery on the complainant or did an act that would cause a reasonable person to feel or apprehend an immediate battery. A battery is the forceful or violent touching of the person or something closely connected with the person.

2. The defendant intended to either injure the complainant or make the complainant reasonably fear an immediate battery.

3. At the time, the defendant had the ability to commit a battery, appeared to have the ability or thought he had the ability.

4. That the defendant committed the assault with a dangerous weapon. See *People v Jones*, 443 Mich 88, 100 (1993); *People v Avant*, 235 Mich App 499, 505 (1999).

In CJI 2d 17.10, a dangerous weapon is defined as:

1. A dangerous weapon is any object that is used in a way that is likely to cause serious physical injury or death.

2. The way an object is used or intended to be used in an assault determines whether or not it is a dangerous weapon. If an object is used in a way that it is likely to cause serious physical injury or death, it is a dangerous weapon.

The prosecutor has the burden of proving that the weapon was dangerous or an object was used or intended for use as a weapon. See *People v Goolsby*, 284 Mich 375 (1938); *People v Brown*, 406 Mich 215 (1979). Whether an object is a dangerous weapon under the circumstances of the case is a question for the fact finder. *People v Barkley*, 151 Mich App 234 (1986), *People v Jolly*, 442 Mich 458 (1993).

B. Discussion: Dan can be convicted of felonious assault for attempting to strike Ronald with a large tree branch.

The first element is fulfilled because the defendant attempted to commit a battery by swinging the tree branch at Ronald. It could also be established because Ronald was in immediate fear of a battery as the tree branch was swung at him, causing him to quickly step back. The second element is fulfilled because Dan specifically intended to swing the branch at Ronald, i.e. "Get away from me." The third element is fulfilled because Dan had the ability to commit the battery because he possessed and swung the tree branch. Fourth, the defendant committed the assault with a large tree branch. Although an argument can be made that a tree branch does not constitute a dangerous weapon within the statute, the better argument is that because it can cause serious physical injury or death, it qualifies as a dangerous weapon. See *People v McCadney*, 111 Mich App 545, 549-550 (1981) (holding that a stick can be a dangerous weapon).