POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit toward California Criminal Law Specialization: -- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider #172.

Week Of	Topic	Guest	General
April 16, 2018	**Intoxication Evidence** **Part I**		30 min

I. Relevant Penal Code Statutes

Penal Code section 29.4 (former Penal Code section 22, amended)

(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.

(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.

Penal Code section 25 (Abolishment of Defense of Diminished Capacity

"The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's ***intoxication***, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged."

Thus, evidence of a person's intoxication is not admissible to negate the "capacity" to form the requisite mental state, no matter what the mental state that is required for the crime.

II. Definition of Intoxication

As provided in subdivision (c) of Penal Code section 29.4 (above) the definition encompasses any intoxicating liquor, drug or other substance voluntarily ingested, injected or taken by any other means.

CALCRIM No. 3426: "A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing the risk that it could produce an intoxicating effect, or willingly assuming that risk."

CALJIC No. 4.21: "Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug or other substance, and that person knew or reasonably should have known that it was capable of an intoxicating effect or if [he] [she] willingly assumed the risk of that effect.

Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug or other substance."

III. Voluntary Intoxication and Non-Homicide Crimes

A. Voluntary Intoxication is Admissible as to the Required Specific intent

1. "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent." (Pen. Code 29.4.)

2. Evidence of voluntary intoxication is *not* admissible to negate the existence of general criminal intent. (*People v. Wiliams* (2001) 26 Cal.4th 779, 789.)

3. Voluntary intoxication is *not* a defense to a crime. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119, emphasis added.) Evidence of intoxication is "relevant only to the extent that it bears on the question of whether the defendant actually had the requisite specific mental state." (*Ibid*.)

B. How to Distinguish Between General Intent and Specific Intent Crimes When Voluntary Intoxication Is at Issue

1. As an opening caveat to this discussion, the Supreme Court in *People v. Hood* (1969) 1 Cal.3d 444, 456, stated that the terms "specific and general intent" crimes have been difficult to apply. The Supreme Court in *People v. Hering* (1999) 20 Cal.4th 440, 445, cautioned, "[C]ourts should avoid rote application."

2. Nevertheless, the Supreme Court in *People v. Hood* provided this guidance:

a. "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant

intended to do the proscribed act. This intention is deemed to be a general criminal intent." (*Hood*, *supra*, 1 Cal.3d at pp. 456-457.)

b. "When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." (*Hood*, at p. 457.)

{However, as will be discussed further below, there are some crimes for which the "requisite specific intent" does not fall within traditional Hood formula.}

C. Examples

1. Specific intent crimes typically contain such phrases as "with the intent to" or "for the purpose of" achieving some additional result. (*People v. Hering*, *supra*, 20 Cal.4th at p. 446.)

a. For example, burglary (Penal Code section 459) requires an entry "*with intent to* commit theft or other felony."

b. A lewd act upon a child (Penal Code section 288) requires that the defendant acted *with the intent of* arousing or gratifying his lust passions or sexual desires, or that of child victim.

c. Forgery (Penal Code section 470) requires the false making or unauthorized alteration of a document *with the intent to defraud*.

d. Criminal threats (Penal Code section 422) requires that the threat be made "*with the specific intent* that the statement be taken as a threat."

e. Torture (Penal Code section 206) requires that the person inflicting the injury did so *with specific intent* to cause cruel and extreme pain and suffering *for the purpose* of revenge, extortion, persuasion, or for any sadistic purpose."

2. A general intent crime requires only that the defendant intend to do the act. "The only intent required for a general intent offense is the purpose or willingness to do the act or omission. [Citation.]" (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.

"In other words, if the end is simply a proscribed act, the intent required is only a general one because no further acts or future consequences are envisioned from the illegal act." (People v. Alvarado (2005) 125 Cal.App.4th 1179, 1186.)

a. Battery (Penal Code section 242) is a general intent crime. The crime of battery requires only that the defendant actually intend to commit a "willful and unlawful use of force or violence upon the person of another."

b. Assault with a deadly weapon (Penal Code section 245) is general intent crime. "Assault with a deadly weapon is termed a 'general intent' crime because it is not necessary to find a specific intent to cause a particular injury. What is required, however, is the general intent to willfully commit a battery, an act which has the direct, natural and probable consequences, if successfully completed, of causing injury to another." (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1735.)

c. Rape, sodomy and forcible oral copulation are general intent crimes.

3. Words such as "maliciously, willfully or intentionally" do not create specific intent.

a. "Conviction under a statute proscribing conduct done 'willfully and maliciously' does not require proof of a specific intent." (*People v. Licas* (2007) 41 Cal.4th 362, 366. "

b. In *People* v. *Atkins* (2001) 25 Cal.4th 76, 88, an arson case, the Supreme Court stated that the willful and malice requirement of arson (Penal Code section 450) "ensure that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional act of setting a fire."

c. The expressions "intentionally" and "maliciously" are expressions of general, not specific, intent when used in a penal statute." (*People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1188.)

D. "Attempt Crimes"

1. All attempt crimes are specific intent crimes.

2. Penal Code section 21a states expressly: "An attempt to commit a crime requires a specific intent to commit the crime and a direct but ineffectual act done toward its commission."

E. Enhancements

1. "When the Legislature intends to require proof of a specific intent in connection with a sentence enhancement provision, it has done so explicitly by referring to the required intent in the statute." *(In re Tameka C.* (2000) 22 Cal.4th 190, 198-199).

2. For example, as explained in *People v. Lucero* (2016) 246 Cal.App.4th 750, "[Penal Code] section 12022.53, subdivisions (c) and (d) both provide for additional punishment for a defendant who 'personally and intentionally discharges a firearm' under specified circumstances. Both subdivisions refer only to the description of a particular act – discharging a firearm – without reference to the defendant's intent to achieve any additional consequences." (*Id.* at p. 759.) The *Lucero* court noted that "intentional" use of a firearm does not encompass any specific intent. (*Ibid.*) Thus, the trial court properly instructed the jury that it was not to consider evidence of the defendant's voluntary intoxication in determining the truth of the section 12022.53 (c) and (d) firearm enhancements. (*Ibid*.)

Lucero notes that, by contrast, Penal Code section 12022.55 states "any person who *with the intent to inflict great bodily injury or death*, inflicts great bodily injury … or causes the death of a person, other than the occupant of a motor vehicle, as a result of discharging a firearm from a motor vehicle in the commission of a felony or attempted felony shall be punished …." (*Id*. at p. 759, emphasis added.) Thus as to this enhancement, "it is necessary to prove that the defendant had the intent to do the act which caused a person to suffer great bodily injury, coupled with the specific intent to inflict such injury upon a person." (*In re Sergio R*. (1991) 228 Cal.App.3d 588, 601.)

F. Particular Situations Where Voluntary Intoxication Can Negate Actual Knowledge

In limited situations, courts have recognized that where the offense requires the defendant to have the mental state of actual, subjective knowledge of particular facts or circumstances, evidence of voluntary intoxication may be admissible to prove defendant lacked that mental state.

1. Receiving Stolen Property: In *People v. Reyes* (1997) 52 Cal.App.4th 975, the court of appeal considered the effect of the defendant's voluntary intoxication and mental disorders on his ability to form the mental state required for receiving stolen property. (*Id*. at p. 979.) The *Reyes* court described the elements of the offense: " '[P]roof of the crime of receiving stolen property requires establishing that the property in question was stolen, that the defendant was in possession of it, and that the defendant knew the property to be stolen.' " (*Id*. at p. 984.) *Reyes* held that although receiving stolen property is a general intent crime, it requires "the element of knowledge, a *specific mental state*." (*Id* at p. 985, emphasis added.) The *Reyes* court concluded that "with regard to the element of knowledge, receiving stolen property is a 'specific intent crime.' " (*Ibid.*) Therefore, defendant's evidence of voluntary intoxication as to this element should have been admitted. (*Id*. at p. 986.)

2. Aiding and Abetting: In *People v. Mendoza* (1998) 18 Cal.4th 1114, the Supreme Court held a defendant may present evidence of intoxication solely on the question of whether he is liable for a criminal act as an aider and abettor. The mental state for aider and abettor liability, which has intent and knowledge components, is a "required specific intent for purposes of [former] section 22, subdivision (b)," [now section 29.4, subdivision (b)]. An aider and abettor must " 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' " (*Id*. at p. 1123.) The Supreme Court concluded the intent requirement for an aider and abettor comported with the definition of specific intent as set forth in *Hood*. An aider and abettor must intend not only the act of encouraging and facilitating, but also the *additional* criminal act the perpetrator commits. (*Id*. at p. 1129.)

While acknowledging that (former) Penal Code section 22 referred to "a required specific intent" and not specifically to knowledge, the Supreme Court in *Mendoza* stated that the defendant's mental state could not be "mechanically divided" into knowledge and intent. "One cannot intend to help someone do something without knowing what that person meant to do." (*Id*. at p. 1131.) The *Mendoza* court said that although knowledge may not fall literally with the *Hood* formulation of specific intent, "it is closely akin" to *Hood*'s definition. (*Id.* at p. 1131.)

Further, "the mental state required for an aider and abettor must specifically intend to aid the

perpetrator, whether the intended crime itself requires a general or specific intent on the part of the perpetrator." (*Id*. at p. 1132.). Also, a person who knowingly aids and abets criminal conduct is guilty not only of the intended crime, but also of any other crime the perpetrator commits that is the natural and probable consequence of the intended crime. The questions as to those crimes is whether, judged objectively, the additional crime were reasonable foreseeable. Intoxication is irrelevant in deciding what is reasonably foreseeable. (*Id*. at p. 1133.)

Note: In *People v. Atkins* (2001) 25 Cal.4th 76, the Supreme Court emphasized that its holding in *Mendoza* was "very narrow," "limited to admission of evidence of intoxication solely on the question of aider and abettor liability." The *Atkins* court noted that *Mendoza* recognized that knowledge does not fall within former section 22, but because "the knowledge requirement was intimately entwined with intent, an element of aiding and abetting that requires the defendant to act with knowledge of the perpetrator's criminal intent 'is closely akin to *Hood*'s definition of specific intent." (*Atkins*, at pp. 92-93.)

IV. Murder

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Malice aforethought may be express or implied. (§ 188.) 'Express malice is an intent to kill unlawfully. . . . Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses.' A killing with express malice formed willfully, deliberately, and with premeditation constitutes first degree murder. 'Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.' " (*People v. Beltran* (2013) 56 Cal.4th 935, 942.)

A. First Degree Murder and Voluntary Intoxication Evidence

1. Premeditated, Deliberated, Express Malice (*Intoxication Evidence Admissible*)

a. **"**Evidence of voluntary intoxication is admissible solely on the issue. . ., when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. (Pen. Code, § 29.4)

b. The use of the phrase "harbored express malice aforethought" in section 29.4 is understood as meaning "formed the specific intent to kill required for express malice." See *People v. Swain* (1996) 12 Cal.4th 593, 601.)

c. Premeditation, deliberation and malice all must be present for a killing to be first degree murder. (*People v. Swain*, *supra*, 12 Cal.4th at p. at p. 593, 608.)

B. Felony-Murder (*Intoxication Evidence Admissible as to Underlying Felony*)

1. "The mental state required [for felony murder] is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140–1141.) "The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a co-felon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony." (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

2. The felony-murder rule dispenses with the requirement of malice and replaces it with the specific intent to commit the underlying felony. (*People v. Jones* (2000) 82 Cal.App.4th 663, 667.)

3. Specific intent to commit the underlying felony is required even if the underlying felony is a general intent crime. (See *People v. Jones, supra,* 29 Cal.4th at pp. 1256–1257.) In *Jones*, the jury was properly instructed that rape felony murder requires the specific intent to rape, *and that where specific intent is an essential element of a crime, the defendant's voluntary intoxication or mental disorder should be considered in determining whether he possessed the requisite specific intent*.

4. The evidence must establish the defendant harbored the felonious intent either prior to or during the commission of the acts which resulted in the victim's death. (*People v. Brooks* (2017) 2 Cal.5th 674, 736.) The doctrine of felony murder, therefore, must be limited to those cases in which an intent to commit the felony can be shown from the evidence." (*People v. Sears* (1965) 62 Cal.2d 737, 745.) " 'Under the felony-murder rule, a strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of one continuous transaction.' " (*People v. Wilkins* (2013) 56 Cal.4th 333, 340.)

C. Murder by Torture (*Intoxication Evidence Admissible as to the Specific Intent*)

1. Torture-murder involves a unique specific intent which the standard instructions on murder do not cover. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243.) Torture murder "requires no proof of intent to kill, and the malice element of torture murder can be shown by the doing of an intentional act involving a high probability of death committed with conscious disregard for human life." (*Ibid.*)

2. When intoxication is relevant to the formation of the specific intent required for murder by torture, the jury must be instructed that it should consider the intoxication in relation not to the intent to kill, but to the requisite intent for murder by torture, i.e., the intent to inflict extreme pain. (*People v. Cole* (2004) 33 Cal.4th 1158, 1209; *People v Pensinger*, *supra*, 52 Cal.3d at p.1243.) *An instruction on intoxication must be related to the specific intent involved in torture murder*. (*Ibid*.)

D: Second Degree Implied Malice Murder (*Intoxication Evidence Not Admissible*)

Implied malice exists when there is no intent to kill, but the defendant commits an intentional act, the natural and probable consequences of which are dangerous to human life, and the defendant acted with conscious disregard for that danger. (*People v. Elmore* (2014) 59 Cal.4th 121, 133.) Voluntary intoxication is inadmissible to negate implied malice. (Pen. Code, § 29.4). "To the extent that a defendant who is voluntarily intoxicated unlawfully kills with implied malice, the defendant would be guilty of second degree murder." (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1374–1375.)

E. Voluntary Manslaughter

"[T]he element of malice may be negated by evidence that (1) the defendant acted in a sudden quarrel or heat of passion, or (2) the defendant unreasonably but in good faith believed it was necessary to act in self-defense. If either of these circumstances is found, an unlawful killing will be voluntary manslaughter rather than murder. 'Only these circumstances negate malice when a defendant intends to kill.' [Citation]." (*People v. Landry* (2016) 2 Cal.5th 52, 97.)

1. Heat of Passion/Sudden Quarrel

a. Heat of passion voluntary manslaughter has both a subjective and objective component: (1) the defendant must have killed while actually in the heat of passion induced by the provocation, and (2) the provocative conduct must be such that a reasonable person would have reacted rashly or without due deliberation and reflection. (*People v. Moye* (2009) 47 Cal.4th 537, 549–550)

b. Intoxication is irrelevant to the objective component of heat of passion; i.e., voluntary manslaughter heat of passion arises when " 'an average, sober person would be so inflamed that he or she would lose reason and judgment.' " (*People v. Manriquez* (2005) 37 Cal.4th 547, 586, italics Provocation is legally adequate if it " ' "would cause the ordinarily reasonable person of average disposition to act rashly and ... from ... passion rather than from judgment." ' " (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) Thus, evidence of intoxication is not admissible on the objective component because the provocation necessary to reduce a killing to voluntary manslaughter is governed by the reasonable person standard. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.)

2. Voluntary Manslaughter: Imperfect Self-Defense

a. " '[O]ne who holds an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury does not harbor malice and commits no greater offense than manslaughter.' " (*People v. Elmore* (2014) 59 Cal.4th 121, 133-134.)

b. This issue of whether the jury can be instructed on voluntary intoxication in connection with imperfect self-defense is currently under review in the Supreme Court, *People v. Soto* (2016) 248 Cal.App.4th 884, review granted October 12, 2016, argued and submitted on February 7, 2018. In the

Court of Appeal, the defendant argued the trial court erred in instructing the jury that evidence of his voluntary intoxication could not be considered as related to whether he acted in imperfect self-defense (*Id*. at p. 894). The Court of Appeal concluded the instruction "ran afoul of Section 29.4 because the state of mind required for imperfect self-defense negates express malice, and Section 29.4 by its express terms makes voluntary intoxication admissible on the issue of express malice." The Court of Appeal concluded the trial court's instruction erroneously precluded the jury form considering voluntary intoxication in determining whether the defendant acted in imperfect self-defense. (*Id.* at 888.) (P&A will report on the Supreme Court's decision.)

VI. Instructions By the Trial Court

The trial court has no sua sponte duty to instruct on voluntary intoxication. "An instruction on the significance of voluntary intoxication is a 'pinpoint' instruction that the trial court is not required to give unless requested by the defendant." (*People v. Rundle* (2008) 43 Cal.4th 76, 145,overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390.) "If the defendant in a particular case believes voluntary intoxication is an issue that could affect the jury's determination of the mental state elements of the charged crimes, he or she must request an instruction on that subject. Any lack of clarity regarding the consideration, if any, the jury should give to evidence of voluntary intoxication, in the absence of a request for an instruction on this subject, is of the defendant's doing, and on appeal he cannot avail himself of his own inaction." (*Rundle*, *supra*, 43 Cal.4th at p. 145.)

Evidence that a defendant consumed alcohol or other intoxicating substances, without more, is not sufficient to warrant the instruction; there must be some evidence from which a reasonable jury can infer that the consumption of the substance affected the defendant's actual formation of specific intent. (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.)

Also note that evidence that a defendant was intoxicated *after* or *before* commission of the crime does not justify an instruction on intoxication. There must be evidence that the defendant was intoxicated at the time of the crimes. See *People v. Roldan* (2005) 35 Cal.4th 606, 716 ["Because the evidence that defendant was intoxicated at the time of the crime was 'at most minimal', the trial court properly refused the defense request to instruct the jury that his alleged voluntary intoxication precluded him from forming the specific intent to kill or to rob."]

Pertinent Instructions on Intoxication: CALCRIM No. 3426, 625 and CALJIC No. 4.20-421.1:

NEXT WEEK: Part II: Voluntary Intoxication and Unconsciousness

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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