

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO STANDARD
JURY INSTRUCTIONS IN CRIMINAL
CASES

CASE NO. SC10-113

COMMENT ON AMENDMENTS TO INSTRUCTION 7.7,
STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES

The amended manslaughter instruction issued by this Court on April 8, 2010, contains the following provisions regarding the defense of justifiable or excusable homicide:

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 in 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 lawful intent, or

The amended instruction is legally incorrect because it requires evidence of a “lawful act” committed by “lawful means with usual ordinary caution” in order to establish excusable homicide by accident and misfortune. The jury may be led to conclude, erroneously, that a defendant may not claim that the killing was an

excusable accident (the result of simple negligence) if the act causing death was "unlawful." In fact, a killing may be an excusable accident even if the act causing death was unlawful. Examples include deaths resulting from civil traffic infractions such as speeding, running a red light, or running a stop sign. Another example might be an electrocution death resulting from the work of an unlicensed contractor. Yet another example is where a convicted felon in possession of a firearm accidentally discharges his weapon resulting in a purely unintended death. In these instances, the killing or death may be the result of ordinary negligence and may not qualify as manslaughter by act, though resulting from civilly or criminally "unlawful" conduct. By informing the jury that an "excusable" homicide demands that the death result from "lawful" conduct, the standard jury instruction erroneously withdraws from the jury the prerogative to find the homicide "excusable" in such situations.

The amended instruction is also confusing because it uses a single term, "lawful," to describe both the "killing" and the "act" which results in death. The indiscriminate use of the term "lawful" in each instance invites the jury to merge the concepts to the extent that a jury finding of an unlawful act resulting in death precludes a finding that the killing was lawful.

Hence, I recommend that the term "lawful" be replaced with "not criminal." The revised instruction would read:

The killing of a human being is excusable, and therefore ~~lawful~~ not criminal, under any one of the following circumstances:

It follows that the same revision should be made in the instruction for justifiable homicide, as follows:

The killing of a human being is justifiable homicide and ~~lawful~~ not criminal 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.

Even more importantly, this analysis commands a corresponding change in the first of the "three circumstances" qualifying as "excusable homicide." At present, the instruction reads:

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

This instruction is erroneous because it does not clearly and unequivocally embrace the defense of negligence, e.g., "I was just cleaning my gun when it accidentally discharged, killing my best friend." To be consistent with the above analysis, the "lawful act" requirement must be deleted. Moreover, the reference to "usual ordinary caution" is erroneous and must be deleted because negligence is characterized by the *failure to exercise* usual ordinary (or reasonable) caution. I recommend, therefore, that the instruction be revised to read as follows:

1. When the killing is committed accidentally or unintentionally with no intent to harm or injure (victim) or anyone else, or

The undersigned recognizes that the above recommendations are contrary to the plain language of section 782.03, Florida Statutes, which provides, in pertinent part:

Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent. . .

The undersigned submits, however, that the plain terms of the statute are the proper subject of judicial interpretation. As explained above, a literal application of section 782.03 would make a death resulting from simple negligence punishable as a felony. In other words, the defendant would be guilty of manslaughter even without proof of mens rea. As indicated by this Court's opinion in Chicone v. State, 684 So. 2d 736 (Fla. 1996), the imposition of felony punishment for an offense not requiring proof of mens rea would be unconstitutional, i.e., violate due process. Some degree of judicial interpretation is, therefore, necessary and proper.

In addition, a literal application of section 782.03 would lead to absurd consequences. If death resulting from simple negligence were punishable as manslaughter by act, the offense of manslaughter by culpable negligence would be rendered entirely superficial. In order to give some effect to all parts of the manslaughter statute, some degree of judicial interpretation is required.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Lisa T. Munyon, Chair, Comm. on Std. Jury Instr.-Crim., c/o Les Garringer, Office of the General Counsel, 500 S. Duval St., Tallahassee, FL, 32399-1925, on this day of June, 2010.

Respectfully submitted,

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