Professor DeWolf | Criminal Law
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# SAMPLE ANSWER TO EXAM

## Multiple Choice

1. **(a)** is incorrect, since theft does not require that any damage be done or that the person actually profit. It only requires the purpose to deprive the owner of possession, whether successful or not. **(b)** is incorrect; previous holdings are not binding upon the court; Mike might have a defense if he had relied upon those previous cases, but there's no showing here that he did; **(c)** is incorrect, because no mens rea is required regarding the illegality of the conduct (MPC § 2.02(9). **(d)** is correct, since under § 4.10 the jurisdiction of the juvenile courts is exclusive.

2. **(a)** is incorrect; his *purpose* is determinative; whether he was likely to succeed or not in keeping the property is irrelevant. **(b)** is correct; it is the converse of (a). **(c)** is incorrect, since the crime consists of exercising unlawful control over the property; whether or not he actually receives it is irrelevant. **(d)** is incorrect; "moveable property" is defined in § 223.0(4) as including documents; "property" includes airline tickets in 223.0(6).

3. **(a)** is incorrect, since it is only necessary that *someone* in the conspiracy commit an overt act. **(b)** is correct, since it is the essence of conspiracy; **(c)** is incorrect, since benefit is not required in defining the crime. **(d)** is incorrect since (a) is incorrect.

4. **(a)** is correct, since that is the definition of being an accomplice under § 2.06(3)(a)(ii). **(b)** is incorrect, because it sets too low a threshold; under the Code there must be the purpose of facilitating the commission of the offense; **(c)** is likewise incorrect. **(d)** is incorrect because it includes two incorrect responses.

5. **(a)** is correct, since rape is defined as occurring when there is no consent (or if the victim is unconscious or below the age of 10). It may constitute Seduction of Minors, but that is not rape under § 213.1. **(b)** is incorrect because it makes the answer contingent upon whether Swinehart knows her age. **(c)** is incorrect for reasons described in (a); **(d)** is incorrect for the same reason.

6. **(a)** is incorrect, assuming that, as a result of what the undercover officer said, Swinehart thought she was 15. (b) is incorrect because it misstates the requirement for an attempt; a "substantial step" is enough for an attempt if it is "strongly corroborative" of the actor's criminal purpose. **(c)** is incorrect because the MPC does not recognize the doctrine of legal impossibility. (d) correctly states the application of MPC § 5.01(1)(c).

7. **(a)** is incorrect because an intoxicated person is treated as though he were sober for purposes of the awareness of risk (§ 2.08(2)). **(b)** is correct, since it may negative an element of the offense (per § 2.08(1)); **(c)** is incorrect, since culpability with respect to criminality is never required (MPC § 2.02(9) **(d)** is incorrect, since (b) is a correct answer.

8. **(a)** is correct. See pp. 2-3.

9. **(b)** is correct. See p. 112.

10. **(a)** is incorrect. See § 221.1(3). **(b)** is correct, for the same reason. **(c)** is incorrect; he can be *charged* with both; only conviction for both is impermissible; see § 1.07(1). **(d)** is incorrect; at common law the accomplice could not be convicted unless the principal was, but the MPC has no such requirement (§ 2.07(7)).

# ESSAY QUESTIONS

## Question 1

Billy could be charged with robbery and with assault.

Under MPC § 222.1(1) robbery may have been committed under either subsection (a) (infliction of injury) or (b) (use of threats).

*Theft.* Theft is defined in § 223.2(1) as exercising unlawful control over the property of another with purpose to deprive him thereof. Billy apparently exercised control over the money that was handed to him, and ran out the door. In order to constitute theft, the jury would have to find that he exercised unlawful control over the money and had the purpose to deprive the liquor store owner of the money. That seems quite likely.

*Robbery under (1)(a)*. A theft plus a serious bodily injury suffices to establish robbery. It is not clear whether or not the lady suffered serious bodily injury. (An unassigned section of the MPC defines a "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss orimpairment of the function of any bodily member or organ." (MPC § 210.0.) If her injury qualifies, then the question is with what mens rea it must be committed. No mens rea was specified, and therefore the standard is recklessness. Thus, the jury would have to find that he was aware of a risk that injury would result, and that his disregard of the risk constituted a gross deviation from the standard of a law-abiding person. (MPC § 2.02(2)(c)). His statement that he didn't see Mrs. Gatzmeyer will help him in arguing that he was not aware of the risk; but the jury may disbelieve him.

*Robbery under (1)(b)*. The addition of the crime of robbery consists of the use of a threat of serious bodily injury. The store clerk apparently thought he might have a gun, and so he did fear immediate serious bodily injury. Billy might argue that he didn't mean to create this impression, but there are two responses to this: (1) as above, the jury may disbelieve him; just because he says he doesn't want to inflict fear doesn't mean the jury has to believe him. (2) the statute doesn't require that he purposely put fear into the clerk; only that he cause the fear with at least recklessness. Thus, the jury would have to find that he was at least aware of a risk that his actions might create a fear of serious bodily injury, and that would suffice for a conviction under § 222.1(1)(b). Of course, if the jury found that he intended to create the fear of imminent serious bodily harm, that would definitely establish robbery. If convicted under either (a) or (b), the crime is graded as a second degree felony. (It would not be a first degree felony unless Billy purposely inflicted the injury on Mrs. Gatzmeyer.)

*Assault*. Billy might also be guilty of assault for knocking down Mrs. Gatzmeyer. Under MPC § 211.1(1)(a) he would be guilty of simple assault if he recklessly caused her bodily injury. This is punished as a misdemeanor. Billy might also be guilty of assault for putting the clerk in fear of imminent serious bodily injury, but this would likely merge with the robbery charge pursuant to MPC § 1.07(4). It would not be a lesser included offense, however, if he were convicted for the assault on Mrs. Gatzmeyer and the robbery charge were based upon the threat to the clerk.

Question 2

1. Liability

Wilson might be charged with *burglary*, *arson*, *reckless burning* and *criminal mischief*. He would have defenses based upon *necessity* and *insanity* (mental defect).

*Burglary*. Wilson entered the occupied structure of another, but he did not do so (at least under the facts given), with a purpose of committing a crime therein. Thus, he would not guilty of burglary. In any event, it would only be a felony of the third degree, because although it was committed at night it was not committed in the dwelling of another.

*Arson*. Arson is a serious crime, punishable as a second degree felony (§ 220.1(1)). To be guilty of arson, Wilson would have to be found to have (1) started a fire (2) with the purpose of destroying the occupied structure of another. The mens rea for the starting of the fire would be purpose, but that is clearly met here since he spilled the chemicals and then set fire to them with his lighter. The second question is whether he intended to destroy an "occupied structure" of another. Occupied structure is defined in §220.1(4) as a place "adapted . . . for carrying on business therein" even if no one is present. The real issue would be whether it was his intent to destroy the structure. He poured the chemicals on the floor and set them on fire; he might say that he intended only to damage the contents, but the definition of an occupied structure ("each unit" within the larger structure is defined as an occupied structure") seems to make the rooms themselves the structure, and his purpose may have been to destroy it. The jury would have to decide.

*Reckless Burning*. Even if Wilson were not guilty of arson, he should be found guilty of reckless burning. However, it is only a third degree felony. The elements of reckless burning are that he must (1) purposely start the fire (easy to establish, as noted above), and (2) recklessly "place[] a building or occupied structure of another in danger of damage or destruction." Here, unlike arson, it is unnecessary to show *intent to destroy*; it is enough to show that there was recklessness with respect to the danger of damage. The damage clearly did occur, and Wilson's purpose does seem to be to cause

at least damage to the contents of the structure; it would also be apparent that a fire would pose the risk of damage to the structure itself. Thus, the requirements of §220.1(2)(b) would easily be met.

*Criminal Mischief*. Wilson could also be charged with a violation of § 220.3(1). From the description of the facts, he appears to have purposely destroyed property in excess of $5,000, thus making it a felony of the third degree (§220.3(2)).

2. Defenses

Wilson might assert defenses based upon necessity and insanity.

*Necessity*. Under § 3.02 an actor is justified in committing what would otherwise be a crime if the harm or evil sought to be avoided is greater than the harm caused by the commission of the "crime." Here Wilson might assert that the harm caused by obscenity is greater than the harm caused by his property destruction. However, as with the *Warshow* case, the judge might very well rule that the risk posed by obscenity is ordinarily taken into account by the rules that govern that area of law, and unless the photographs in the office were in violation of the law, this is just a case of "taking the law into his own hands." (MPC § 3.02(1)(c) makes the defense unavailable when "a legislative purpose to exclude the justification claimed . . . plainly appear[s].") I think Wilson would lose this argument.

*Insanity*. The Code removes criminal responsibility from any defendant whose mental disease or defect causes him to "lack substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MPC § 4.01(1). Wilson apparently was suffering from some kind of nervous exhaustion. He might argue that he either couldn't appreciate what he was doing. Even if he did know what he was doing, he would be entitled to acquittal if, because of mental disease or defect, he lacked substantial capacity to control his conduct.

It wouldn't matter that Wilson's "insanity" was only temporary; so long as it could be characterized as a "mental disease or defect" it would qualify.

Question 2½

*Necessity*. Many jurisdictions impose a higher standard for necessity, requiring that the danger be imminent. Wilson clearly couldn't meet that standard here.

*Insanity*. The standard for insanity might be different if the MPC definition is not followed. Wilson's conduct might be judged by whether or not he *knew* what he was doing (whether or not he *appreciated* the criminality of his conduct); and he may or may not be able to take advantage of the control prong of the test. In other words, in jursidictions not using the MPC test, the fact that he could not control himself would not be a defense.