THE PSYCHOLOGY OF LITIGATION

Voluntary Intoxication – Expert vs. Legal Issues

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Consider these two cases:

Defendant #1, a 35 year old male with a long history of multiple hospitalizations for both serious psychiatric and substance abuse problems who is prescribed anti-psychotic medication, leaves work one afternoon, kills a close friend a few hours later, steals his car, and leaves town. Upon being captured several days later he claims to have abused his medication, taken copious amounts of pain killers, and drunk a pint of whiskey immediately preceding the offense, for which he now has no memory. He is charged with first degree murder.

Defendant #2, a 24 year old male with one prior psychiatric hospitalization who is taking anti-depressants at the time of the homicide, kills a close friend based on a delusional belief while sharing a 12 pack of beer with him. He then calmly walks home, tells his father what he did, and takes a shower while awaiting the arrival of the police. His blood alcohol level registers .13. He is charged with second degree murder.

Which defendant is in a position to use voluntary intoxication evidence in his defense?

I commonly receive requests for forensic evaluations on individuals charged with serious crimes who were allegedly intoxicated at the time of commission of the crime. This is not surprising in view of substance abuse being one of the most frequent psychiatric disorders in forensic populations. It is the single most common syndrome in cases involving violence, abuse, neglect, and other criminal activity. According to the National Institute on Drug Abuse, about one half of all violent behavior in our country involves acute intoxication on the part of the perpetrator and/or victim. Substance abuse is estimated to be a contributing factor in between one half to two thirds of violent crimes committed (62% assault, 68% manslaughter, 54% murder or attempted murder, 52% rape or sexual assault). Between approximately one half and four fifths of arrestees test positive for one or more illicit drugs at the time of arrest, according to the National Institute of Justice (Marlowe, Lambert, and Thompson, 1999).

Tennessee, along with twenty other states, permits evidence of voluntary intoxication to negate cases of crimes involving specific intent such as first degree murder, robbery, and burglary. Another twenty states permit evidence of voluntary intoxication to negate an element of the offense, with this language interpreted as applying to the *mens rea* of general intent crimes, i.e., crimes predicated on intentional misconduct. The remaining

states bar the use of such evidence in all criminal cases to negate any element of the offense (Marlowe, Lambert, and Thompson, 1999).

Thus, since defendant #2 was charged with second degree murder, he cannot use voluntary intoxication evidence as a defense. Had he been charged with first degree murder, a specific intent crime, it might be another story. With a pre-existing psychotic disorder warranting the earlier psychiatric hospitalization and because of being improperly maintained by an outpatient mental health center on anti-depressants instead of anti-psychotics, it is quite plausible that the beer he drank the night of the homicide triggered his pre-existing schizophrenic condition, resulting in the delusional thinking prompting homicidal behavior. There were witnesses who were aware he was intoxicated shortly before the homicide and who had observed his steady mental decline over a period of several months.

The Court of Appeals opined in Harrell, 593 S.W. 2d at 670 that in voluntary intoxication cases evidence must be presented to demonstrate that the defendant was deprived of his mental capacity to entertain specific intent by virtue of his state of intoxication such that he could not premeditate or deliberate. Although potentially helpful, the blood alcohol level alone is not a defense since there must be actual evidence that intoxication deprived the accused of sufficient mental capacity to form specific intent. Proof of intoxication minus evidence that intoxication deprived the accused of the mental capacity to form specific intent does not entitle an accused to jury instructions on voluntary intoxication. Voluntary intoxication evidence may be used as a mitigating factor in the penalty phase of capital cases but not in non-capital cases.

Mental health experts may need some help with case law on the issue of voluntary intoxication since it seems to be "common knowledge," albeit erroneously, that voluntary intoxication cannot be used as a defense. Accordingly, you may get back evaluations with the defendant having been diagnosed as a substance abuser or as drunk at the time of the incident, end of story, with little to no clinical exploration of the possible interplay between the voluntary state of acute intoxication and the incident under discussion.

Forensic evaluation in voluntary intoxication cases is not much different from any other kind of forensic mental evaluation, with acute intoxication being just another factor that is looked at in assessing the defendant's mental state during commission of the crime involving specific intent. Psychological instruments are administered, witnesses are interviewed who may have knowledge of the defendant's behavior prior to and immediately following the incident, records are gathered pertinent to understanding the defendant's history, and the state's file is reviewed, all with the goal of determining 1) proof of intoxication and 2) evidence that intoxication deprived the accused of the capacity to deliberate and premeditate.

Marlowe, Lambert, and Thompson (1999) describe three categories for psychologists to consider in cases involving possible voluntary intoxication. The first is to appraise the characteristics of the offense itself, including possible motive, whether the offense required a coordinated sequence of events over time requiring planning, if adverse

witnesses perceived the defendant as intoxicated, and whether the defendant engaged in efforts to conceal his or her offense.

Second, one should consider the specific characteristics of the substance(s) used. Alcohol is the drug most commonly linked to violent behavior although cocaine and PCP likewise are disinhibitory. Other drugs may actually be sedating although some used in sufficiently high quantities may result in aggressive behavior. The additional expertise of an addiction specialist may be helpful in sorting this out.

Third, the defendant characteristics need to be examined through psychological instruments that assess the usual clinical features of personality functioning and intelligence as well as malingering, neurological impairment, and psychopathy.

In view of this, let us again consider the viability of voluntary intoxication as a defense for defendant #1, the man with many psychiatric problems and a long history of substance dependence. First, as a forensic psychologist examining this defendant I would take into consideration that we have only his word as to the amount of intoxicating substances ingested, the defendant having been out-of-pocket for several days following the incident while evading authorities and lab work alone insufficient even if it had been done in a timely manner. Unfortunately for the defendant, no one saw him ingest the alleged substances nor did anyone have the opportunity to comment on behavior he may have displayed typically associated with acute intoxication such as slurred speech, staggering gait, etc. Second, I would be interested in the fact that witnesses reported his behavior at work in the hours leading up to the homicide as normal. Third, his psychiatric issues really only come into play if, as with defendant #2, the substances ingested may have triggered a pre-existing psychiatric condition and if there is evidence to suggest that this condition affected his ability to deliberate and premeditate. A pre-existing mental condition did not seem to impair his ability to steal the victim's car, leave town, and evade arrest. Fourth, his long history of substance dependence may be relevant if he suffers from d.t.'s (delirium tremens) and was in withdrawal during commission of the crime such that he was psychotic and unable to premeditate. However, it takes only one episode of acute intoxication as opposed to a diagnosis of a substance use disorder to have a potential voluntary intoxication defense.

Clearly, I am not convinced that defendant # 1 has a voluntary intoxication defense and would not render expert opinions to this effect. An attorney may look at defendant # 1 in a different manner than I, particularly if there is little else available and voluntary intoxication is the only defense there is, however thin the evidence. Although I may not find a particular defendant credible for a variety of reasons and am thus not willing to base my expert opinions predominantly on his/her statements to me in the absence of supporting evidence, this is not to say that a jury might not be otherwise persuaded.

Judge Asbury has these points to make on this issue:

- In a jury trial the finding of specific intent is the province of the jury.

- If evidence of high levels of intoxication is introduced into the record the State then has a burden to disprove the defense beyond a reasonable doubt.
- On the issue of a defendant's unsupported claims be reminded that a testifying defendant's testimony is to be weighed by the jury by the same rules that apply to all other witnesses. Credibility is a necessary part of this process.
- In this context an expert can present facts, opinions based on reasonable certainty and supporting facts and must be ready to answer a host of questions based on the testimony of other witnesses.
- A high level of alcohol or drugs in the blood or urine is beneficial in asserting the defense of intoxication but not essential if there is other evidence in the record sufficient to warrant a court in instructing the jury that it may consider the defense. This is especially true where no opportunity for blood or urine tests existed at a time when they would have been meaningful.
- Competent lawyers need to be on the lookout and assert the defense if there is any evidence to support it.
- Doc, always be aware that experts can be very helpful in supplying facts but in a jury trial the jury gets to make the final decision. To drive this point home, just imagine a case in which qualified experts disagree. The only opinion that really matters is the one announced by the foreman of the jury.

How helpful is it that defendant #1 allegedly has no memory of the homicide? According to Thomas v. State 201 Tenn. 645, 301 S.W. 2d 358 1957, "…failure to remember later, when accused, is in itself no proof of the mental condition when crime was performed." Amnesia may occur following the commission of a crime for any number of reasons. One may have full or partial amnesia due to posttraumatic stress disorder engendered by the blood and gore even if one premeditated the homicide. It is possible to premeditate a homicide and then suffer head trauma when fleeing the scene such that one suffers some form of amnesia. In actual fact, despite blackouts being an over-represented complaint among those accused of crimes, where substance abuse is concerned blackouts are only likely to occur with high blood alcohol levels, intravenous administration of benzodiazepine, and with certain combinations of sedatives and alcohol (Marlowe, Lambert, and Thompson, 1999).

In view of the above it should come as no surprise that the "best" candidates for a voluntary intoxication defense, according to Marlowe, Lambert, and Thompson (1999), are those in which the defendant took unusually high doses of the drug, had no previous arrest history, showed no evidence of premeditation, had no apparent motive for the crime, and displayed no plan to avoid escape.

Marlowe, D.B., Lambert, J.B., & Thompson, R.G.(1999). Voluntary intoxication and criminal responsibility. *Behavioral Sciences and the Law*, 195-217.

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