

## **THE NECESSITY FOR A SPECIAL JURY INSTRUCTION ON HEAT OF PASSION MANSLAUGHTER**

Homicide can be divided into degrees, as in first, second, or third degree murder, or manslaughter. See Florida Standard Jury Instruction 7.1. Homicide can also be divided into lawful and unlawful killings. See section 782.04, 782.07 Florida Statutes. A killing which is justifiable or excusable is lawful, while an unlawful killing is any other kind of homicide. See 782.02, 782.03 Florida Statutes.

Justifiable homicide is a killing committed by the justifiable use of deadly force, that is, one committed in self-defense or the defense of another. See 782.02 Florida Statutes; Florida Standard Jury Instruction 3.6(f). Excusable homicide occurs 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 by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.” Section 782.03 Florida Statutes.

The excusable homicide statute was first enacted in 1868, and was revised in 1892, 1906, 1920, 1927, and 1975. It reflects a time when the heat of passion component, such as might occur if, for example, a man found his wife in bed with another man, was deemed to be a complete defense to the charge. The statute to this day purports to completely excuse a killing done in the heat of passion, so long as there is “sufficient provocation.”

The current standard jury instruction does not define the words “heat of passion,” and a jury instruction which gave that definition was deleted by the Florida Supreme Court some years ago. Moreover, the instruction, which makes heat of passion homicide a complete defense to the charge of murder, does not reflect the values of our maturing society or reflect the views of most potential jurors. Perhaps this is why there are so few outright acquittals where the defense is heat of passion, despite evidence of provocation.

It is for this reason that a special instruction for heat of passion manslaughter should be requested when counsel is trying a charge of murder and the defense is excusable homicide. Although the standard jury instruction does not cover a manslaughter committed in the heat of passion, see Florida Standard Jury Instruction 7.7, Florida caselaw does recognize heat of passion manslaughter.

In Paz v. State, 777 So.2d 983 (3<sup>rd</sup> DCA 2000), the court recognized that:

[t]he law reduces the killing of a person in the heat of passion from murder to manslaughter out of recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice. Such killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject. Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror. But for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation.

Id., at 984. For the defense to apply “there must be adequate provocation ... as might obscure the reason or dominate the volition of an ordinary reasonable man. Id. *citing Rivers v. State*, 75 Fla. 401, 78 So. 343, 345 (1918)(internal quotations omitted).

In Palmore v. State, 838 So.2d 1222 (1<sup>st</sup> DCA 2003), the court held that giving the standard jury instruction on excusable homicide in place of defendant's requested instruction on heat of passion manslaughter may constitute reversible error.

In discussing the trial court’s error, the Palmore court explained,

[t]he State's only argument is that the standard jury instruction is sufficient. The State's argument is without merit. The standard jury instructions contain the term “heat of passion” only once. The instruction is based on section 782.03, Florida Statutes, which defines excusable homicide, and the term “heat of passion” itself is not defined in the instruction.

In the case at bar...the jury was instructed that if they found that [defendant] acted in the heat of passion, the killing would be “excusable” and therefore “lawful.” The standard jury instructions do not contain language which would inform the jury that, pursuant to Florida law, if they believed Appellant's passion resulted in a state of mind where depravity which characterizes murder in the second degree (is) absent, they could return a verdict of manslaughter. Accordingly, the jury was not properly instructed on Appellant's theory of defense.

Id. at 1224 -1225 (internal quotations, citations, and footnotes omitted).

Thus, a jury may find complete exoneration for a killing to be unwarranted, but may find, depending on the circumstances surrounding the homicide, that “sufficient provocation” existed to justify a conviction for manslaughter rather than murder in the first or second degree. An instruction to that effect is supported whenever the depravity which characterizes murder is negated by evidence of provocation.

Prosecutors and defense counsel should always research the law to determine if the caselaw is accurately reflected in the standard jury instruction. As can be seen in the context of heat of passion manslaughter, a standard jury instruction is not necessarily a correct statement of the law. In this situation, a special instruction should be proposed by counsel, and if warranted, provided by the trial court.