

ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

David, a carpenter in Carmel, Alaska, had a bad day at work because a deck that he was building collapsed. He went to the local tavern after work to relax with a couple of beers. Victor, another carpenter, saw David in the bar and, much to the amusement of the other patrons, began to loudly ridicule David's skills as a carpenter. Victor was rather intoxicated at the time. David left the bar and walked home. He continued drinking at home and stewed about Victor's comments.

After drinking half of a large bottle of whisky over the next two hours, David went to his garage, picked up a pack of long fireplace matches and a five-gallon jug of gasoline. David then walked down to the harbor where he knew Victor had a sailboat moored. Victor had carefully refurbished the wooden sloop so that it was worth \$110,000. Victor used the boat to sail down to Mexico during the winter. David had refurbished a wooden boat in the past and knew how much time and money Victor had spent in refurbishing the sloop. David also knew that Victor occasionally slept on the boat when he had too much to drink. David stood on the dock and splashed gasoline over the deck of Victor's sloop. He then stuck the spout of the can in an open port hole and sloshed more gas in the sloop's galley. David lit one of the long matches and stuck his arm through the porthole to light the gasoline.

Victor was asleep in a bunk in one of the cabins but woke up before the boat burned to the waterline. Victor leaped overboard and felt pain while passing over some flames but was otherwise not injured. Victor was pretty shook up. The sailboat was a total loss.

Discuss the felonies with which David could reasonably be charged under Alaska state law.

GRADERS' GUIDE
***** QUESTION NO. 1 *****
CRIMINAL LAW

I. Arson in the First and Second Degree – 30%

A. Arson in the First Degree

AS 11.46.400(a). A person commits the crime of arson in the first degree if the person intentionally damages any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury.

A person commits Arson in the First Degree if the person intentionally damages the property of another by starting a fire or causing an explosion and that act recklessly places another person in danger of serious injury. AS 11.46.400. A person acts “intentionally” with respect to a result “when the person’s conscious objective is to cause that result.” AS 11.81.900(a)(1). A person acts “recklessly” with respect to a result when the person disregards a substantial and unjustifiable risk that the result will occur. AS 11.81.900(a)(3). The risk must be of such a nature that disregarding the risk constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. AS 11.81.900(a)(3).

The facts indicate that David intended to cause damage to Victor’s boat by fire. He went to his garage and picked up a book of matches and a five gallon jug of gasoline. He then went to the harbor, poured the gasoline over and into Victor’s wooden sloop, and then lit the gasoline.

The facts also indicate that David was probably intoxicated when he burned the boat. He went to the tavern after work to relax by having a couple of beers. After Victor began deriding him, he left the tavern and went home to continue drinking, where he drank half a large bottle of whisky. Under AS 11.81.630, evidence of intoxication is relevant on the issue of whether the defendant could form the requisite intent. David would be able to present evidence of his intoxication to support an argument that he could not form the intent to commit arson. But realistically, given the facts, that argument is not likely to be successful. The facts show that David deliberately went to his garage and got the gasoline and matches. He then went to the harbor where he sloshed the gasoline on and in the sloop. Finally, he lit a match and lit the gasoline. These acts create a very strong inference of intent.

The facts also arguably support a conclusion that David acted recklessly as to whether he was putting another person in danger. David saw Victor earlier in the evening at the tavern, and Victor was rather intoxicated at that time. David also knew that Victor slept on the boat occasionally when he had

too much to drink. Moreover, a person who has had too much to drink is much more likely to remain unconscious during a fire. Given these facts, David's conduct in starting the fire on the boat likely constituted a gross disregard of the conduct of a reasonable person.

David's intoxication would not affect the conclusion as to whether he acted recklessly or not because AS 11.81.900(a)(3) provides that a person who is only unaware of a risk because of the person's intoxication is deemed to have acted recklessly.

B. Arson in the Second Degree

AS 11.46.410(a). A person commits arson in the second degree if the person knowingly damages a building by starting a fire or causing an explosion.

A person commits Arson in the Second Degree by knowingly damaging a building by starting a fire or causing an explosion. AS 11.46.410. The definition of "building" includes any propelled vehicle adapted for overnight accommodation of persons, and the definition of "propelled vehicle" includes sailboats. AS 11.81.900(b)(5) & (50).

The facts suggest that Victor's sloop probably qualifies as a building because it was adapted for overnight accommodation. The sloop had a cabin in which Victor slept and a galley in which he could cook. The sailboat also presumably had an indoor head because Victor used the boat to sail down to Mexico in the winter. In *Shoemaker v. State*, 716 P.2d 391, 392 (Alaska App. 1986), the court of appeals concluded that a fishing boat that was designed to sleep two crew members during the fishing season was a building and a dwelling because it had a galley, two bunks, and an indoor head.

The facts also demonstrate that David knowingly damaged Victor's boat with fire. As discussed above, he deliberately got the gasoline, spread it on the boat, and then lit it. David's intoxication also has no impact on whether he acted knowingly because AS 11.81.900(a)(2) provides that a person who is unaware of conduct because they are intoxicated is deemed to act knowingly.

II. Burglary in the First and Second Degrees – 20%

A. Burglary in the Second Degree

AS 11.46.310(a). A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime in the building.

A person commits the crime of Burglary in the Second Degree by entering or remaining unlawfully in a building with intent to commit a crime in the building. AS 11.46.310. As noted above, Victor's sailboat probably qualifies as a building. AS 11.81.900(b)(5),(50). A person enters or remains unlawfully in a building if the person inserts any part of his body or any instrument intended to be used in the commission of a crime into the building. *Sears v. State*, 713 P.2d 1218, 1220 (Alaska App. 1986). David stuck the spout of the gasoline jug through the open port to slosh gasoline into the galley of the sloop. Then he stuck his arm and the long match through the porthole to light the gas. Thus, he stuck both an instrument of the crime and part of his body through the port hole, thereby entering the building. David's target crime could be arson as discussed above or criminal mischief as discussed below.

Also as noted above, the facts indicate that David intended to damage the boat by burning it. Since Burglary is an intent crime, evidence of David's intoxication would be relevant to support an argument that he didn't enter the boat with the intent to commit a crime.

B. Burglary in the First Degree

AS 11.46.300(a). A person commits the crime of burglary in the first degree if the person violates AS 1146.310 and (1) the building is a dwelling; or (2) in effecting entry or while in the building, the person (A) is armed with a firearm; (B) causes or attempts to cause physical injury to a person; or (C) uses or threatens to use a dangerous instrument.

A person commits Burglary in the First Degree if the person commits Burglary in the Second Degree and the building is a dwelling. AS 11.46.300(a)(1). As discussed above, a boat can qualify as a dwelling. See *Shoemaker v. State*, 716 P.2d 391, 392 (Alaska App. 1986) (fishing boat qualified as a dwelling even though it was not occupied at the time of the burglary because it had bunks, a galley, and an indoor head, and the owner's son lived on the boat during the fishing season.) Victor's sloop had at least one bunk in a cabin and a galley. The facts do not indicate whether it had an indoor head, but Victor apparently lived on the boat when he sailed it to Mexico in the winters.

Under alternate theories of Burglary in the First Degree, a person also commits that crime if, while effecting entry into the building or while in the building, the person causes physical injury to another person or the person uses a dangerous instrument. AS 11.46.300(a)(2)(B) & (C). The facts indicate that David caused injury to another person because Victor felt pain as he escaped the fire. "Physical injury" means physical pain. AS 11.81.900(b)(46). The facts also indicate that David used a dangerous instrument during the burglary. A "dangerous instrument" is anything that is capable of causing

death or serious physical injury under the circumstances in which it is used. AS 11.81.900(b)(15(A). Under the facts, the gasoline would count as a dangerous instrument. Gasoline when used as an accelerant is capable of causing death or serious physical injury in the ensuing fire.

The facts indicate that David committed Burglary in the Second Degree by entering a building to commit a crime in the building and that he committed Burglary in the First Degree under several theories.

III. Criminal Mischief in the First and Third Degrees – 20%

A. Criminal Mischief in the First Degree

AS 11.46.475 (a) A person commits the crime of criminal mischief in the second degree if, having no right to do so or any reasonable ground to believe the person has such a right,... (3) with intent to damage property of another by use of widely dangerous means, the person damages property of another in an amount exceeding \$100,000 by the use of widely dangerous means.

Under AS 11.46.475(a)(3), a person commits Criminal Mischief in the First Degree if the person intends to damage the property of another by means of “widely dangerous means” and causes damage in excess of \$100,000 by “widely dangerous means”. Alaska Statute 11.46.495(8) defines “widely dangerous means” as any substance that is difficult to contain and capable of causing widespread damage, including fire. The person must act recklessly with regard to the fact that the damage exceeded \$100,000. AS 11.81.610(b)(2).

The facts indicate that David intended to cause damage to Victor’s boat by fire. He went to his garage and picked up a book of matches and a five gallon jug of gasoline. He then went to the harbor, poured the gasoline over and into Victor’s wooden sloop, and then lit the gasoline. The facts also indicate that David caused more than \$100,000 in damage. The sloop was worth \$110,000 and the fire completely destroyed the boat.

The facts also indicate that David was probably intoxicated when he burned the boat. He went to the tavern after work to relax by having a couple of beers. After Victor began deriding him, he left the tavern and went home to continue drinking, where he drank half a large bottle of whisky. Under AS 11.81.630, evidence of intoxication is relevant on the issue of whether the defendant could form the requisite intent. David would be able to present evidence of his intoxication to support an argument that he could not form the intent to commit criminal mischief. But realistically, given the facts, that argument is not likely to be successful.

The facts also may support a conclusion that David acted recklessly as to whether the damage he was causing exceeded \$100,000. The sloop was worth \$110,000. And David had also refurbished a wooden boat himself and knew how much time and money Victor had spent in refurbishing the sloop. Given these facts, David arguably consciously disregarded the risk that he was going to cause more than \$100,000 worth of damage to the sloop by starting the fire.

David's intoxication would not affect the conclusion as to whether he acted recklessly or not because AS 11.81.900(a)(3) provides that a person who is only unaware of a risk because of the person's intoxication is deemed to have acted recklessly.

B. Criminal Mischief in the Third Degree

AS 11.46.482(a)(1). A person commits criminal mischief in the third degree if, having no right to do so or any reasonable ground to believe the person has such a right, (1) with intent to damage property of another, the person damages property of another in an amount exceeding \$500....

Criminal Mischief in the Third Degree only requires a person act with intent to damage the property of another and cause damage in excess of \$500. This offense would be a lesser included offense of Criminal Mischief in the First Degree and would apply if a jury was not convinced that David acted recklessly with regard to the fact that the damage would exceed \$100,000.

Criminal Mischief in the Second Degree, AS 11.46.480, is not a lesser included offense because it only applies to tampering with food or drugs, gas or oil pipelines, or aircraft.

IV. Attempted Murder and Assault in the Second and Third Degrees – 30%

A. Attempted Murder

AS 11.41.100(a). A person commits murder in the first degree if (1) with intent to cause the death of another, the person (A) causes the death of any person.... AS 11.31.100(a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

A person commits Attempted Murder in the First Degree if the person intends to kill someone and engages in conduct that constitutes a substantial step toward the commission of the murder. AS 11.31.100(a), 11.41.100(a).

The facts do not explicitly state that David intended to kill Victor. But one may infer that a person intends the ordinary and probable consequences of their actions. *Calantas v. State*, 608 P.2d 24, 36 (Alaska 1980). In the present case, David knowingly started a fire on the wooden sloop. Arguably, burning the sloop to the waterline is an ordinary and probable consequence of starting the fire. And similarly, killing anyone on board during the fire would be an ordinary and probable consequence of starting the fire.

Additional facts support a finding of intent. Victor had publicly humiliated David in the bar that evening about the collapse of the deck that David had been building. Victor's derision was particularly inflammatory because it went to David's ability to make a living. Also David knew that Victor occasionally slept on the boat when he had too much to drink. Victor was rather intoxicated that evening, so David would have known there was a possibility that Victor was asleep on the boat.

In contrast, the fact that David drank a half of a large bottle of whisky provides some indication that he may not have intended to kill Victor. Alaska Statute AS 11.81.630 provides that evidence of intoxication may be offered when relevant to argue that the defendant did not act intentionally.

The facts also indicate that David engaged in conduct that amounted to a substantial step toward the commission of the murder. The court of appeals stated in *Beatty v. State*, 52 P.3d 752, 755-56 (Alaska App. 2002), that examples of acts that amount to a substantial step as opposed to mere preparation include "lying in wait, searching for or following the potential victim, enticing the victim to go to a contemplated place, possessing materials for the commission of the offense, or any overt act done towards its commission." David possessed the materials necessary to carry out the offense because he brought gasoline and matches to the boat. He also committed an overt act towards the commission of the murder by pouring the gasoline onto and into the boat and lighting it.

B. Assault in the Second Degree

AS 11.41.210(a). A person commits the crime of assault in the second degree if (1) with intent to cause physical injury to another person, that person causes physical injury to another person by means of a dangerous instrument.

A person commits Assault in the Second Degree when the person intends to cause physical injury to another person and causes physical injury to another person by means of a dangerous instrument. AS 11.41.210(a)(1). "Physical injury" means physical pain or an impairment of physical condition. AS 11.81.900(b)(46).

The same facts that support an inference that David intended to kill Victor also support a conclusion that he only intended to injure Victor. The facts are somewhat ambiguous about David's intent, so it is possible that a jury could conclude that he had an intent to injure Victor rather than kill him.

There is no question that David caused Victor a physical injury because he poured gasoline on the deck and in the galley of the sloop and then lit the gasoline. Victor, who was asleep in the cabin, felt pain as he passed over some flames while escaping the fire.

C. Assault in the Third Degree

AS 11.41.220. A person commits the crime of assault in the third degree if that person (1) recklessly (A) places another person in fear of imminent serious physical injury by means of a dangerous instrument; [or] (B) causes physical injury to another person by means of a dangerous instrument; ...

A person can commit Assault in the Third Degree in two ways relevant to these facts: first, by recklessly placing someone in fear of serious injury by means of a dangerous instrument, and second, by causing physical injury to someone by means of a dangerous instrument. AS 11.41.220(a)(1)(A),(B).

David caused Victor a physical injury because Victor felt pain as he passed over the flames while escaping the fire. A dangerous instrument is anything that is capable of causing death or serious physical injury under the circumstances in which it is used. AS 11.81.900(b)(15)(A). Under the facts, the gasoline would count as a dangerous instrument. Gasoline when used as an accelerant is capable of causing death or serious physical injury in the ensuing fire. Thus, the facts support the conclusion that David committed Assault in the Third Degree by causing physical injury to Victor by means of a dangerous instrument.

The facts also support the conclusion that David committed Assault in the Third Degree by placing Victor in fear of serious imminent physical injury by means of a dangerous instrument. The gasoline qualifies as a dangerous instrument. "Serious physical injury" means "physical injury caused by an act performed under circumstances that create a substantial risk of death; or ... physical injury that causes serious and protracted disfigurement, protracted impairment of health [or] protracted loss of or impairment of the function of a body member or organ..." AS 11.81.900(b)(56). Fires regularly cause death and disfigure or cripple people. Victor was pretty shook up after escaping a fire which burned his sloop to the waterline. This fact supports an inference that he feared that he was going to die or suffer serious physical injury.

Assault in the First Degree, AS 11.41.200, does not apply because it requires the infliction of serious physical injury. The pain that Victor suffered does not qualify as serious physical injury.