

A woman became extremely intoxicated after a night of heavy drinking at a party. After the party was over, she got into her car and sped off. While driving 70 mph in a 30-mph zone, she struck and killed a pedestrian. Blood tests revealed that her blood alcohol content had been more than twice the legal limit at the time of the accident.

The woman was tried for murder. At the close of the evidence, the court refused to dismiss the murder charge but offered to give a lesser-offense instruction.

What lesser-offense instruction should the defense attorney request?

- A. Depraved-heart homicide. (10%)
- B. Involuntary manslaughter. (78%)
- C. Voluntary intoxication. (1%)
- D. Voluntary manslaughter. (9%)

Incorrect

Correct answer B

78% Answered correctly

01 min, 19 secs Time Spent

2023 Version

### Explanation:

A **lesser included offense** is a **less serious offense** that is **necessarily committed** during the commission of a **greater offense**. A defense attorney should request an instruction on a lesser included offense if, based on the evidence presented at trial, a rational jury could acquit the defendant of the charged offense but convict the defendant of the lesser offense.

Here, the woman was charged with **murder**—ie, an **unlawful killing** committed with **malice aforethought**. The prosecution likely argued that the woman's act of driving at more than twice the speed limit while intoxicated displayed the reckless disregard for an obvious or unjustifiably high risk of death that is needed for **depraved-heart murder**—a form of malice aforethought. Consequently, an instruction on this type of murder would not help the defendant **(Choice A)**.

However, the woman's conduct could also support a conviction for **involuntary manslaughter**—ie, an **unintentional killing** committed:

with **criminal negligence**—ie, conduct that grossly deviates from a standard of reasonable care and carries a high degree of risk to others *or*

during the commission of an **unlawful act**.

A person who commits depraved-heart murder necessarily acts with the type of criminal negligence required to commit involuntary manslaughter. Therefore, **involuntary manslaughter** is a **lesser included offense** of **depraved-heart murder**. And since a rational jury could conclude that the woman's conduct did *not* rise to depraved-heart recklessness but *did* constitute the negligence required for involuntary manslaughter, the defense attorney should request an involuntary-manslaughter instruction.

**(Choice C)** A defendant might assert **voluntary intoxication** as a *defense* to a criminal charge, but voluntary intoxication is not a lesser included *offense* of murder.

**(Choice D)** Voluntary manslaughter is an intentional killing based on adequate provocation or imperfect self-defense. Here, there is no indication that the woman intended to kill the pedestrian, so the defense attorney should not request a voluntary-manslaughter instruction.

### Educational objective:

A lesser included offense is a less serious offense that is necessarily committed during the commission of a greater offense. For example, involuntary manslaughter is a lesser included offense of depraved-heart murder.

Copyright © 2021 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

## Hierarchy of criminal homicide

