

EXAMINERS' ANALYSIS OF QUESTION NO. 15

The three levels of homicide at issue in the facts presented are first-degree premeditated murder, second-degree murder, and voluntary manslaughter. Murder is distinguished from manslaughter in this context because the former contains malice, while in the latter, malice is negated by the killer's state of mind. First-degree murder is distinguished from second-degree by premeditation and deliberation.

The elements of first-degree premeditated murder are: (1) The defendant caused the death of the deceased. (2) The defendant intended to kill the deceased. (3) This intent was premeditated or thought out beforehand. (4) The killing was deliberate, where the defendant considered the pros and cons and thought about and chose the action taken. There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill, and the killing cannot be the result of a sudden impulse without thought or reflection. (5) The killing was not justified, excused or done under circumstances that reduce it to a lesser crime. *People v Unger*, 278 Mich App 210 (2009), and Mi Crim JI 16.1

Second-degree murder's elements, for purposes of the question posed, are similar to first-degree murder with the marked distinction being the absence of premeditation and deliberation. *People v Goeke*, 457 Mich 442 (1998), and Mi Crim JI 16.5

Voluntary manslaughter's elements in this context (as a lesser offense of murder) are as follows: (1) The defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to calm down. (2) When defendant acted, his/her thinking must be disturbed to the point a reasonable person might have acted on impulse, without thinking twice, from passion or judgment. This emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse. - (3) The killing itself must be from this emotional excitement. The defendant must have acted before a reasonable time had

passed to calm down and return to reason. The test is whether a reasonable time passed under the circumstances. *People v Pouncey*, 437 Mich 382 (1991), and Mi Crim 31 16.9

The facts, as applied to the stated elements, leave no doubt that Carl killed his wife and friend intending to do so. Six gun shots at close range establish the point. The real issue pertains to Carl's state of mind, thereby allowing a lesser charge than first-degree premeditated murder.

The facts cut both ways. Certainly finding one's spouse engaged in infidelity could cause the blood to suddenly stir, robbing one of the ability to reason and calm down. Discovering his wife's lover is his close friend, in one's own marital home, would most probably intensify the realization one's wife is unfaithful.

But other facts go a different direction. Carl was already suspicious. He left work early to confirm or refute his suspicions. The drive home took 30 minutes, ostensibly enough time to cool his anger, if that is what he was feeling. Seeing the cars may have added to his anger or passion. Certainly hearing the voices, while he was in the kitchen, emanating from a bedroom would have contributed to that anger or passion. However, thereafter Carl grabbed a gun and ammunition before leaving the kitchen.

Moreover, Carl had the lucid mental awareness to walk slowly up an indirect stairway to avoid detection. And although he heard sounds confirming his fears, he nevertheless had the wherewithal to load six bullets into the gun.

These countervailing facts undercut the notion that Carl acted out of anger and passion brought about by adequate cause. Each case is unique and, while some facts are supportive of manslaughter, others are not. A case could be made that while on his way up the stairs, Carl knew all he needed to know and although that knowledge was upsetting--even traumatic--having a gun and loading it suggest his actions were more from planned vengeance than from anger and passion that were born from disturbed emotional excitement. While it certainly can be maintained, legitimately, that seeing who his wife was having an affair with made things worse, this fact alone may be insufficient to stem the tide of the other facts.

The factual scenario more likely supports a charge of murder with the element of premeditation and deliberation being at issue to make difficult favoring one degree over another. But not so difficult to conclude that Carl's state of mind suggests manslaughter is not the most supported charge under the facts. Second-degree murder seems most likely.