CHAPTER ELEVEN: HOMICIDE

INTRODUCTION

New York's homicide statutes are found in Article 125 of the Penal Law. Section 125.00 defines homicide as "conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree." New York defines a "person" in Section 125.05(1) as "a human being who has been born and is alive." An "unborn child" is the victim of a homicide when an abortion is performed after the 24th week of gestation. The idea of a "person," however, was recently challenged in the case law and will be discussed later in *People v. Gray*.

As the textbook states, the decision regarding which level of homicide to charge a defendant depends on both the level of mental culpability and the nature of the circumstances surrounding the incident (*mens rea* and *actus reus*). In New York, homicides are generally divided into two categories. Homicides committed with intent include: murder in the first degree/capital murder, murder in the second degree, manslaughter in the first degree, and aggravated manslaughter in the first degree. Unintentional homicides include criminally negligent homicide, vehicular homicide in the first and second degree, manslaughter in the second degree,[1] and abortion in the first and second degree.

In this chapter, homicides charged at the levels of murder in the first and second degree and manslaughter in the first and second degree will be the focus. Offenses which will not be the focus on are criminally negligent homicide, vehicular manslaughter in the first and second degrees, abortion in the first and second degrees, and self-abortion in the first and second degrees.

HOMICIDE

Homicide Rates

Homicide in New York state has decreased in recent years. The following link provides a list of homicides reported by the United States Bureau of Justice Statistics from 1996 through 2002. It can be found at http://bjsdata.ojp.usdoj.gov/dataonline/Search/Homicide/State/RunHomTrendsInOneVar.cfm and is based on the Uniform Crime Report (UCR). The UCR defines homicide as murder and nonnegligent manslaughter. The reader can see increases in homicides in the early 1980s with a peak in 1990 and thereafter a steady decline.

Reported murder rates, for the years 2000 through 2005, are found at http://criminaljustice.state.ny.us/crimnet/ojsa/indexcrimes/region_totals.htm where again decreases are evident in both New York City and New York State. These data are reported by the New York State Division of Criminal Justice Services. Also, on this site http://criminaljustice.state.ny.us/crimnet/ojsa/indexcrimes/index.htm links to municipal and county murder rates can be found.

WHEN LIFE BEGINS

In New York, a "person" is defined, as previously mentioned, by §125.05(1). Additionally, Public Health Law §4130(1) defines a "live birth" as the "complete expulsion or extraction from its mother of a product of conception…which after separation, breathes or shows any other evidence of life such as a beating heart, pulsation of the umbilical cord, or definite movement of the voluntary muscles."

In a recent case, *People v. Gray*, the Supreme Court, Kings County grappled with broadening the definition of a person and live birth under the Penal Law. In this case, a baby's mother was killed by an off-duty police officer who, after drinking alcohol all day, had hit with his vehicle the mother, Maria Herrera, her son, and her sister. The mother was eight months pregnant. The baby was delivered prematurely by Caesarean section and lived for 12 hours.[2] Although the baby's heart had to be artificially stimulated by medication, the court relied upon both the Penal Law and Public Health Law to interpret the definition of a "live birth" as a fetus separated from its deceased mother that sustains a heart beat and has blood pressure, even if only for a short period of time and wholly sustained by a machine.[3]

WHEN LIFE ENDS

In New York, death is defined when a person has "suffered an irreversible cessation of breathing and heartbeat, or, when these functions are artificially maintained, an irreversible cessation of the functioning of the entire brain, including the brain stem." Under the brain dead criterion, a defendant will not be relieved of homicide by the removal of artificial life-support even if such support would continue the victim's breathing and heartbeat.[4]

In New York State, a life may justifiably be ended before birth by abortion under certain conditions. If these conditions are not met, then abortion will be a criminal act. An abortion conducted prior to the 25th week of a pregnancy is not an offense. However, the commission of an abortion on a woman more than 24-weeks pregnant is manslaughter in the first degree. And an abortion that results in the death of the woman, regardless of when it was conducted, is considered manslaughter in the second degree.

New York, however, does recognize justifiable defenses to an abortion after the 24th week. In New York, an abortion is justified under §125.25(3) when where there is a reasonable belief that it is necessary to save the woman's life. Two conditions that must first be met for this defense are that the woman has consented to the abortion and that the abortion is completed by a licensed physician.

New York also criminalizes the intentional "causing or aiding" of a suicide which is charged as manslaughter in the second degree. This offense will also be charged as murder in the second degree when evidence of the defendant's use of duress or deception on the victim is shown.

In New York State, there is no statute prohibiting a competent adult patient from declining necessary medical treatment even when the treatment may be necessary to preserve the patient's life. Additionally, doctors cannot be held civilly liable for honoring such decisions. The state supports the right of a competent adult to make his own decision to decline treatment even when treatment would be beneficial. The state's interest in the preservation of life does not outweigh an individual's right to decline life preserving treatment. On the other hand, the guardian of an adult who has never been competent may not deny the incompetent the treatment necessary for a condition which threatens the patient's life.[5]

RESOURCES

The link for Article 125 at http://wings.buffalo.edu/law/bclc/web/NewYork/nyart125.htm includes the sections discussed in this chapter.

MURDER IN THE FIRST DEGREE

The revised Penal Law of 1965 made murder a single, degreeless crime. Murder in the first degree was added by the Legislature in 1974. The revised Penal Law eliminated the concept of premeditation in the current statute. The decision to eliminate premeditation was due in part a problem of definition. Through case law, judicial constructions of premeditation interpreted the concept so broadly that the definition came to include a defendant's determination to kill in a mere fleeting second before the homicide. Under the revised Penal Law, intent alone is the *mens rea* element required for murder.

First degree murder attaches when the victim of the murder is a police officer, a correctional officer, or when, among other factors, the defendant is serving a life sentence of imprisonment. Upon this change, murder in the second degree was retitled without a change in the substantive text. First degree murder also incorporates the affirmative defense of extreme emotional disturbance which, if successfully persuaded, would reduce the crime to manslaughter in the first degree.

Heat of Passion and Extreme Emotional Disturbance

The current murder statute does not incorporate the heat of passion doctrine. This doctrine was eliminated in favor of including extreme emotional disturbance. Prior to the 1965 revision, extreme emotional disturbance was not part of the Penal Law. Instead, heat of passion was recognized and was an element of the crime of manslaughter in the first degree rather than an affirmative defense. It was the prosecution's burden to prove heat of passion to establish the commission of a first degree manslaughter offense. One of the prime motivations for changing the homicide article in the 1965 was to remove this burden from the prosecution. The new defense of extreme emotional disturbance, however, differed from the old heat of passion concept. The older concept applied only to immediate action in which "hot blood" prevented calm reflection. The newer concept embodied the more psychologically sophisticated view that, even though mental trauma may not be readily apparent, it may still diminish a person's mental capacity. The extreme emotional disturbance defense, unlike heat of passion, recognizes that a defendant intended to kill the victim, but is less blameworthy. It is thus an affirmative defense that the defendant is less blameworthy by a preponderance of the evidence.[6]

The extreme emotional disturbance defense includes both subjective and objective tests. The subjective test concerns whether the defendant was provoked and acted in response to that provocation. The objective test concerns the adequacy of the provocation that would be found by a reasonable person.[7]

The First Degree Murder Statute

Section 125.27 provides that a person is guilty of murder in the first degree when he or she has intent to cause the death of another person and causes the death of that person or of another person. The statute further includes 12 aggravating factors, at lease one of which must be present along with the intended homicide.

Subsection (1) states that a defendant who is older than 18 years is guilty of murder when he or she has intent to cause death to another, causes the death; and

(a) Either:

(i) the intended victim is a police officer and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the intended victim was a peace officer, such as uniformed court officer, parole officer, probation officer, or employee of the division for youth, and the defendant knew or reasonably should have known that the victim was a such an officer; or

(iii) the intended victim was a state or local correctional officer and the defendant knew or reasonably should have known that the victim was a such an officer; or

(iv) the defendant committed the killing while committed to a state correctional institution, or was serving a life term or an indeterminate term with a minimum of 15 years and a maximum life sentence, or the defendant had escaped from the institution and had committed the killing while away from the institution; or

(v) the intended victim was a witness to a crime and the death was intended to prevent the victim's testimony, or the intended victim had previously testified on a case and the death was intended to exact retribution for the testimony, or the victim was an immediate family member of a crime witness and the death was intended to influence the testimony of the witness, or the intended victim was an immediate family member who had previously testified and the death was intended to exact retribution; or

(vi) the defendant killed or procured the killing pursuant to a murder for hire agreement; or

(vii) the victim was killed by the defendant who was in the course of committing or attempting to commit robbery, burglary in the first or second degree, kidnapping in the first degree, arson in the first or second degree, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or defendant was in the course of immediate flight after committing or attempting to commit one of these crimes or murder in the second degree, and the victim was not a participant in one of these crimes; or

(viii) as part of the previous commission or attempt, the defendant intentionally causes the death of a person not part of the crime, or

(ix) the defendant has a previous conviction for murder in the first or second degree; or

(x) the defendant inflicted torture upon the victim; or

(xi) the defendant intentionally caused the death of two or more persons in separate crimes within a 24-month period and used similar means to murder; or

(xii) the intended victim was a judge and was killed because of this status.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined form the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a Class A felony. The sentence imposed must be no less than 15 years and the maximum is either life without parole or death.

The following case examines a felony murder (§127.27(1)(a)(vii)). The facts of this case were retrieved from Indictment 1845/2000.[8] The defendant and an accomplice went to a Wendy's in Flushing, Queens between 11 p.m. and 12 a.m. on May 25, 2000. After entering the restaurant, one of the men asked for the manager. The manager and one of the men then went downstairs. From downstairs, the manager called to the employees. Once the employees were downstairs, the two accomplices tied up inside the refrigerator all seven employees with duct tape, placed plastic bags over their heads, and shot each victim. When the suspects left the restaurant, one of the victims freed himself and called 911. After the shootings, the defendant went to Long Island to stay with his sister-in-law. On May 26th, one of the children from the house fell off his bicycle and became injured. The defendant called 911, and when the police responded, they noticed that defendant fit one of the suspect's descriptions. Police placed defendant under arrest.

PEOPLE V. TAYLOR
Supreme Court of New York, Queens County
738 N.Y.S. 2d 497 (2002)

Opinion By: Fisher, J.

Defendant was charged with first and second degree felony murder for intentionally killing another while in the course of committing a robbery. Prior to trial, defendant made a motion to dismiss counts based on §125.27(1)(a)(vii) which he argued makes robbery unconstitutionally vague. He claims that the robbery element of first-degree felony-murder had not received a definitive definition from the Court of Appeals, and thus gives different district attorneys the occasion to apply charges differently (i.e., murder in the first degree or murder in the second degree). The court found that the previous lack of definitive definition by the Court of Appeals does not make robbery unconstitutional. If such a lack was unconstitutional, then "no new criminal statute could ever pass constitutional muster."

Defendant also argued that §125.27(1)(a)(vii) is unconstitutional in that it is "irrationally underinclusive." The legislature's decision to include certain felonies but not others in the first degree felony murder statute is irrational and without justification. The court stated that, unless a statute is struck down by a trial court, that is, its invalidity is shown beyond a reasonable doubt, it will strongly be presumed constitutional.

Each of these motions was denied.

In a postscript, Taylor was convicted on November 26, 2002 of intentionally causing the deaths of five people during the commission of a crime (first degree murder) and received a death sentence.[9]

MURDER IN THE SECOND DEGREE

Murder in the second degree constitutes those crimes not rising to the level of culpability of first degree murder. Penal Law §125.25 defines three types of murder in the second degree. Subdivision (1) includes intentional murder. Subdivision (1) is the only subdivision in §125.25 that contains a provision for mitigation of the charge by the affirmative defense of extreme emotional disturbance. Subdivision (2) entails the highest crime of reckless homicide which evinces a depraved mind. Subdivision (3) imposes murder not only on the killer but also the nonkiller accomplice in felony murder offenses. As with felony murder in the first degree, felony murder in the second degree is broadened to cover killings committed during "immediate flight" from the underlying felony. This notion of immediate flight will be examined later in the analysis of *People v. Gladman.*

Section 125.25 A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

    (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph

shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; …in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

   (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

   (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

   (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

   (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury; or

4. Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person.

Murder in the second degree is a class A-I felony. For sections (1) through (4), the punishment imposed is the same as for murder in the first degree.

Depraved Indifference: Subsections 2 & 4

The Court of Appeals has defined several of the concepts in the above statute. In the court's definition, depraved indifference crimes are those that lack specific homicidal intent, but show a

"depraved kind of wantonness." Crimes evincing depraved indifference are shooting into a crowd, placing a bomb in a public place, or opening the door of the lions' cage in a zoo. Fatally shooting an intended victim is not depraved indifference murder, but could instead be charged as murder, manslaughter in the first or second degree, or criminal negligence. The more a defendant shoots or stabs a victim, the more clearly intentional is the homicide.[10]

Immediate Flight (Felony Murder): Subsection 3

In felony murder cases, the Court of Appeals has been confronted with how to define "immediate flight." The court has generally left this as a question of fact for juries to decide. However, in *People v. Gladman*,[11] the court provided some general guidelines for determining whether a homicide subsequent to an enumerated felony described in §125.25(3) is connected with that underlying felony. In *Gladman*, the defendant committed an armed robbery in a delicatessen. The police arrived minutes later, although defendant had already left. In a nearby bowling alley, Patrolman Rose walked through the parking lot in search of the suspect and found him under a car. The officer ordered the suspect to place his hands on the hood. Instead, defendant fired his own gun and mortally wounded the officer.

In its decision, the Court of Appeals stated that immediate flight can be decided based on a combination of factors, such as the physical distance separating the felony and homicide, the interval of time between the commission of both the felony and homicide, whether the suspects had possession of the fruits of their crime, whether the police or citizens were in close pursuit, and whether the criminals had reached a place of temporary safety.

Extreme Emotional Disturbance: Subsection 1

The following case provides an example of a defendant with whom the Supreme Court of New York agreed suffered from extreme emotional disturbance. The purpose of the extreme emotional disturbance defense is not to negate intent, but rather allow the defendant to show that his actions were caused by mental infirmity not arising to the level of insanity, and that the defendant is less culpable for having committed the actions.

PEOPLE V. LIEBMAN
Supreme Court of New York, Appellate Division, First Department
583 N.Y.S. 2d 234 (1992)

Opinion By: Murphy, P.J.

The single issue in this case concerns whether the defendant's conviction of murder in the second degree ought to be reduced to first degree manslaughter based on extreme emotional disturbance.

On October 16, 1985, the police responded to defendant's apartment where he lived with his wife. Mrs. Liebman was bleeding profusely from multiple stab wounds, while the defendant lay unconscious in the couple's bed. In the apartment, the police found an open bottle of prescription drugs, closed windows, and the gas jets on the stove turned on. Mrs. Liebman died from her wounds the following day in the hospital. Defendant, who recovered from a coma, had been charged with her murder.

Defendant and his wife had a rocky relationship punctuated, according to the testimony of his personal psychiatrist, by nightmares, acute depression, extreme anxiety, suicidal thoughts, and

schizophrenia. The court-appointed forensic psychiatrist also agreed that defendant suffered from schizophrenia.

In the weeks prior to the murder, defendant had pleaded with his wife to allow him to be institutionalized in a psychiatric hospital. She repeatedly refused and insisted that he get a job instead. On the night of the murder, an argument had erupted where Mrs. Liebman told defendant, "You really need help! Take ninety seconals. This will take you out of a lot of problems." The defendant then proceeded to stab his wife 51 times, screaming, "You hate me" in the process.

In his appeal, the defendant conceded that he intended to cause his wife's death, but claimed that his actions were "less blameworthy than those of a cold-blooded killer for having been the product of extreme emotional forces over which he had little, if any, control."

The court held that there are two elements to the affirmative defense. The first is that the defendant did in fact act under extreme emotional disturbance. Based on the testimony of the psychiatric experts concerning the depth and intensity of the rage the defendant experienced as he stabbed his wife, the court believed that this element had been satisfactorily proven.

The second, more objective element concerned whether the disturbance was a reasonable response to the circumstances as they were perceived by the defendant, however irrational those perceptions may have been. The court recognized that the evidence showed that defendant was a "very seriously disturbed person." The issue is not whether the killing was a reasonable response under the circumstances since it was not. The issue is rather the reasonableness of the explanation that defendant offered for his extreme emotional reaction. According to the court, "[o]n this record, it is all but impossible to conclude that the defendant's emotional response to the situation as he perceived it was without reasonable explanation." And "it would be a rare person who would not react with extreme anger and despair to the apparently hateful response of a spouse to a plea for help in dealing with a psychiatric crisis."

The Court of Appeals held that the second degree murder conviction should be reduced to manslaughter in the first degree.

MANSLAUGHTER IN THE FIRST DEGREE

New York distinguishes manslaughter by grading it into first and second degree rather than the common law distinction of voluntary and involuntary as the textbook describes. In first degree manslaughter, the *mens rea* element requires an intent to commit the act. Subdivision (1) includes an intent to inflict serious physical injury that is less culpable than the intent to kill required for murder. Subdivision (2) includes the mitigating factor extreme emotional disturbance that reduces murder to manslaughter. Subdivision (3) includes the death of an aborted female that occurs from an abortion after she is 24-weeks pregnant. This great liability results from a recognition that abortion at this stage is considerably more dangerous than in the first 24 weeks. Subdivision (4) includes a reckless *mens rea* element when the victim is under age 11.

Section 125.20 A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance…The fact that homicide was committed under the influence of extreme disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; or

3. He commits upon a female pregnant for more than twenty-four weeks an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05; or

4. Being eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly engages in conduct which creates a grave risk of serious physical injury to such person and thereby causes the death of such person.

Manslaughter in the first degree is a class B felony. The minimum prison sentence is fixed by the court and the maximum is not to exceed 25 years.

In the following case, the defendant was convicted of first degree manslaughter. This case gained national notoriety for the highlighting the brutality of child abuse. The full-text version of the case can be found at http://wings.buffalo.edu/law/bclc/web/nysteinberg.htm.

PEOPLE V. STEINBERG
Court of Appeal of New York
79 N.Y. 2d 673 (1992)

Opinion By: Kaye, J.

The defendant appealed his conviction by contending, among other issues, that only a person with medical expertise could form the requisite intent to cause serious injury to a child by failing to obtain medical care.

Defendant was the adopted parent of the victim, Lisa Steinberg, although the legality of the adoption was subsequently called into question. Defendant and his live-in paramour, Hedda Nussbaum, lived in a one-bedroom apartment with their two "adopted" children, Lisa, aged six, and Mitchell, aged 16 months. On November 1, 1987, he defendant was in the bedroom getting dressed in preparation for a dinner appointment with a friend. Lisa went into the bedroom to ask defendant to take her with him. Soon after, defendant carried Lisa's limp body into the bathroom where Nussbaum was and laid the unconscious child on the bathroom floor.

Defendant told Nussbaum that he knocked Lisa down and that she didn't want to get up. Nussbaum tried to revive Lisa while defendant continued to dress. He told Nussbaum to let the child sleep and would wake her upon his return. Defendant left the apartment. Nussbaum did not seek medical attention since she believed that defendant had supernatural healing powers and felt that calling for assistance would be a sign of disloyalty.

Defendant returned three hours later, about 10:00 p.m. He picked up a file on his oil well investments, and left again. He returned a few minutes later and left again for several hours to freebase cocaine. At 4:00 a.m., he returned, and after Nussbaum's repeated urgings, he carried Lisa from the bathroom to the bedroom, rested his arm on her body, and continued talking to Nussbaum.

At 6:00 a.m., he found that Lisa had stopped breathing. After rejecting Nussbaum's offer to call 911, he finally gave in after his attempts at resuscitation failed. At the hospital, defendant stated that Lisa had been complaining of a stomach ache and had vomited during the night. He called 911 only after her breathing had grown "coarse." The doctors, however, determined that Lisa, who was in a coma, had suffered from severe head injuries resulting from blunt trauma. The doctors then placed her on life support equipment, and after neurological tests on November 3 indicated that she was brain dead, removed the life support.

Defendant was indicted for second degree (depraved indifference) murder, first degree manslaughter, and other charges. He was acquitted of murder but convicted of manslaughter in the first degree. The Appellate Division affirmed the conviction.

Under §125.20(1), defendant contends that his conviction for first degree manslaughter was error since, as a layperson, he could not have formed the requisite intent to know that serious injury could result from a lack of medical attention. According to defendant, "everyone knows that failure to supply food to a child will lead to death, and thus intentional homicide is a proper charge under those circumstances… but the need for medical care is often a matter of opinion, and a layperson could not be expected to know the gravity of the situation."

The court rejected this argument. In contrast to the defendant's argument, the court stated that parents have a "nondelegable affirmative duty" to provide their children with medical care and the failure to perform that duty can form the basis for a homicide charge.

According to the court's definition, a person acts intentionally when "there is a 'conscious objective' to cause the result proscribed by the statute." The focus is on the defendant's conscious aim in doing certain acts. Intent can be inferred from conduct as well as surrounding circumstances. In this case, the evidence of intent for the jury's consideration included: 1. the defendant's own statements that placed him the apartment in the hours prior to the 911 call which showed that he and Nussbaum were the only adults in the apartment; 2. the medical testimony that the injuries were inflicted by a man of his stature; 3. the fresh bruises on his hand; and 4. hairs, forcibly removed from Lisa's head, that were found on defendant's clothing. Additionally, defendant made statements to Nussbaum that he knocked Lisa down because "the staring business had gotten to be too much for her." Defendant believed that the children were staring at him in order to induce hypnotic trances.

Based on defendant's acquiescence to Nussbaum's request to call 911, the court did not believe that defendant intended to cause the child's death, but it did believe that he intended to cause serious injury, thereby creating a substantial risk of death.

The Court of Appeals affirmed the conviction.

MANSLAUGHTER IN THE SECOND DEGREE

In manslaughter in the second degree, one of three subdivisions is found. Subdivision (1) is reckless homicide which is more culpable than criminally negligent homicide, but the defendant hasn't formed the requisite *mens rea* of intent for a charge of first degree manslaughter. Subdivision (2) includes the death of a pregnant woman from an abortion any time within the first 24 weeks. After a 24-week

pregnancy, the crime is aggravated to the first degree manslaughter. Subdivision (3) reduces the culpability of aiding a suicide in the revised Penal Law.

Section 125.15, Manslaughter in the second degree states:

A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person; or

2. He commits upon a female an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05; or

3. He intentionally causes or aids another person to commit suicide.

Manslaughter in the second degree is a class C felony. The minimum sentence is fixed by the court and the maximum sentence cannot exceed 15 years.

Prior to 1965, "abetting and advising" suicide was first degree manslaughter but has since been mitigated to second degree. In *People v. Duffy*, defendant was indicted for two counts of manslaughter in the second degree. The first count alleged that defendant intentionally caused or aided the victim in committing suicide (§125.15(3)). The second count alleged that defendant had recklessly caused the victim's death (§125.15(1)). Defendant was acquitted of the first account but convicted of the second. The Supreme Court, Appellate Division reversed and dismissed the indictment resulting from its conclusion that in its view, §125.15, when read as a whole, evinced a legislative intent "that a person be found guilty of manslaughter in the second degree for causing or aiding a suicide *only* (emphasis added) when he or she acts intentionally." The suicide resulted when the victim, Schuhle, distraught from a recent romantic break-up, died from a self-inflicted wound after pointing at himself a rifle which defendant provided.

The Court of Appeals disagreed with the Appellate Division by noting that defendant's behavior fell squarely within the scope of §125.15(1). The court asserted, "a person who, knowing that another is contemplating immediate suicide, deliberately prods that person to go forward and furnishes the means of bringing about death may certainly be said to have 'consciously disregard[ed] a substantial and unjustifiable risk' that his actions would result in the death of that person." Additionally, the court found that the trial jury could rationally have concluded that Schuhle's behavior was something defendant should have plainly foreseen and that his behavior was the direct cause of the victim's death. Defendant gave Schuhle a rifle and ammunition knowing full well that Schuhle had been drinking and was in a heightened state of depression. Further, defendant began taunting the victim to put the gun in his mouth and blow his head off. Accordingly, the Court of Appeals reversed the Appellate Division's order and remitted the case to that court for further consideration of the facts. [12]

REVIEW QUESTIONS

1. Which of the following would **not** be a victim indicated by the first degree murder statute?

    A. a municipal judge
    B. a witness to drug dealing who testified in court on this crime
    C. an off-duty corrections officer who, after identifying herself, is killed while trying to prevent a robbery
    D. an unborn fetus 12-weeks old

2. Under the depraved indifference sections of the murder in the second degree statute, which level of *mens rea* is required?

    A. intentional
    B. reckless
    C. knowing
    D. criminally negligent

3. Which of the following scenarios is an example of depraved indifference murder?

    A. a husband who stabs his wife after finding her in bed with another man
    B. a distraught man who drives down a crowded sidewalk and kills a baby in a stroller
    C. a serial killer who stalks and shoots women who have brunette hair
    D. a postal employee who shoots his co-workers at his job

4. A doctor who causes the death of a pregnant woman after aborting her seven-month old fetus can be charged with:

    A. first degree manslaughter
    B. second degree manslaughter
    C. negligent manslaughter
    D. second degree murder

5. A woman who, after learning that her companion of 14 years has a younger girlfriend, writes him a letter expressing her anguish over his relationship as well as unflattering references to his girlfriend, drives to his home with a gun in her purse, and shoots him in his home after he struggles with her has committed:[13]

    A. first degree murder
    B. second degree murder
    C. first degree manslaughter
    D. second degree manslaughter

REFERENCES

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[2] Feuer, A. & Mansnerus, L. (2001, September 5). New indictment of ex-officer counts baby among victims. *New York Times.*
[3] 736 N.Y.S. 2d 856 (2002)
[4] People v. Eulo (63 N.Y. 2d 341 (1984))
[5] In re Storar (52 N.Y. 2d 363 (1981))
[6] People v. Fardan (82 N.Y. 2d 638 (1993))
[7] Kirschner, S., Litwack, T. & Galperin, G. (2004). Pscyhology, Public Policy and Law, 10(1-2), 102-133.
[8] 2002 N.Y. Misc. LEXIS 171
[9] Kershaw, S. & Santora, M. (2002, November 27). Jury sentences Wendy's killer to be executed. *New York Times.*
[10] 786 N.Y.S. 2d 116 (2004)
[11] 41 N.Y. 2d 123 (1976)
[12] 79 N.Y. 2d 611 (1992)
[13] People v. Harris (57 N.Y.2d 335 (1982))

ANSWERS

1. D; 2. B; 3. B; 4. A; 5. B.