In The Supreme Court of Florida

In re STANDARD JURY INSTRUCTIONS
IN CRIMINAL CASES
REPORT NO. 2010-05 CASE NO. SC10-2434

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COMMENTS ON PROPOSED ATTEMPTED VOLUNTARY MANSLAUGHTER JURY INSTRUCTION

This is a comment regarding the proposed jury instruction on attempted voluntary manslaughter. The committee proposes to amend the current jury instruction on attempted voluntary manslaughter to read:

6.6 ATTEMPTED VOLUNTARY MANSLAUGHTER
§ 782.07 and 777.04, Fla. Stat.

To prove the crime of Attempted Voluntary Manslaughter, the State must prove the following element beyond a reasonable doubt:

> (Defendant) intentionally committed an act [or procured the commission of an act], which ~~was intended to cause the death of (victim) and~~ would have resulted in the death of (victim) except that someone prevented (defendant) from killing (victim) or [he] [she] failed to do so.
>
> However, the defendant cannot be guilty of Attempted Voluntary Manslaughter by committing a merely negligent act or if the attempted killing was either excusable or justifiable as I have previously explained those terms.
>
> I will now define "negligence" for you. Each of us has a duty to act reasonably and use ordinary care toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence.

It is not an attempt to commit manslaughter if the defendant abandoned the attempt to commit the offense or otherwise prevented its commission under circumstances indicating a complete and voluntary renunciation of [his] [her] criminal purpose.

Give only if procurement is alleged and proven.
To "procure" means to persuade, induce, prevail upon, or cause a person to do something.

~~Give if attempted manslaughter is being defined as a lesser included offense of attempted first degree premeditated murder~~.

In order to convict of Attempted Voluntary Manslaughter it is not necessary for the State to prove that the defendant had a<u>n</u> ~~premeditated~~ intent to cause death, only an intent to commit an act which would have caused death and was not justifiable or excusable attempted homicide.

COMMENTS

First, this Court should determine if the crime of attempted manslaughter exists. There is no point in writing a jury instruction for a non-existent crime. Indeed, writing a jury instruction for a non-existent crime is ill-considered because it guarantees that error will occur when trial courts throughout the State give such an instruction, only for this Court to later determine that the crime does not exist. The issue of whether the crime of attempted manslaughter exists is currently pending in this Court in three cases. See *State v. Rushing* SC10-1244; *Williams v. State*, SC10-1458; see also *Rushing v. State*, 2010 WL 2471903 (Fla. 1st DCA 2010)(holding that the jury instruction on attempted voluntary manslaughter is also fundamental error); but see *Williams v. State*, 40 So.3d 72 (Fla. 4th DCA

2010)(holding that the jury instruction on attempted voluntary manslaughter is not fundamental error). Furthermore, the First District in *Minnich v. State*, - So.3d -, 2011 WL 265765 (Fla. 1st DCA January 28, 2011), recently certified the question of whether attempted manslaughter a viable offense in light of *State v. Montgomery*, 39 So.3d 252 (Fla. 2010) to this Court. The certified question is currently pending in this Court as well. *State v. Brian R. Minnich*, case No. SC11-338. The issue should be expedited and the legal existence of the crime should be established before any consideration of the corresponding jury instruction is undertaken. To do otherwise, is to put the cart before the horse.

This Court's recent decision in *State v. Montgomery*, 39 So.3d 252 (Fla.2010), created tension with this Court's previous decision in *Taylor v. State*, 444 So.2d 931, 933-934 (Fla. 1983). This Court in *Taylor* explained that "in Florida, the crime of manslaughter includes certain types of intentional killings" and recognizing "the distinction found in common law between voluntary and involuntary manslaughter" and noting that in voluntary manslaughter there is an intent to kill and finding an intent to kill where the defendant intentionally fired the shotgun at the victim. While this Court in *Montgomery* held that the crime of manslaughter did not require an intent to kill, this Court in *Taylor* held that the crime of attempted manslaughter existed because the crime of voluntary manslaughter included an intent to kill and therefore, an attempt version of the crime was proper. That there was an intent to kill element to voluntary manslaughter was absolutely critical to the *Taylor* Court's

analysis. *Taylor*, 444 So.2d at 934 (citing *Anthony v. State*, 409 N.E.2d 632, 636 (Ind. 1980)(explaining that because manslaughter can be proved by evidence of the intentional killing of another human being, ... the crime of attempted manslaughter does exist)). See also *Cox v. State*, 534 A.2d 1333, 1335-1336 (Md. 1988)(interpreting that same statutory language of act, procurement or culpable negligence manslaughter and holding that the crime of attempted voluntary manslaughter exists under the common law of Maryland, quoting and relying on this Court's decision in *Taylor v. State*, 444 So.2d 931 (Fla. 1983)). Basically, in *Montgomery*, this Court said that there was no intent to kill but in *Taylor*, this Court said the exact opposite. This Court needs to resolve this tension.

And to do so, it should explain that there are two types of manslaughter - voluntary manslaughter and involuntary manslaughter. Voluntary manslaughter has an intent to kill but involuntary manslaughter does not. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 652 (2nd ed. 1986)(explaining that common law manslaughter included both voluntary and involuntary manslaughter). *Fortner v. State*, 119 Fla. 150, 154, 161 So. 94, 96 (Fla. 1935)(defining voluntary manslaughter as "the intentional killing of another in a sudden heat of passion due to adequate provocation . . ."). As Professor Lafave explains, voluntary manslaughter is "an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing" and "the usual type of voluntary manslaughter involves the intentional killing of another" while in the heat of passion

and that except for this mental state, which causes a temporary loss of self-control, it would be murder. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, 653-654 (2nd ed. 1986). Several other treatise on the criminal law also note that voluntary manslaughter does include an intent to kill. See W. Clark & W. Marshall, A Treatise on the Law of Crimes § 258, at 339 (5th ed. 1952) (observing that "[i]n all cases of voluntary manslaughter there is an actual intention to kill, or there is an intention to inflict great bodily harm, from which such an intent may be implied"); J. Dressler, Understanding Criminal Law 450 (1987) ("an intentional killing committed in 'sudden heat of passion' as the result of adequate provocation constitutes voluntary manslaughter");); 2 C. Torcia, Wharton's Criminal Law § 153, at 236-37 (14th ed. 1979) ("[v]oluntary manslaughter is an intentional killing in the heat of passion as the result of severe provocation and a killing, which would otherwise constitute murder, is mitigated to voluntary manslaughter"). It is provocation and its resulting heat of passion, not intent to kill, that distinguishes voluntary manslaughter from first degree murder. *Disney v. State*, 72 Fla. 492, 503, 73 So. 598, 601 (1916)(affirming a conviction for manslaughter and explaining that a killing in the heat of passion occurs when the defendant is intoxicated by his passion, is impelled by a blind and unreasoning fury and "[i]n that condition of mind, premeditation is supposed to be impossible, and depravity which characterizes murder in the second degree absent). The intent to kill is a given in voluntary manslaughter. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, 653 & n.3

(2nd ed. 1986)(noting that voluntary manslaughter "presupposes an intent to kill" and citing cases). Provocation is the critical concept in this type of manslaughter, not intent to kill.

Involuntary manslaughter, on the other hand, commonly referred to as misdemeanor/manslaughter, does not involve an intent to kill. Indeed, involuntary manslaughter does not even require an intent to harm. Like its equivalent, the felony/murder rule, misdemeanor/manslaughter only requires an intent to commit the underlying crime. The classic case of misdemeanor/manslaughter is a single punch resulting in the death of the victim. In such cases, the defendant does not intend to kill the victim, he only intends to commit the underlying misdemeanor of simple battery. However, under the misdemeanor/manslaughter rule, he is guilty of involuntary manslaughter. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 675-682 (2nd ed. 1986)(explaining the common law classifying involuntary manslaughter as "an unintended homicide in the commission of an unlawful act."); *Hall v. State*, 951 So.2d 91 (Fla. 2d DCA 2007) (en banc). The equivalent is the felony/murder rule. As with the felony murder rule, no intent to harm is required. For example, a burglar breaks into a home and the homeowner dies of fright from a heart attack. The burglar had no intent to harm the homeowner. Indeed, the burglar never touched the homeowner. He is still guilty of felony murder under the felony/murder rule. All that is required is that the burglar commit the underlying felony of burglary. This is equally true of the misdemeanor/manslaughter rule.

The defendant need only have intentionally committed the underlying misdemeanor, not to intentionally harm the victim. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 676 (2nd ed. 1986)(referring misdemeanor-manslaughter as "a sort of junior grade counterpart of the felony-murder doctrine."). Therefore, while the crime of attempted voluntary manslaughter exists, the crime of attempted involuntary manslaughter does not exist.

Secondly, while titled attempted voluntary manslaughter, the proposed jury instruction is actually a jury instruction on attempted involuntary manslaughter. The jury instruction cannot be a jury instruction on voluntary manslaughter because it does not define heat-of-passion killings or sudden combat. Voluntary manslaughters are heat-of-passion killing which are provoked or mutual combat killings. This Court has still not adopted a standard jury instruction defining provocation and its resulting heat-of-passion. And it should do so. Murder convictions are being reversed because there is no standard jury instruction covering these concepts. *Palmore v. State*, 838 So.2d 1222 (Fla. 1st DCA 2003)(reversing a second-degree murder conviction because the trial court refused to give a requested special instruction on heat of passion manslaughter). A jury cannot be expected to understand the crime of manslaughter without instructions on provocation and its resulting heat-of-passion yet the current jury instruction does not define either term as the *Palmore* Court noted. The excusable homicide jury instruction uses both the term "heat of passion" and the term "sudden and sufficient provocation" but does not

define either term. This Court should direct the committee to develop a standard jury instruction on heat-of-passion and provocation as well as sudden combat. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, 654-664 (2nd ed. 1986)(discussing the concept of provocation and its requirements at length).

Finally, the jury instruction does not correctly define attempted involuntary manslaughter because it suggests that the underlying act need only be more than negligent. The underlying act, however, must be unlawful, not merely more than negligent. Involuntary manslaughter, commonly referred to misdemeanor/manslaughter, as the name suggests, requires that the underlying act be a misdemeanor (or at least violation of a public safety ordinance). See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 675-682 (2nd ed. 1986)(explaining the common law classifying involuntary manslaughter as "an unintended homicide in the commission of an unlawful act." and referring misdemeanor-manslaughter as "a sort of junior grade counterpart of the felony-murder doctrine."); *United States v. Walker,* 380 A.2d 1388 (D.C.1977)(affirming a conviction for involuntary manslaughter where the defendant was carrying a pistol without a license and dropped it in the stairwell of an apartment building, and that the gun went off, fatally wounding a bystander because carrying a pistol without a license outside the possessor's "dwelling house or place of business" was a misdemeanor and noting that involuntary manslaughter required an unlawful act which is a misdemeanor involving danger of injury); *State v. Powell*, 426 S.E.2d 91 (N.C. App. Ct.

1993)(affirming a conviction for involuntary manslaughter based of a violation of a city ordinance requiring dogs to be "restricted to the owner's property by a tether, rope, chain, fence or other device" where two Rottweilers dug out and killed a jogger because the ordinance was a safety ordinance, not merely a nuisance law and explaining that all the State must prove for an involuntary manslaughter conviction is that the defendant intentionally violated the ordinance). This Court should before resolve these matters before formulating a new jury instruction on attempted manslaughter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing COMMENTS ON PROPOSED ATTEMPTED VOLUNTARY MANSLAUGHTER JURY INSTRUCTION has been furnished by U.S. Mail to the Standard Jury Instructions Committee in Criminal Cases c/o Bart Schneider, General Counsel's Office, Office of the State Courts Administrator, 500 Duval Street, Tallahassee, FL 32399-1900, this 16th day of March, 2011.

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Charmaine M. Millsaps