

A man was arrested in his girlfriend's apartment after her neighbors had reported sounds of a struggle and the police had arrived to find the man bent over his girlfriend's prostrate body. The girlfriend was rushed to the hospital where she lapsed into a coma. Despite the explanation that he was trying to revive his girlfriend after she suddenly collapsed, the man was charged with attempted rape and assault after a neighbor informed the police that she had heard the girlfriend sobbing, "No, please no, let me alone."

At trial, the forensic evidence was inconclusive. The jury acquitted the man of attempted rape but convicted him of assault. While he was serving his sentence for assault, the girlfriend, who had never recovered from the coma, died. The man was then indicted and tried on a charge of felony murder. In this common law jurisdiction, there is no statute that prevents a prosecutor from proceeding in this manner, but the man argued that a second trial for felony murder after his original trial for attempted rape and assault would violate the double jeopardy clause.

Is the man's claim correct?

- A. No, because he was convicted of the assault charge.
- B. No, because his girlfriend had not died at the time of the first trial and he was not placed in jeopardy for murder.
- C. Yes, because he was acquitted of the attempted rape charge.
- D. Yes, because he was convicted of the assault charge.

Explanation:

The **Fifth Amendment double jeopardy clause** protects criminal defendants from undue government harassment by prohibiting (1) multiple punishments for the same offense and (2) a **second prosecution** for the **same offense** after a conviction or acquittal. Two crimes constitute the same offense when:

both crimes have identical elements *or*

every element of one crime is **also an element** of the other crime (as seen here).

Here, the man was convicted of assault and acquitted of attempted rape at the first criminal trial. The girlfriend then died, and the man was indicted for **felony murder**—a crime requiring proof that the defendant:

unintentionally killed another

during the commission, or attempted commission, of an **inherently dangerous felony**.

Since felony murder requires proof of the underlying felony, they are considered the same offense. And because the man was acquitted of attempted rape (underlying felony) at the first trial, a second trial for felony murder (same offense) would violate the double jeopardy clause.

(Choices A & D) Common law assault—an attempted battery or intentionally placing another in apprehension of imminent harmful contact—is not considered an inherently dangerous felony. Therefore, the man's assault conviction is unrelated to his subsequent felony murder charge.

(Choice B) A second prosecution is permitted when the facts necessary to establish the greater offense did not exist at the time of the initial prosecution. Here, the man was acquitted of attempted rape (underlying felony) at the first trial, and no new facts regarding this felony were discovered before the second trial. Therefore, the girlfriend's subsequent death does not permit a second prosecution of felony murder (since attempted rape still cannot be proven). But her death would have permitted a second prosecution had the man been *convicted* of attempted rape.

Educational objective:

Double jeopardy prohibits multiple punishments or a second prosecution for the same offense. Two crimes are considered the same offense when they have identical elements or when every element of one crime (eg, an underlying felony) is also an element of the other crime (eg, felony murder).

References

U.S. Const. amend. V (prohibition against double jeopardy).

Brown v. Ohio, 432 U.S. 161, 169 (1977) ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense").

Harris v. Oklahoma, 433 U.S. 682, 682–83 (1977); Whalen v. United States, 445 U.S. 684, 694 (1980) (holding that felony murder and the underlying felony are the same offense for double jeopardy purposes).

Copyright © 1997 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

Double jeopardy clause

Same offense

Felony murder

- Unintentional killing of another person
- +

Rape (inherently dangerous felony)

- Sexual intercourse with woman (other than his wife)
- Against her will by force or threat of immediate force

Distinct offenses

Felony murder

- Unintentional killing of another person
- Inherently dangerous felony

Assault

- Attempted battery *or*
- Intentionally placing another in apprehension of imminent harmful contact