

### EXAMINERS' ANALYSIS OF QUESTION NO. 11

1. Self defense justifies a person's actions, including taking another person's life. However, a person claiming self defense will be judged by the following standards. First, at the time of the killing, the accused must have had an honest and reasonable belief that she was in danger of being killed or seriously hurt. If her belief was honest and reasonable at the time, her self defense claim may be legitimate even if it turns out she was wrong. Second, a person may not kill or seriously injure another person to protect themselves from the threat of minor injury. Third, at the time she acted, she must have honestly and reasonably believed that the force used was immediately necessary. CJI 2d 7.15.

Applying these standards to our situation yields the conclusion that Debbie's self defense claim is unpersuasive. The facts show that Debbie confronted Sally with taunts more than once. Moreover, Debbie shortened the distance between herself and Sally as Sally just stood in the street. These facts contradict the predicate for Debbie's claim of self defense, i.e. that she was in fear of Sally.

Although the fighting did not really start until after the foregoing, this does not help Debbie's claim of self defense. The facts indicate that Debbie responded to Sally's comment about Hugh with anger - not fear. Anger is not a component of self defense; fear is. Moreover, once in the street, Debbie swung at Sally first, a circumstance to be considered in evaluating Debbie's self defense claim. At the point Debbie swung, Sally had done nothing to make Debbie fear her.

Based on the foregoing, Debbie's claim of self defense does not carry much weight because she had no honest and reasonable belief of death or great bodily harm. This conclusion is not altered even if the point of evaluation is the realization by Debbie she was "losing the fight." The facts are silent on what level of harm was perceived by Debbie. The facts do not indicate Sally was armed. While the facts describe the fight as a tussle, no facts suggest Debbie could not have disengaged herself from the fight, thereby undermining any claim for immediate resort to stabbing Sally. (Indeed, that she could use

one arm to grab the metal nail file from her back pocket suggests some measure of maneuverability.)

In sum, a claim of self defense is not present in these facts and the killing of Sally was not justified.

Michigan statutes regarding self defense do not call for a different conclusion. To employ statutory self defense, the individual must not be engaged in the commission of a crime when the defense was employed. MCL 780.972(1). Moreover, the individual must have the same honest and reasonable belief that the use of deadly force is necessary to prevent imminent death or great bodily harm.

Here Debbie was the aggressor and, in fact, committed a crime when she swung at Sally. Accordingly, statutory self defense is unlikely to be successful for many of the same reasons described above.

2. Because the homicide of Sally was not justified, its degree must be established by comparing the facts to the elements of first degree murder, second degree murder and manslaughter.

First degree, premeditated murder requires proof of the following elements: (1) defendant caused the death of decedent; (2) defendant intended to kill decedent; (3) the intent to kill was premeditated, i.e. thought out beforehand; (4) that the killing was deliberate, which means the accused considered the pros and cons of the killing and thought about and chose her actions before she did it. The killing cannot be the result of a sudden impulse without thought or reflection; and (5) the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. CJI 2d 16.1.

The elements of second degree murder are (1) defendant caused the death of decedent; (2) defendant had one of these three states of mind: she intended to kill the decedent or she intended to do decedent great bodily harm or she knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would likely result from her actions; (3) the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. CJI 2d 16.5. *People v Dykehouse*, 418 Mich 488 (1984).

Manslaughter as a lesser offense to murder has the following elements: (1) first, when defendant acted, her thinking must be distinguished by emotional excitement to the point a reasonable person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse; (2) the killing must itself result from this emotional excitement and defendant must have acted before a reasonable time had passed to calm down and return to reason. CJI 2d 16.9.

The facts clearly indicate that Debbie intentionally stabbed Sally in the throat with a metal nail file and Sally died as a result. These facts, while salient, do not help distinguish the level of homicide involved. Rather, it is Debbie's mind-set that must be evaluated, along with her corresponding actions.

First degree murder is distinguished from second degree murder by the presence of premeditation and deliberation in the former and its absence in the latter. The facts suggest an absence of premeditation and deliberation for the following reasons. First, Debbie moved in increments toward Sally. Second, Debbie did not physically involve herself with Sally until Sally's taunt. Relatedly, Debbie first struck at Sally with her fist, not the nail file. Third, Debbie did not resort to stabbing Sally until the fight had commenced. Finally, while a case could be made either way, Sally's taunt may have provided the provocation which prompted Debbie to act from sudden impulse and not the deliberation necessary to support a first degree murder conviction.

Second degree murder is distinguished from manslaughter by the inclusion in the former of a malice element. The three intents described above for second degree murder comprise various forms of malice. The facts here support the conclusion that Debbie, at the very least, intended great bodily harm to Sally, if not indeed death. The weapon used and the location of the stab wound support this position.

However, the crime of second degree murder can be further reduced by the absence of malice embodied in one of the stated intents. See *People v Reese*, 491 Mich 127 (2012), citing *People v Mendoza*, 468 Mich 527, 540 (2003), in turn citing *People v*

*Scott*, 6 Mich 287, 245 (1859). In this regard, that Debbie acted as a result of the anger prompted by Sally's taunt becomes germane. Whether manslaughter, rather than murder, is suggested by the facts turns on whether Debbie's actions flow from provocation and heat of passion, circumstances that negate malice. *Mendoza*, supra. Factors to consider include the level of provocation and the timeliness of the reaction, among others.

### Conclusion

While arguments of varying degrees of strength could be made to support any level of homicide, second degree murder or manslaughter establish the most likely levels of homicide. The elements of premeditation and deliberation seem wanting, eliminating first degree murder. Whether malice exists or is absent will either support or eliminate second degree murder. Given a self defense claim filled with shortcomings, manslaughter as a lesser offense of murder is likely most supportable.