

John Clark Legal Argument Fact Pattern

State vs. Fogarty

Introduction

This is an action for First Degree Murder arising out of a shooting incident involving Someplace Transit driver, Lorna Stephani-Fogarty, who was the estranged wife of the defendant, Soren Fogarty. The incident occurred aboard a Someplace Transit Authority (STA) Number 13 Divide Street bus, which was being operated by the decedent on the evening of Tuesday, the 15th of October, 2013, at or near the intersection of Divide Street and Conquer Avenue in the city of Someplace Washington.

Witness Testimony

J. Lian (Jack) Johnson

Jack Johnson is a fifteen year old freshman at Someplace Alternative School.

Jack Johnson states:

I had been hanging out at the STA Plaza with some of my friends. We'd been skateboarding all afternoon. I caught the 7:15 bus out of downtown. When the bus got into Medwood, this dude gets on the bus and sits in those sideways seats at the front of the bus. I remember him getting on the bus because he got on at the stop right by the Jet Tavern. My Uncle Stan used to work there, but the owner fired him for smoking weed on the job. Stan's better off now anyway. The Jet's a wreck.

Anyway, this dude gets on the bus and he was so drunk, he could hardly walk. He just kind of fell over into the seat and passed out. He didn't pay or nothing. So, the bus lady tries to get him to wake up and the dude starts snoring.

The bus lady acted like she knew the dude. She said something like, "You need to pay. I don't like you on my bus, but if you're here, you have to pay like everyone else." The dude does nothing. Man; he is out cold. She probably tried to wake him and make him pay for about two or three minutes. Then she slapped the side of his head and went back to driving the bus."

I got off at my stop which is by the corner of Lincoln and Queen. As I walked by him to get off the bus, I could smell him. There's nothing like the smell of stale cigarettes and booze. I really felt sorry for that bus lady having to drive the bus next to that stinking dude.

The guy was old; maybe 40 or even older. He must have been about 5'6 and probably weighed about 200 pounds. I remember he was wearing an old black coat.

I got off the bus about three or four miles before the lady got shot.

Mic ("Slick") Sovereign

Mic "Slick" Sovereign is a 35 year old white male with no identifiable legal income. His driver's license lists his height at 6'2 and weight at 270 pounds. He has been arrested three times on

charges relating to running an illegal gambling ring. However, he has never been convicted. Police suspect him of involvement in several "shady" businesses and various nefarious activities, but what few witnesses who have spoken to police have either changed their stories or disappeared without a forwarding address. He is impeccably dressed in a dark black cashmere three piece suit, silk white shirt and red silk tie. He was riding the bus home after meeting with a couple of business associates.

Mic Sovereign states:

I was on the #13 bus. I was sitting across from Lorna, the driver in the first "face forward" seat. I always like that particular chair because I've got long legs and I like to stretch them out on the long side facing couch between me and the driver. People in Someplace have the good sense to let me sleep.

I was listening to music on my iPod and had fallen asleep. I often sleep on the bus. The drivers know me. I just tell 'em where I want off and they wake me at my stop. They know that I'm always appreciative of good service and I always express my appreciation with a little folding green if you know what I mean. I especially liked Lorna. She was a good looking and smart. I could have used a dame like that in my organization.

I woke up once and saw that Loren's ex. had got on my bus and was passed out on the side facing couch seat across from me. I thought about telling him to get the (expletive deleted) off the bus before he pissed himself, but I fell back to sleep. I didn't wake again until I heard the shots. I woke up and saw Lorna lying on the floor in a pool of blood, and Fogarty holding a piece and yelling, "It was an accident, an accident."

I just got up and cold cocked him. The old drunk never got back up until the cops and paramedics arrived.

I don't know nothing else about this, so don't bother me no more.

Billy Thiam

Billy Thiam is a 17 year old senior at Someplace High School. He is a proud Eagle Scout from Troop 329, which meets at Someplace Valley Elementary.

Billy Thiam states:

I remember that the shooting occurred in the middle of October. I was walking home from a scout meeting when I heard two shots. They sounded like two firecrackers. They went bang bang in rapid succession. I looked up and saw a bus careening into the curb. The bus hopped up over the curb and hit a tree and stopped. I called 911, ran to the bus, and shoved open the back door of the bus to get inside.

When I got on the bus, I saw a well dressed man who looked like he had been dozing. He was sitting in the first forward seat on the side of the bus that the bus driver sits. He seemed dazed

and confused, but when I asked him for his name, he said some words that a good scout like me does not repeat. Anyway, since he did not want my help, and the bus lady was bleeding, I went to try and help her.

The lady bus driver was lying on the floor. She was bleeding badly. She had been shot in the stomach and close to her right shoulder. I took off my kerchief and tore up my uniform shirt to make bandages just like they showed us in our first aid merit badge course.

I noticed that there was a proper first aid box at the front of the bus, but by that time, the paramedics had already taken over the victim's care. I found one of the officers and gave her a statement and then went home. It was pretty cold walking home without my shirt, but I was sure proud!

While I was trying to stop her bleeding, my patient kept trying to say something. I couldn't really make out what she was trying to say. It sounded like "rum" or "gun." Thinking back, she might have been talking about a bum, but I can't be positive. I was busy trying to save her life!

The guy who got hit was just lying on the floor of the bus. He didn't regain consciousness until the paramedics were able to help him. I gave my name and contact information to the officers of the law and then went home. I heard that they arrested the bum on the floor. People say that he's the one who shot her, but I don't know. I didn't see him with a gun. He was just lying on the floor.

Big Ike McCrudy

Big Ike McCrudy is a motorcycle patrol officer with the Someplace Police Department. He has been on the force for nineteen years. He has been in motorcycle patrol since his third year on the force. Although he has been offered opportunities to move up to detective, he has always refused the offers. He says he can't understand why anyone would trade a job where a guy gets to spend his entire work shift riding to become a desk monkey.

Big Ike McCrudy states:

I arrived at the scene at 19:50 hours on Tuesday evening, the 15th of October, 2013. The first person I saw was that sleaze ball, Slick Sovereign. For just a moment, I thought this might be my chance to put that piece of trash where he belongs, but it looks like this time, he was the good guy.

When I arrived, the paramedics were working on the two injured persons. I secured the scene, and told everyone on the bus they would have to stay seated until we could get statements and complete the process of gathering evidence.

I located a .22 caliber pistol and found a lady's shoe. When I picked up the shoe, one of the passengers, a Ms. Jessifer Manette volunteered that it was her shoe; thanked me for finding it, and politely asked to have it back. She seemed rather "put out" when I told her we'd have to

keep the shoe as evidence. She asked, "Well then sir, how am I supposed to get home without my shoe?" I told her that that was her problem. We had a crime to solve.

Detective Karlena Lakes arrived in a few minutes, and according to department protocol, she took the witness statements and I protected the scene. I departed just after the detective at 21:50 hours.

Norm Sampson

Norm Sampson is a forty-nine year old Caucasian male. He holds a masters degree in law enforcement management and a BA in law enforcement from Eagles' Bay State College. Norm put in twenty years as a patrol officer and then detective with the Someplace Police Department before retiring early because of disagreements with a supervising lieutenant. Sampson held the rank of sergeant when he retired. Because of his reputation for thoroughness and the fact that he was known as a "straight shooter," Sampson was encouraged to apply for the open position of Loss Control Officer with the STA. He has held this position for three years.

Norm Sampson states:

When I arrived at the scene, Detective Karlena Lakes was already on the scene. She's a nice kid and a good cop. I should know. I trained her. Because we go back a long ways, Lakes will often slip me information to help with my investigation. She told me that the first officer on the scene was a motorcycle cop by the name of Big Ike McCrudy. Big Mike found the gun under the driver's seat. It was a .22 caliber pistol which was registered to the decedent.

Lorna was being placed in the ambulance just as I left. That despicable husband of hers had already been arrested and transported to the hospital to be checked out for supposed injuries he incurred when he got slugged by another passenger by the name of Mic Sovereign.

I looked around the bus and took some pictures. There was blood on the floor directly below the fare box. I also noted what appeared to be a bullet hole in the driver's seatback cushion.

Detective Karlena Lakes

Detective Karlena Lakes has been with the Someplace Police Department (SPD) for fifteen years. She graduated top of her class from the Evergreen Police Academy and trained with the SPD under the direction of legendary Someplace Police Department Sergeant Norm Sampson. She was promoted to detective three years ago when her mentor, Norm Sampson retired for personal reasons.

Detective Lakes states:

I arrived at the scene at 19:57 hours on the 15th of October, 2013. Officer Ike McCrudy was already on scene and had been there for about five minutes. McCrudy had already found the gun, a .22 caliber revolver and a woman's shoe with a stiletto heel, which was discovered under the side facing seat opposite of the bus driver. Further investigation confirmed that the shoe

belonged to one of the passengers, a Ms. Jessifer Manette who had apparently thrown it at the defendant, Fogarty. McCrudy turned the gun and the shoe over to me and I subsequently logged them into the department's evidence and property room. I took blood swabs from a blood spot located directly under the fare box. Statements were obtained from the witnesses, and I departed the scene at 21: 47 hours.

Corrine Heathcliff

Corrine Heathcliff is a sixteen year old sophomore at Captain Sparrow High School where she is a member of the school's cross country and croquet teams.

Corrine Heathcliff states:

My boyfriend, Jimmy Langford, and I were riding home from a date at the movies. We were on the number 13 Divide bus, and were sitting in the back of the bus. We were playing Candy Crush on his phone, so I wasn't paying much attention to what was going on up front until the bus made a sharp swerve to the right. At first, it was kind of romantic. I was sitting on the left of Jimmy, and when the bus swerved, I fell right into his manly arms! He is so gorgeous! But then I saw the commotion and heard the shots! Man, what a mood killer!

This dude had a hold of the lady bus driver's arms and was pulling at them and yelling at her. It looked like he had pulled her out of her seat and was attacking her.

The dude and the lady bus driver were yelling at each other. I heard him call her the "B" word. She was yelling at him to get off of "her bus" and she called him the "A" word. Then I heard two shots. They sounded like they were one right after the other. I heard a bang and then another bang almost immediately. The bus lady just fell forward onto the floor.

There was this other guy there too. A pretty good looking older guy. He was well dressed. He looked rich. Anyway, I don't remember if he jumped up before or after I heard the shots, but I do remember him slugging the dude in the face and seeing the dude fall to the floor almost like he was in slow motion.

I started freaking out and screaming. It was a good thing for me that Jimmy was there. He held me close. He also called 911; although I don't know how they could hear him with me screaming like that. It's kind of embarrassing now; but I was really freaking out.

We stayed until the policewoman showed up. I gave her a statement and waited while Jimmy talked with her and then she said we could leave.

James "Jimmy" Langford

Jimmy Langford is an eighteen year old senior at Pope Francis Prep, a private high school, in Someplace, Washington. He is in the school band, where he plays the saxophone.

James "Jimmy" Langford states:

I was riding the bus with my girlfriend, Corrine Heathcliff. I'm not sure what the bus number is, but it is the bus that goes up and down Divide Street. Corrine and I were on our way back from a date. We went to the movies. We saw some chick flick that Corrine wanted to see. I'm not even sure what the name of the movie was, but it had that English actor in it that played in that movie about the King of England with the stuttering problem. Corrine thinks he's hot and likes to see any movie that he's in. I didn't care. I just wanted to be with her.

Anyway, we were on our way home. We had to take the bus, because my car has a leak in the oil pan and it's in the shop. We were sitting in the long seat in the back of the bus. I had a good view of everything that was going on in the front of the bus. Corrine and I were playing Candy Crush. Actually, she was playing the game and I was just watching and listening to her. She is so beautiful that I could watch her all day.

I had been kind of watching the goings on in the front of the bus. It seemed kind of funny at first and then got pretty serious and scary, and then of course, it ended tragically.

The first thing I remember is that this guy kind of stumbles onto the bus, flops down on the sideways facing seat across from the bus driver. It looked like he just passed out on the seat. The lady bus driver actually stopped the bus, went over to the guy and was yelling at him. She said something about not liking him on "her bus," but if he was on the bus, he had to pay. She tried to rouse him, but he wasn't responding. I remember that she smacked at him with her hand and went back to driving the bus.

He must have laid there on the seat for ten minutes or so. We stopped a couple of times. I remember some kid getting off of the bus and I remember this good looking college aged chick get on the bus. She sat the front regular seats on the same side of the bus as the guy who looked like he was passed out.

I'm pretty sure he had to have been faking the whole "passed out thing," because about the time we got to the big intersection by the shopping center, I saw the guy standing up and yelling at the bus driver. The bus driver kept telling the guy to either sit down or get off her bus. She said something about calling dispatch or the cops or something like that. Whatever she said, must have ticked him off. I remember him looking back in my direction and then he just lunged at the lady bus driver. He grabbed at her purse which she had hanging over the side of her seat. He really had to reach, because the purse was on the other side of her by her driver window. They both started pulling at the purse. As the lady tried to grab the purse back from the guy, she must have let go of the steering wheel, because the bus swerved sharply to the right. Everyone on the bus got thrown to the right. Corrine was thrown into my arms.

When I looked back up, the guy had a gun and the lady was actually trying to pull it out of his hands. Just then a shoe comes flying at the guy from somewhere on the bus. The guy got hit in the head. Then I heard the gun go off. I heard two distinct shots. They were close together, but they were a few seconds apart. It seemed like I heard the first shot, and then there was this moment of calm silence and then I heard the second shot.

About the same time as the second shot, a man who had been sleeping on the bus jumped up and hit the guy who was holding the gun. The guy with the gun just collapsed and fell on the floor. Corrine started screaming. I was trying to comfort her. I did call 911.

The guy was out cold, so I didn't think we were in any danger. In any event, the man that hit the guy with the gun also picked up the shooter's gun and slipped it in his pocket. Some boy scout arrived and was trying to give first aid to the lady bus driver. I don't see how he was going to help her. I'm pretty sure she was dead already.

I don't remember the bus driver saying anything.

The Boy Scout left after the paramedics arrived. Corrine and I both gave statements to Officer Lakes, and then left as soon as she told us we could go.

Jessifer Manette

Jessifer Manette is a twenty-three year old flaxen blond haired female student at Someplace River Community College where she is studying for an AA with hopes to transfer to Eagles' Bay State College, where she plans to study fashion design.

Jessifer works part time as a model for a local clothing designer. She is a first generation American. Her father was British, but lived for many years in France where he met her mother. Her family moved to the United States when she was fifteen, and settled in a small suburb just North of Someplace. Jessifer attended Mt. Someplace High School where she was briefly a member of the Mt. Someplace croquet team. Jessifer ended up quitting the team when her coach informed her she would not be allowed to compete for Mt. Someplace unless she began wearing her skirts at a modest length. Jessifer was horrified that anyone would question the latest Parisian styles and immediately quit.

Jessifer Manette states:

I was on my way home from an evening class. I always take the bus. I will never drive a car. I see no reason for people to own cars when public transportation is available at such a modest rate. I am a regular on this route. I have been taking this same route, the number 13, since the fall quarter began almost two months ago. I like to sit across from Lorna and talk with her on the ride home. She is, I'm sorry, was a very nice and beautiful person. We got to know each other very well. She has two young twin girls who attend Someplace Elementary School. I shudder to think what will happen to her girls now that she is gone.

On several nights we talked about our love lives. I often complained that there are no good men in Someplace. They all act like cowboys on steroids. Not a one seems to want to have a romantic dinner and go to an art museum. There does not seem to be a true gentleman anywhere in this town. Lorna would often speak of her almost ex-husband. Even though they have been separated for more than the ninety days, her ex would constantly put up road blocks to the divorce. She even told me that on several occasions, he said he'd kill her before ever agreeing to a divorce. As a result, she had to get a restraining order. However, the judge refused to restrain him from

taking the bus because he had no other form of transportation. She was always afraid that he'd show up on one of her routes.

I got on the bus at my regular stop at Divide and Riverview; I was upset to see that some man was lying down, apparently sleeping, in my regular seat. I had never seen a picture of him, so I did not know at the time that he was Lorna's husband.

I sat down in the first face forward seat so I could move into my regular seat whenever the man got off of the bus. I was sitting across from a very well dressed gentleman who often rides the bus. His name is Mic. I use the word gentleman loosely, because even though he dresses well and has always spoken nicely to me, I have seen some of the people he meets when he gets off of the bus and I don't want to be any part of him and his "friends."

I have heard that other people said that Lorna's husband smelled. That is ridiculous. I could tell that he had been drinking, but he was not smelly. Since I smoke cigarettes, I don't smell tobacco on other people. I do not think he smelled.

We had gone several blocks down the street, when the guy lying on my regular seat (Lorna's ex) stood up. I remember that I had been looking out the window as we went by the street that Lorna had once told me she and her husband lived when they were first married. As we passed that street, Soren jumps up. I don't think he could have really been sleeping, because he did not seem groggy when he woke up. He just stood up and walked the two steps to Lorna. I distinctly heard him say, "If you think you're going to win, you've got another thing coming." He turned and looked at Mic and looked at me. He kind of growled, "What do you think you're looking at?" and turned back toward Lorna.

Lorna grabbed for her purse. I was frightened because I know that Lorna carried a gun in her purse. She once told me she hated guns, but she bought one after the first time her ex-husband threatened her because she was scared to death he'd hurt her. Soren (that's her ex-husband's name) grabbed for her purse at the same time. They started to almost wrestle over the purse. I took off my shoe (an Italian made dress shoe with a stiletto heel) and threw it at Soren. I hit him in the head. I heard a shot go off. Lorna lost control of the bus, and we turned hard to the right, hit the curb, and stopped when the bus bumped into a tree (we were not going fast at this point). In my mind, I heard the first shot, the bus went out of control, and then I heard the second shot just seconds before we hit the tree. There was definitely a lapse of a few seconds between the two shots.

At some point, Mic stood up and snarled at Soren to get off the bus and get lost if he knew what was good for him. That was right about the time of the first shot. I remember when we bumped into the tree; Mic fell backwards into his seat, but jumped right back up again and hit Soren in the face. Soren just kind of slumped to the ground and was out like a light.

Lorna had fallen over. It looked like she had slumped into the steering wheel and then fallen out of her chair in the commotion. I immediately went to Lorna. She was bleeding in the stomach and above her right breast just close to her right shoulder. She was having a hard time talking, but she said, "He finally got me – with my own gun."

About that time, a Boy Scout came on to the bus and told everyone to stand back because he was an expert in first aid. He tore his neckerchief and his shirt up and used it to bandage her wounds. I don't know why he didn't just use the first aid kit in the front of the bus. I tried to tell him that it was there, but he just shushed me. He said he needed quiet to work on his patient. He told me I should call 911; which I did.

The paramedics arrived almost immediately. They took over Lorna's care and worked on Soren, who was still passed out on the floor of the bus.

Two officers came. A motorcycle policeman came first and was securing the scene since the paramedics were already trying to help Lorna. He found Lorna's gun and my shoe, but he wouldn't let me have the shoe back. He said it was evidence.

A woman detective showed up a few minutes later. I gave her my statement and then departed as soon as she told me I could go home.

Nick Billingsworth

Nick Billingsworth is a forty year old high school teacher and croquet coach. He lives in Someotherplace, Washington on the coast, but was in town for an important croquet coaches meeting. Since he was in town alone, he called up his old friend from college, Soren Fogarty and arranged to meet for dinner and drinks at their old college hangout, the Jet Tavern.

Nick Billingsworth states:

Since I was in town alone on work, I thought I'd call up Soren Fogarty. Soren and I had gone to school together at Whatsitworth College (now University) in what is now the suburb of Medwood, just North of Someplace. We met at the Jet at 5:00 PM. I ordered burgers and a pitcher of cold beer. Soren hardly touched his food, but he drank almost the entire pitcher. I knew that Soren had been really down about his impending divorce, but he was sounding deranged at dinner. It must have been about 7:30 that he looked at his watch and said, "I've got to run. I've got someone to kill." It was such a weird thing to say, but he was drunk, so I shrugged it off.

I offered to give him a ride home. I knew that he had driven to the tavern, and he was in no shape to drive. He declined. He said he was just going to take the bus. He said that he especially liked riding the Divide bus because it took him right by the first home that he and Lorna shared. He sounded pretty morbid to me; but it didn't seem like I could do anything for him, and he said he was taking a bus, so I just said goodbye and hugged my old friend before he left.

I really wish now that I had made him take me up on my offer of a ride home.

I just have to believe that it was an accident. As crazy as he was acting, I just can't believe that he'd kill Lorna on purpose. He loved her too much.

Dr. Anita Grumpsy, age 52 Toxicologist

Dr. Grumpsy is employed at Sacred Family Hospital, Someplace, Washington, in the pathology department.

Soren Fogarty was brought to the hospital by paramedics for treatment following the bus incident. By the time he was at the hospital, he had regained consciousness. He agreed to a sample of his blood. The toxicology report established a blood alcohol level of 1.2. The legal limit in Washington is .08 for adults over the age of 21. Considering the absorption rates of alcohol, Dr. Grumpsy's professional opinion is that Fogarty's blood alcohol level must have been "somewhat lower" at the time of the shooting incident.

Dr. Anita Grumpsy states:

Metabolisation rates vary somewhat from person to person. A person's retrograde extrapolation i.e. a person's blood alcohol concentration at a time previous to the sample collection could be lower or higher than the reading at the time of the sample depending on whether the person's blood alcohol rate was rising or falling based on the subject's rate of alcohol absorption.

Given my education, training and experience, as well as my review of the evidence and facts of this case, it is my opinion that Mr. Fogarty's blood alcohol level was rising at the time the sample was taken. At the time of the shooting incident, his blood alcohol level should have been somewhat lower than the 1.2 which we found in his blood alcohol test. In my professional opinion, his blood alcohol level at the time of the shooting would have been about .05 or .06.

Dr. D.A. Cascade

Dr. D.A. Cascade is a retired toxicologist. He worked for twenty-seven years as a toxicologist at Camaro Hospital, in Trust City, Washington. Following his retirement, Dr. Cascade has worked as an expert witness for both the defense and prosecution in over one hundred cases involving alcohol. In this matter, he has been hired as an expert witness to testify on behalf of the defendant.

Dr. D.A. Cascade states:

Whereas I agree with Dr. Anita Grumpsy's statements regarding the science of alcohol absorption, her findings are impossible to correlate with the facts of this case. After carefully examining the toxicology reports and reviewing the actual witness statements concerning the actions of Mr. Soren Fogarty, it is my professional opinion that Mr. Fogarty's blood alcohol level was falling at the time of the shooting.

Even assuming the common knowledge that alcohol burns off at a rate of approximately one beer/glass of wine/mixed drink per hour, it just seems ludicrous to assume that the alcohol rate was rising. To support her findings, Mr. Fogarty would have had to have

been drinking while he was on the bus. There is just no way that science can support her findings.

Sjol Dansun Age 35 – Pathology

Sjol Dansun is employed as a phlebotomy technician at Pathology, PS in Someplace, Washington. On the night of the shooting incident, he was working at Sacred Family Hospital, in Someplace, Washington.

Sjol Dansun states:

I am a phlebotomy technician. On the night of the shooting incident, I was assigned to draw a blood specimen from the defendant, Soren Fogarty. The patient was fully cognizant of what I was doing, except that he must have thought I was a doctor, because he kept calling me doctor, even though I told him a couple of times that I am not a doctor. Then all of a sudden, he just blurted out:

“It was an accident, doctor. It was an accident. I only wanted to scare her and talk some sense into her, so she’d come home. I saw that ape of a man, Mic Sovereign, and I got really scared. Mic had told me on a couple of times that if I didn’t stop stalking Lorna, he would make me stop. How can I stalk my own wife? I love her!

When I saw Mic, I just freaked. I knew she had a gun because I was following her one day and I saw her go in and buy it. I also knew that she kept it in her purse. I just tried to get the gun so I could protect myself from Mic. Then I got hit in the head with some chick’s shoe and the gun just went off. I was so nervous; I think it might have gone off a second time.”

That was all he said; but I remember thinking that it was odd that he wasn’t crying or anything. He just sat there stone faced and kept saying, “It was an accident.” “It was an accident.”

Elizabeth Brimful

Elizabeth Brimful is a 37 year old female who is employed as a dispatcher by the Someplace Transit Authority.

Elizabeth Brimful states:

Lorna and I have been friends for years. On many times she told me about her husband and how abusive he was to her. She told me she was frightened to death of him. I knew she had a gun, but I kept her secret. I did tell her to get a restraining order, which she did get.

About two weeks after the shooting, I received an anonymous phone call. Even though I saved the number, it didn’t do any good. Apparently, the number was traced back to one

of the last remaining phone booths in town. Right, here, at the STA Piazza. Anyways, there was a man's voice on the other end. The man said,

"What do you think of your restraining order now, witch."

I think it must have been Lorna's ex-husband and murderer, Soren. However, since I've never met the man nor ever spoken with him, I can't really be positive it was him.

Dr. Laura Barrelmaker

Dr. Laura Barrelmaker is an emergency room physician at Sacred Family Hospital in Someplace, Washington.

Dr. Laura Barrelmaker states:

Lorna Stephani-Fogarty was admitted by ambulance to the Sacred Family Hospital Emergency Room at 22:59 hours.

I was on duty when the victim, Lorna Stephani-Fogarty was transported by ambulance to the hospital. Upon examination, I discovered two bullet wounds. One entered through the abdomen and exited on the opposite side of the body. The other wound was just above the right breast. Microscopic green cotton tissues, which were later linked "to a Boy Scout shirt were imbedded in the wound to the abdomen. It is apparent that the young man who attempted first aid stopped the bleeding in the wound to the front of the abdomen and in the shoulder/breast area. However, the bullet exit wound was left untreated until paramedics arrived. All wounds were properly treated by the paramedics.

Upon further examination, it was discovered that Methicilin-resistant Staphylococcus aureus (MRSA bacteria) had entered the wound. MRSA is a sepsis pathogen that cannot be treated with normal antibiotics. The bacteria apparently entered the body through one of the two abdominal wounds. The bacteria could have been on the floor of the bus or on the material used by the first aid provider.

The patient expired at 8:37 AM on the morning of October 16th 2013 as a combined result of traumatic injury/bullet wounds and severe and rapid onset of septic shock resulting from the introduction of bacteria into the body, most likely as a result of the gunshot wounds.

Applicable Washington State Pattern Jury Instructions

Note: Students may use their own research into Washington State Law in addition to these instructions.

WPIC 26.01 Murder—First Degree—Definition

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person [unless the killing is *[excusable]*[or]*[justifiable]*].

WPIC 26.01.01 Premeditated—Definition

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

WPIC 26.02 Murder—First Degree—Premeditated—Elements

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about _____, the defendant acted with intent to cause the death of _____;
- (2) That the intent to cause the death was premeditated;
- (3) That _____ died as a result of the defendant's acts; and
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 27.01 Murder—Second Degree—Intentional—Definition

A person commits the crime of murder in the second degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person [unless the killing is *[excusable]*[or]*[justifiable]*].

WPIC 27.02 Murder—Second Degree—Intentional—Elements

To convict the defendant of the crime of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about _____, the defendant acted with intent to cause the death of _____;
- (2) That _____ died as a result of defendant's acts; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 28.01 Manslaughter—First Degree—Reckless—Definition

A person commits the crime of manslaughter in the first degree when he or she recklessly causes the death of another person [unless the killing is *[excusable]* *[or]* *[justifiable]*]

WPIC 28.02 Manslaughter—First Degree—Reckless—Elements

To convict the defendant of the crime of manslaughter in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about _____, the defendant engaged in reckless conduct;
- (2) That _____ died as a result of defendant's reckless acts; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 18.10 Voluntary Intoxication

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant *[acted]* *[or]* *[failed to act]* with _____.

NOTE ON USE

Use this instruction for voluntary intoxication cases only. It does not apply to a case in which involuntary intoxication is claimed.

Use bracketed material as applicable.

COMMENT

RCW 9A.16.090.

Approval of instruction. WPIC 18.10 is a correct statement of the law. *State v. Corwin*, 32 Wn.App. 493, 649 P.2d 119 (1982). WPIC 18.10 is also cited with approval in *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987), and *State v. Hackett*, 64 Wn.App. 780, 827 P.2d 1013 (1992).

Basis for giving instruction. “[A] criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state.” *State v. Gallegos*, 65 Wn.App. 230, 238, 828 P.2d 37 (1992) (cited in *State v. Ager*, 128 Wn.2d 85, 904 P.2d 715 (1995)). The evidence “must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged. ... Evidence of drinking alone is insufficient to warrant the instruction; instead, there must be ‘substantial evidence of the effects of the alcohol on the defendant's mind or body.’” *State v. Gabryschak*, 83 Wn.App. 249, 252–53, 921 P.2d 549 (1996) (citations omitted). See also *State v.*

Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002) (defendant not entitled to a voluntary intoxication instruction where he did not present sufficient evidence to show his intoxication affected his ability to acquire the required mental state); *State v. Harris*, 122 Wn.App. 547, 552–53,

Particular mental state at issue. Although the defense of voluntary intoxication is usually associated with crimes requiring proof of a specific intent, the defense is also appropriate when the defendant is charged with a crime for which a particular mental state, such as knowledge, is required. *State v. Lottie*, 31 Wn.App. 651, 644 P.2d 707 (1982) (arson). In a prosecution for first degree murder, premeditation and intent are two distinct elements, and the defendant is entitled to an instruction such as WPIC 18.10 upon a showing that intoxication affected either element. *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982).

When the crime charged (first degree assault) involved a particular mental state (intent to inflict great bodily harm), it was error to refuse defendant's request to give this instruction when there was “substantial evidence that the defendant was in fact intoxicated at the time the crime was committed and that the intoxication affected his ability to acquire the requisite mental state.” *State v. Hackett*, 64 Wn.App. 780, 785 n. 2, 827 P.2d 1013 (1992) (defense applies to intoxication by drugs as well as alcohol, and diminished capacity instruction was not broad enough to cover voluntary intoxication falling short of mental illness or disorder). Cf. *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993) (a diminished capacity instruction may be adequate when based, in whole or in part, on defendant's voluntary consumption of drugs or alcohol).

In *State v. Swagerty*, 60 Wn.App. 830, 810 P.2d 1 (1991), the trial court did not err by refusing to give a voluntary intoxication instruction in a prosecution for statutory rape. The appellate court found that the defense of voluntary intoxication was not available to the defendant, because the Legislature's definition of statutory rape did not include specific intent or any other mental state.

Nature of defense. In a technical sense intoxication is not a “true defense,” because a criminal act committed by a person who is voluntarily intoxicated is not justified or excused. Rather, intoxication may raise a reasonable doubt as to a mental state required for conviction of a certain crime. Therefore, in an appropriate case, the jury should be instructed that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state. *State v. Coates*, supra.

In *State v. Guilliot*, 106 Wn.App. 355, 365–66, 22 P.3d 1266 (2001), the court held that a defense based upon hypoglycemia is similar to an intoxication defense. A jury instruction based upon hypoglycemia is proper only if the defendant produces substantial evidence of a link between an insulin reaction and the defendant's ability to form the culpable mental state at the time of the crime.

Voluntary intoxication is intoxication not caused by force or fraud, *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993) (Sentencing Reform Act case, reaffirming prior holdings that an alcoholic or addict is not an “involuntary” intoxicate), or by medicinal use of drugs, *State v. Gilcrist*, 15 Wn.App. 892, 552 P.2d 690 (1976).

Burdens of proof and persuasion. It is constitutionally permissible to require the defendant to bear the initial burden of coming forward with evidence of intoxication and its effect upon the

defendant's mental state before giving an instruction on intoxication. However, the jury should not be instructed that the defendant has the burden of proving voluntary intoxication by a preponderance of the evidence. Such an instruction unconstitutionally relieves the prosecution of the burden of proving beyond a reasonable doubt the mental state that is the element of the crime charged. *State v. Carter*, 31 Wn.App. 572, 643 P.2d 916 (1982).

The State has no burden of disproving intoxication, and the jury should not be instructed that it does. *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987). It is sufficient to instruct the jury that the State must prove the mental state that is an element of the crime charged. *State v. James*, 47 Wn.App. 605, 736 P.2d 700 (1987); *State v. Sam*, 42 Wn.App. 586, 711 P.2d 1114 (1986); *State v. Fuller*, 42 Wn.App. 53, 708 P.2d 413 (1985).

WPIC 15.01 Excusable Homicide—Definition

It is a defense to a charge of *[murder][manslaughter]* that the homicide was excusable as defined in this instruction.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 16.07 Justifiable Homicide—Actual Danger Not Necessary

A person is entitled to act on appearances in defending *[himself][herself][another]*, if that person believes in good faith and on reasonable grounds that *[he][she][another]* is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

WPIC 4.01 Burden of Proof—Presumption of Innocence—Reasonable Doubt

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The *State* is the plaintiff and has the burden of proving each element of *the* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]*

WPIC 5.01 Direct and Circumstantial Evidence

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

NOTE ON USE

This instruction should be given upon the request of any party when there is circumstantial evidence in the case.

WPIC 25.02 Homicide—Proximate Cause—Definition

To constitute *[murder][manslaughter][homicide by abuse][or][controlled substance homicide]*, there must be a causal connection between the criminal conduct of a defendant and the death of a human being such that the defendant's *[act][or][omission]* was a proximate cause of the resulting death.

The term “proximate cause” means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.

[There may be more than one proximate cause of a death].

NOTE ON USE

Use bracketed material as applicable.

The first two paragraphs should be given in all homicide cases in which there is an issue of causal connection between defendant's act and the death of the decedent. Do not use this instruction for vehicular homicide cases; instead use WPIC 90.07, Vehicular Homicide and Assault—Proximate Cause—Definition.

The bracketed third paragraph should always be used when the evidence supports multiple proximate causes. It should always be included when WPIC 25.03, Conduct of Another, is given.

COMMENT

The definition of proximate cause is adapted from WPI 15.01. See the Comment to that instruction.

Cause of death is a question of fact. *State v. Engstrom*, 79 Wn.2d 469, 476, 487 P. 2d 205 (1971). When an unforeseeable act breaks the causal connection between the original act and the injury, such intervening cause may excuse the defendant from legal accountability. *State v. Little*, 57 Wn.2d 516, 522, 358 P.2d 120 (1961). In *State v. Perez-Cervantes*, 141 Wn.2d 468, 6

P.3d 1160 (2000), the court held that the defendant failed to present sufficient evidence to show that the victim's drug use after the stabbing or failure to promptly seek medical attention following release from the hospital was an intervening cause of death.

In *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990), the Supreme Court found that WPIC 25.02 pertains to “cause in fact”, the “but for” consequences of an act, and not “legal causation.” In *Dennison*, the defendant argued that the trial court should have given WPIC 25.02, because the decedent's felonious acts superseded the defendant's acts when the decedent overreacted under circumstances not reasonably foreseeable. The Supreme Court rejected this argument, noting that the defendant confused the two elements of proximate cause, cause in fact and legal causation. For a more detailed discussion of “cause in fact” and “legal causation,” see the Comment to WPI 15.01, 6 Washington Practice: Washington Pattern Jury Instructions—Civil (5th ed.).

In *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990), a prosecution for first degree felony murder, the court rejected the argument that an instruction based on WPIC 25.02 unconstitutionally relieved the State of proving an element of proximate cause because the instruction did not state that proximate cause is limited by foreseeability. The court held that foreseeability is not an element of proximate cause and that the instruction given “properly stated the law and was not unconstitutional.”

See the Comment to WPIC 90.02, Vehicular Homicide—Elements, for a discussion of the proximate cause requirements under the vehicular homicide statute.
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11 WAPRAC WPIC 25.02

WPIC 4.11 Lesser Included Crime or Lesser Degree

The defendant is charged [*in count*] with _____. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime[s] of _____.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more [*degrees*] [*crimes*] that person is guilty, he or she shall be convicted only of the lowest [*degree*] [*crime*].

Note on Use

Use this instruction when the evidence would allow conviction of a lesser included crime, whether that be a lesser degree of the same crime or a lesser included crime with a different name. See discussion in the Comment.

Along with this instruction, use WPIC 155.00, Concluding Instruction—Lesser Degree/Lesser Included Crime/Attempted Crime, and the applicable special verdict forms from WPIC180.01, WPIC180.05, and WPIC180.06 180.06.

In order to have a complete set of instructions, there must be a separate elements instruction setting out what must be proved to convict a defendant of the lesser included crime or lesser degree.

Comment

RCW 9A.04.100(2); RCW 10.61.003; RCW 10.61.006; RCW 10.58.020.

Lesser included crimes and lesser degree crimes. This instruction explains the proper sequence of the jury's decisions when considering a lesser offense. The instruction applies regardless of whether the crime is a lesser degree crime or a lesser included crime. In either instance, the framework for juror decision-making is the same. It is only in other regards that the law distinguishes between lesser degree crimes and lesser included crimes. See *State v. Tamalini*, 134 Wn.2d 725, 730–35, 953 P.2d 450 (1998) (distinguishing between lesser included crimes and lesser degree crimes with respect to the judge's threshold test for deciding whether to instruct the jury about a lesser crime); see also *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

Lesser included offenses—Analysis. The test for analyzing lesser included offenses is traditionally stated as follows: “First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.” *State v. Workman*, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978) (citations omitted). Additionally, “the lesser offense must arise from the same act or transaction supporting the greater charged offense” *State v. Porter*, 150 Wn.2d 732, 738, 82 P.3d 234 (2004).

The *Workman* test requires a factual showing that is “more particularized” than the sufficient evidence standard that otherwise applies to jury instructions. *State v. Porter*, 150 Wn.2d at 737, 82 P.3d 234.

“[T]he evidence must raise an inference that *only* the lesser included . . . offense was committed to the exclusion of the charged offense.” In other words, “the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” *State v. Porter*, 150 Wn.2d at 737, 82 P.3d 234 (quoting *State v. Fernandez-Medina*, 141 Wn.2d at 456; other citations omitted).

Lesser degree offenses—Analysis. The test for lesser degree offenses is whether: “(1) the statutes for both the charged offense and the proposed inferior degree offense ‘proscribe but one offense’; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.” *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (quoting *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)). The factual (third) component of this test is the same as the factual component of the *Workman* test for lesser included instructions. *State v. Fernandez-Medina*, 141 Wn.2d at 455, 6 P.3d 1150.

Unlike a lesser *included* offense, a lesser *degree* offense may have an element that is not an element of the greater offense. For example, second degree assault (by torture) is an inferior *degree* offense for first degree assault (by inflicting great bodily injury), even though the lesser degree offense has an element that is not a part of the greater degree offense and thus does not qualify as a lesser *included* offense. *State v. Peterson*, 133 Wn.2d at 891–92, 948 P.2d 381.

Request for instruction. Either party may request an instruction on a lesser crime, *State v. Lyon*, 96 Wn.App. 447, 450, 979 P.2d 926 (1999), and the court may give such an instruction on its own motion. *State v. Rhinehart*, 92 Wn.2d 923, 927, 602 P.2d 1188 (1979). If the instruction

is requested by the defendant in an appropriate case, it is reversible error to refuse to give the instruction. *State v. Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984).

If not requested by either party, however, the failure to give a lesser offense instruction is not reversible error. *State v. Hoffman*, 116 Wn.2d 51, 111–12, 804 P.2d 577 (1991); *State v. Mak*, 105 Wn.2d 692, 747, 718 P.2d 407 (1986), overruled in part on other grounds in *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). The judge is not required to instruct the jury *sua sponte* on all lesser offenses over a defendant's express objections. *State v. Hoffman*, 116 Wn.2d at 111–12, 804 P.2d 577.

Cross-references. For a more detailed analysis of the law relating to lesser included and lesser degree offenses, see *Fine and Ende*, 13A Washington Practice: Criminal Law With Sentencing Forms §§ 106 et seq. (2d ed.). Additionally, lesser offense issues for specific crimes are discussed in Comments throughout Volumes 11 and 11A.
[Current as of 2005 Update.]

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11 WAPRAC WPIC 4.11