IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES – INSTRUCTION 7.7
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Case No. SC10-113

COMMENTS OF THE SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES

The Court, on April 8, 2010, amended on its own motion standard jury instruction 7.7. In the opinion, the Court solicited the comments of the Committee, along with any suggested changes that the Committee deemed appropriate. The Court also asked for comments from any other interested parties. All of the comments are due to the Court no later than June 7, 2010. The Committee has been directed to respond to any comments filed no later than June 28, 2010.

After the Court opinion was received by the committee, a three person subcommittee consisting of Judge Bradford Thomas, Mr. Bart Schneider, and Mr. Glenn Gifford, was formed on April 8, 2010. The purpose of the subcommittee was to assist the Committee in providing recommendations to the Court regarding the Court's amended manslaughter instruction. After an exchange of e-mails among the subcommittee members, and other members of the Committee, a telephone conference was conducted on April 16, 2010. Draft minutes of the telephone conference are attached at Appendix A.[1]

Mr. Schneider began the telephone conference by advising the committee members that the subcommittee agreed that the Court's interim instruction should be changed. However, the subcommittee could not reach any agreement on exactly how any amendment or amendments should read. At the teleconference, the committee agreed that the best approach was to review each element of the interim instruction in order to determine if any changes should be recommended to the Court.

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[1] Please note that the minutes have not been approved by the committee as the committee was unable to meet between the telephone conference and the deadline for filing these comments.

The committee unanimously agreed that no changes were necessary for element 1.

The committee also unanimously agreed that no changes were necessary to elements 2b or 2c in the interim instruction.

Several committee members believed that element 2a was not a correct statement of the law and therefore should be amended. Element 2a currently reads as follows:

Give 2a, 2b, or 2c depending upon allegations and proof.
2. a. (Defendant's) **act(s) caused the death of** (victim).

Mr. Gifford suggested changing element 2a to read:

2. a. (Defendant's) **<u>intentional, unlawful</u> act(s) caused the death of** (victim).

Mr. Gifford stated that when he drafted the revised element, he was thinking specifically of the case of *Taylor v. State*, 444 So. 2d 931 (Fla. 1983). This case dealt with the offense of attempted manslaughter. In *Taylor*, the mens rea is "intentionally committed an unlawful act." Mr. Gifford felt that at a minimum the element 2a had to include an intentional, unlawful act, rather than just an "act" that appears in the Court's interim proposal. The committee agreed that the term "intentional act" should be included in element 2a. Mr. Schneider did not think it was absolutely necessary, but there would be no error in including the term. Mr. Migliore asked why the Court did not put the term "intentional" in the instruction. Mr. Iten felt that the reason the term is not in element 2a is because it is addressed in the following paragraph of the interim instruction.

Give only if 2a alleged and proved, and manslaughter is being defined as a lesser included offense of first degree premeditated murder.
In order to convict of manslaughter by act, it is not necessary for the State to prove that the defendant had an intent to cause death, only an intent to commit an act that was not justified or excusable and which caused death.

Judge Taylor thought the omission of the term "intentional" was an oversight by the Court. She felt the Court was concentrating more on deleting the intent to kill requirement, and just did not focus enough on the need for there to be an

intentional act that leads to a death. Mr. Schneider stated that the committee needed to make a distinction between intending the act and intending the result of the act. The committee has considered the holding in the Court's opinion in *State v. Montgomery*, No. SC09-332, decided on April 8, 2010, that states: "We further hold that the intent which the State must prove for the purpose of manslaughter by act is the intent to commit an act that was not justifiable or excusable, which caused the death of the victim." The committee feels that this language in the opinion supports the idea of adding the term "intentional" before the term "act" in element 2a of the instruction. The following changes to element 2a were then proposed by various committee members:

2. a. (Defendant) **intended to commit an act which caused the death of** (victim).

2. a. (Defendant**) intentionally committed an act which caused the death of** (victim).

2. a. (Defendant) **committed an intentional act that caused the death of** (victim).

2. a. (Defendant's) **intentional act caused the death of** (victim).

Mr. Gifford commented that the first and second degree murder instructions talk about the defendant's criminal act. He thought that the term "unlawful" was accurate and was consistent with the *Taylor* opinion. It also would help distinguish intentional act (voluntary manslaughter) from culpable negligence manslaughter. He thought the committee had gone a long way toward doing that by inserting the term "intentionally committed an act," but the term "unlawful" is consistent with the case law and further draws a distinction between voluntary and involuntary manslaughter. Based on the continuing discussion by the committee, Mr. Gifford proposed a modified version of his original proposal: He suggested that element 2a read:

2. a. (Defendant) **intentionally committed an unlawful act that caused the death of** (victim).

Mr. Gifford commented that it was hard to get around the last sentence in the *Montgomery* opinion which states: "We further hold that the intent which the State must prove for the purpose of manslaughter by act is the intent to commit an act that was not justifiable or excusable, which caused the death of the victim." He

thought the language was inconsistent with previous case law. Mr. Gifford acknowledged that the holding in the case stated that the intent is merely the intent to commit an act that was not either justifiable or excusable. He thought it was important to draw the Court's attention to the fact that by not issuing a holding that included an "unlawful act," the Court has created an inconsistency in the case law which is not acknowledged in the opinion. Mr. Schneider and Mr. Gifford both acknowledged that in light of the Court's opinion in *Montgomery*, there was no reason for the committee to submit a proposal with the term "unlawful act" included in element 2a.

Judge Taylor noted that the First District Court of Appeal in *Montgomery v. State*, 34 Fla. L. Weekly D 360 (Fla. 1st DCA Feb 12, 2009), used the term "unlawfully." Even though the Supreme Court approved the decision, it did not adopt the term in its opinion, or in the interim jury instruction. Therefore, based on the Court's opinion, the committee should not include the term "unlawful" in a proposed amended instruction to the Court.

A motion was made and seconded to recommend to the Court the following change to element 2a in the interim instruction.

2. a. ~~(Defendant's)~~ ~~**act(s)**~~ (Defendant) **intentionally committed an act that caused the death of** (victim).

The amendment to the instruction was approved by a unanimous vote of the committee.

The committee next considered whether there was a problem with the Court inserting the "justifiable" and "excusable" language in the instruction, since this identical language is given in jury instruction 7.1 - Introduction to Homicide. Mr. Migliore stated that he had no problem with jurors hearing the instructions a second time. This would be especially true if the offense of manslaughter was charged as the lesser included offense of first or second degree murder. It would be awhile before the jurors heard the instructions again. He noted that jurors have no familiarity with the jury instructions, and it only takes another minute or so to read the instructions again. Judge Taylor agreed, especially when manslaughter is read to the jury as a lesser included offense. Judge Scola was not sure the instructions should be read again, since they are read as part of the introduction to homicide. Mr. Gifford did not want it read a second time since he was against redundancy. Mr. Gifford thought that the reason that justifiable and excusable homicides were included by the Court in the interim instruction was because

manslaughter is defined in part by what it is not. Statutorily, manslaughter is defined as a killing without lawful justification according to chapter 776, and in cases where it shall not be excusable. Manslaughter is a residual offense. It is the residue of not being justifiable or excusable homicide in a way that first degree or second degree murder are not.

Mr. Gifford moved to amend a portion of the interim instruction by adding language that had been deleted by the Court, and by striking language that had been inserted by the Court. In other words, this section of the instruction would be identical to the language contained in the original instruction before it was amended by the Court on April 8, 2010. The proposal by Mr. Gifford would read:

However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide <u>as I have previously explained those terms.</u>

~~**The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing.** *§ 782.02, Fla. Stat.*~~

~~**The killing of a human being is excusable, and therefore lawful, under any one of the following three circumstances:**~~

~~**1. When the killing is committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or**~~

~~**2. When the killing occurs by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or**~~

~~**3. When the killing is committed by accident and misfortune resulting from a sudden combat, if a dangerous weapon is not used and the killing is not done in a cruel or unusual manner.**~~

Mr. Gifford explained that the rationale for amending the instruction was to have the trial court only read instruction 7.1 - Introduction to Homicide which contains the definitions of justifiable and excusable homicide. This would eliminate reading the instructions a second time, and would avoid unnecessary repetition of the definitions. The motion to amend was seconded by Mr. Schneider.

Mr. Migliore asked if anyone on the committee knew why the Court deliberately inserted the language in the instruction. Mr. Schneider felt that the reason the Court inserted the language was because there were cases in the past when excusable and justifiable instructions were not read to the jury, for a variety of reasons. The Court routinely reversed these cases. Mr. Gifford thought that in the past there was a short form and a long form, but the short form was used when excusable or justifiable homicide was raised as a defense. In addition, there was some confusion in the short form as well. Mr. Migliore said that the committee was debating what should go in the instruction, and where to place certain language. But he felt that unless there was not a good reason not to include the language, the Court had decided what should go in the instruction and where the language should be placed. He commented that no one on the committee had suggested why the language should not be there. Mr. Schneider stated that the Court had asked for comments and if the Court wants to reinsert the language, it could. Mr. Schneider went on to say that justifiable homicide and excusable homicide are already present in instruction 7.1 - Introduction to Homicide. The introduction applies to first degree murder, second degree murder, and manslaughter. There is no repetition in the first degree murder and second degree murder instructions, and it does not need to be repeated in the manslaughter instruction. The jury now gets the instructions in written form. Mr. Gifford speculated that the Court did not go back and look at instruction 7.1 - Introduction to Homicide. He felt that had the Court done that, it would not have placed the justifiable and excusable instructions in both instructions.

At the conclusion of the discussion, the committee voted on the motion by Mr. Gifford, as follows:

Judge Bulone, Judge Scola, Mr. Iten, Mr. de la Cabada, Mr. Schneider, and Mr. Gifford voted in favor of the motion. Judge Munyon, Judge Taylor, Judge Casanueva, Judge Ward, Mr. Migliore, and Mr. Trettis voted to keep the language added by the Court in the instruction. The motion to delete the language failed for the lack of a majority vote.

The committee turned to that portion of the interim instruction that immediately appears below element 3. Mr. Gifford suggested a change to the instruction that reads:

Give only if 2a alleged and proved, and manslaughter is being defined as a lesser included offense of first degree murder.

In order to convict of manslaughter by act, it is not necessary for the State to prove that the defendant had an intent to cause death, only an intent to commit an act that was not justified or excusable and which caused death.

Mr. Gifford stated that this instruction should be given in every instance where manslaughter by act (voluntary manslaughter) is being charged. In other words, the instruction should be given when manslaughter is given as the lesser included offense of first or second degree murder, or the offense charged is manslaughter. His proposal would read:

Give only if 2a alleged and proved~~, and manslaughter is being defined as a lesser included offense of first degree murder~~.

In order to convict of manslaughter by act, it is not necessary for the State to prove that the defendant had an intent to cause death, only an intent to commit an act that was not justified or excusable and which caused death.

Judge Taylor seconded the motion. The motion passed by a unanimous vote.

The committee next considered a motion by Mr. Schneider to amend the same language appearing in the interim instruction:

Give only if 2a alleged and proved, and manslaughter is being defined as a lesser included offense of first degree murder.

In order to convict of manslaughter by act, it is not necessary for the State to prove that the defendant had an intent to cause death, only an intent to commit an act that was not justified or excusable and which caused death.

Mr. Schneider's proposal would read:

Give only if 2a alleged and proved~~, and manslaughter is being defined as a lesser included offense of first degree murder~~.

In order to convict of manslaughter by act, it is not necessary for the State to prove that the defendant had an intent to cause death~~,~~ <u>[or that [his] [her] act demonstrated a depraved mind without regard for human life],</u> only an intent to commit an act that was not justified or excusable and which caused death.

The proposal was based on the idea that manslaughter is defined, in part, as not being first or second degree murder. Without inserting the underlined language, Mr. Schneider was afraid of juror confusion on the difference between element 2a in the manslaughter instruction and second degree murder. There was some concern among other members about the need for an italicized instruction telling the judge to only give the bracketed language when instructing on manslaughter as a lesser included offense. The members in opposition were not convinced there would be juror confusion regarding the difference between second degree murder and manslaughter by act. Some of the opponents further thought there were parallel construction problems with this language. Judge Taylor, Judge Scola, Judge Casanueva, Judge Ward, Mr. Schneider, and Mr. Iten voted in favor of the motion. Judge Munyon, Judge Bulone, Mr. Gifford, Mr. Trettis, Mr. de la Cabada, and Mr. Migliore voted against the motion. The motion failed for a lack of a majority vote.

The recommended changes to the instruction that were passed by the committee are attached at Appendix B.

Respectfully submitted this 3rd day of June, 2010.

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The Honorable Lisa T. Munyon
Ninth Judicial Circuit
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
425 North Orange Avenue, Room 1130
Orlando, Florida 32801
Florida Bar Number 0513083