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Murder and Aggravated Murder

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MURDER AND AGGRAVATED MURDER

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This is the first of two articles on the Ohio law of homicide. This article discusses the crimes of murder and aggravated murder, including recent statutory amendments. The next article will examine other types of homicides and issues of causation.

Ohio divides murder into two categories: murder and aggravated murder. Aggravated murder is further divided into five categories: (1) a purposeful killing with prior calculation and design, (2) a purposeful killing during the commission of specified felonies, (3) a purposeful killing of a child under thirteen years of age, (4) a purposeful killing while the actor is under detention, or is breaking detention, as a result of a felony conviction, and (5) a purposeful killing of a law enforcement officer if the victim is engaged in official duties at the time of the offense, or if the offender's specific purpose was to kill a law enforcement officer. The death penalty may be imposed only for aggravated murder.

There are two categories of murder: (1) a purposeful killing, and (2) causing a death during the commission of specified violent felonies.

There are also two types of manslaughter: (1) voluntary and (2) involuntary. In addition, Ohio recognizes negligent homicide as a crime. Finally, two provisions govern vehicular homicides.

Because homicides are defined in terms of a result (death), causation issues may arise. See 3 Katz & Giannelli, Baldwin's Ohio Practice, Criminal Law ch. 96 (1996).

COMMON LAW HOMICIDES

At common law, homicide was defined as the killing of a human being. There were three common law homicides: (1) murder, (2) voluntary manslaughter, and (3) involuntary manslaughter. There were no degrees of murder at common law; first and second degree murder are classifications created by statute in this country during the 19th Century.

Common Law Murder

Common law murder was the unlawful killing of a human being "with malice aforethought." This crime included an intentional killing (express malice). Over time murder also came to include situations of "implied malice," of which there were three. First, a killing committed during the commission of a felony constituted "felony-murder." Second, a killing in which the accused intended to inflict great bodily injury, rather than death, also was considered murder if death resulted. Third, a killing caused by extreme reckless conduct was similarly classified as murder, often called "depraved heart" or "abandoned and malignant heart" murder. This crime was characterized by a reckless indifference to an unjustifiably high risk to human life, such as playing Russian roulette, shooting into an occupied house, and sometimes drag-racing related deaths.

Common Law Felony-Murder

Originally, felony-murder involved any killing, even if accidental, which occurred during the commission of a felony. "Malice" was implied from the intent to commit the underlying felony. At the time this crime was developing, there were few felonies, and those few were punishable by death. Accordingly, it made little difference in many cases whether the condemned prisoner was executed for murder or for the predicate felony. As the number of felonies increased and the number of felonies subject to the death penalty decreased, the common law courts began to limit the scope of the felony-murder doctrine.

At least four limitations are noteworthy. First, some courts required that the felony be independent of the killing. Manslaughter or aggravated battery (as lesser offenses of murder) are not independent felonies and therefore do not qualify as the underlying felony. 1 LaFave & Scott, Substantive Criminal Law § 7.5(g) (1986). Unlike rape, arson, burglary, robbery, and kidnaping, which are independent, manslaughter and aggravated battery are said to merge with the conduct resulting in the death. Second, some courts mandated that the death be foreseeable; otherwise the felony was not considered the proximate cause of the death. Id. § 7.5(d). Third, the death must occur during the commission of the felony. This limitation created a temporal limitation, in which the beginning and end of the felony must be defined. Since felony-murder often extended to attempts, the law of attempt frequently determined the commencement of the time period. Similarly, felony-murder often extends to deaths caused while "fleeing" the felony;

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thus, it became necessary to determine a termination date for the time of flight. Here, the common law said that once the felon had reached a place of "temporary safety," the felony-murder rule ceased. Id. § 7.5(f). Fourth, the death of a cofelon was often not punishable as felony-murder if the death was caused by an innocent third party, such as a police officer, a victim, or a bystander. Id. § 7.5(c). This limitation, however, did not extend to the death of an innocent person caused by the conduct of another innocent third party — for example, where the policeman kills a bystander while attempting to capture the felon. In that situation, the felon was held responsible for the death.

Statutory Changes

Modern homicide statutes frequently divide murder into two degrees. Typically, first degree murder statutes in this country encompass (1) "deliberate and premeditated" murders, and (2) felony-murder but limited to the most dangerous felonies — e.g., arson, robbery, burglary, rape, and kidnaping.

The "deliberation and premeditation" formula required reflection, albeit for only minutes in some jurisdictions. It encompassed a planned murder as opposed to a sudden impulse murder, which constituted second degree murder. Note, however, that both first and second degree murder involve intentional killings. In other words, the distinction is not between intended and unintended killings, but rather between premeditated intentional killings and unpremeditated intentional killings. Premeditated killings were considered more heinous, a rather questionable proposition. First-degree murder statutes in this country also often include killings "by lying in wait, poison, or torture." Since these murders all require premeditation, this type of provision could be viewed as a redundant category.

PROOF OF LIFE AND DEATH

By definition, homicide means the killing of a human being. It is not murder to shoot a corpse, although it may be some other crime (e.g., offenses against a corpse) and under certain circumstances it may be attempted murder (e.g., if the actor believed that the corpse was alive). Accordingly, the law of homicide requires defining when life begins and when it ends.

Under the common law, life began when the "victim" was "born alive." State v. Robbins, 8 Ohio St. 131, 192 (1857) ("under our statute, neither degree of criminal homicide can be predicated upon the killing of an unborn child"). In State v. Dickinson, 28 Ohio St.2d 65, 70-71, 275 N.E.2d 599 (1971), the Ohio Supreme Court refused to alter the common law definition of "live birth." The defendant's car struck another car, in which a seven-month pregnant woman was a passenger. Prior to the accident, the fetus was viable and capable of sustaining life. The Court wrote:

> The law has long been clear that to establish the *corpus delicti* in the murder of a newborn child, the evidence must show that the infant was born alive .... In the absence of a specific statute to the contrary, this same element is essential for a conviction of vehicular homicide in Ohio. Since the evidence in this case does not indicate that the child was born alive, a conviction cannot stand.

See also State v. Gray, 62 Ohio St.3d 514, 517, 584 N.E.2d 710 (1992) (parent may not be prosecuted for child endangerment for substance abuse occurring before the birth of the child).

By statutory amendment (1996), however, homicides now encompass the "unlawful termination of another's pregnancy." See R.C. 2903.09(A)(definition). Although this provision was challenged on constitutional grounds, it was upheld in State v. Coleman, 124 Ohio App.3d 78, 80, 705 N.E.2d 419 (1997).

At one time, defining death was relatively simple. When a victim's heart and lungs stopped, that person was legally dead. However, with modern advances in medicine, "brain death" has supplanted "respiratory" death. 1 LaFave & Scott, Substantive Criminal Law § 7.1 (1986). The Ohio Supreme Court adopted this definition in State v. Johnson, 56 Ohio St.2d 35, 40, 381 N.E.2d 637 (1978):

> There was testimony at trial by both the coroner and attending physician that the proximate cause of death was severe head trauma as a result of an extensive skull fracture. This evidence was uncontroverted, but for the bare assertion that Dr. Walus decided to no longer continue the supplemental oxygen supply [through an artificial respirator] to the patient after four days of testing showed brain death.

See also State v. Long, 7 Ohio App.3d 248, 250, 555 N.E.2d (1983). Moreover, R.C. 2108.30 also defines death as "brain death" for physician liability purposes.

Typically, proof of death is a straightforward proposition. A coroner or forensic pathologist will testify about the autopsy. Crime scene photographs also establish the fact of death. See 2 Giannelli & Snyder, Baldwin's Ohio Practice, Evidence § 901.17 (1996) (photographs). However, if the victim's body is not recovered, proof of death becomes more problematic. Nevertheless, death may be proved through circumstantial evidence, even in the absence of the victim's body. E.g., State v. Nicely, 39 Ohio St.3d 147, 150, 529 N.E.2d 1236 (1988) ("It is well-established that murder can be proven in the absence of a body."); State v. Dudley, 19 Ohio App.2d 14, 25, 249 N.E.2d 536 (1969) ("[U]nder present day concepts, production of a 'body' is not absolutely essential to convict, even in a murder case."); Perkins, The Corpus Delicti of Murder, 48 Va. L. Rev. 173 (1962).

MURDER

Until recently, murder was defined as purposely causing the death of another person. R.C. 2903.02(A). In 1998, a second category of murder, a type of felony-murder, was enacted by amendment.

Recent Amendment

R.C. 2903.02(B) defines murder to also include a death that is the proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of R.C. 2903.03 (voluntary manslaughter) or R.C. 2903.04 (involuntary manslaughter). An "offense of violence" is defined in R.C. 2901.01(A)(9). In addition, R.C. 2903.02(C) specifies that division (B) does not apply to felonies that become first or second degree felonies due to a prior conviction.

In effect, Ohio now has three categories of felony-murder, depending on the seriousness of the underlying felony: (1) aggravated murder for specified offenses (kidnaping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, and escape), (2) murder for specified crimes of violence, and (3) involuntary manslaughter for other felonies.

Related Crimes

One type of murder (Division (A), purposeful killing) is a lesser-included-offense of aggravated murder. See Legislative Service Commission (1973) ("This section defines murder simply as the purposeful killing of another, and the offense can thus be a lesser included offense to both forms of aggravated murder."); Ohio Jury Instruction § 503.015(A) (murder as a lesser included-offense). This type of murder differs from aggravated murder in that it does not require the additional element of "prior calculation and design," commission of an enumerated felony, a child under 13 or law enforcement officer as the victim, or while the offender is under detention pursuant to a felony conviction.

Murder differs from voluntary manslaughter because the latter, although a purposeful killing, must have been committed in the sudden heat of passion upon sufficient provocation. The provocation is thought to mitigate the offense.

Depraved Heart Murder

The Ohio statute does not recognize "depraved heart murder" — a type of common-law murder, in which death is caused by extremely reckless conduct. See 1 LaFave & Scott, Substantive Criminal Law § 7.4(a), at 201 (1986) ("A very significant minority of the modern codes do not recognize this type of murder at all.")(citing the Ohio statute). The Ohio involuntary manslaughter, negligent homicide, and vehicular homicide statutes cover some (but not all) of the conduct that would have been criminalized as "depraved heart" murder at common law.

Mens Rea: Purpose

The required mental element in Division (A) is "purpose." One court has ruled that it is not error for an indictment to substitute the mental element of knowledge. State v. Thompson, No. 9-81-9 (3d Dist. Ct. App., 3-3-82). However, under the Code's definition of purpose, the intention of the accused must be to achieve the proscribed result — the death of another person. Knowledge is not sufficient. See R.C. 2901.22(A) ("A person acts purposely when it is his specific intention to cause a certain result."). For example, a person who plants a bomb on his own airplane in order to collect insurance may not have the "purpose" to kill the pilot, although the offender has knowledge that the pilot's death is almost certain. See RC 2901.22(B) ("A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.").

Circumstantial Evidence

Circumstantial evidence is frequently used in homicide prosecutions. In many instances circumstantial evidence is more reliable than direct evidence. See State v. Richey, 64 Ohio St.3d 353, 363, 595 N.E.2d 915 (1992) ("Indeed, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence."), cert. denied, 507 U.S. 989 (1993); State v. Lott, 51 Ohio St.3d 160, 167, 555 N.E.2d 293 (1990); State v. Turner, Wright 20, 28 (1831) ("[c]ircumstantial evidence is often the most convincing. It is difficult to fabricate the connected links in a chain of circumstances .... It is [easier] ... to fabricate positive facts.").

Nevertheless, for a long time the Ohio Supreme Court employed a special rule to evaluate the sufficiency of circumstantial evidence in criminal cases. In State v. Kulig, 37 Ohio St.2d 157, 309 N.E.2d 897 (1974) (syllabus), the Court held that "[c]ircumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt." This position was criticized as more misleading than helpful. For example, the United States Supreme Court commented: "[T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." Holland v. United States, 348 U.S. 121, 139-40 (1954).

In State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), the Ohio Supreme Court overruled *Kulig* and its prior position on circumstantial evidence. The Court wrote:

> Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction. Therefore, where the jury is properly and adequately instructed as to the standards for reasonable doubt a special instruction as to circumstantial evidence is not required.

See also State v. Webb, 70 Ohio St.3d 325, 331, 638 N.E.2d 1023 (1994) ("[A] rule changing the quantum of proof required for conviction may be applied to trials of crimes committed before the rule was announced, without violating the *Ex Post Facto* Clause."); State v. Grant, 67 Ohio St.3d 465, 473, 620 N.E.2d 50 (1993) ("[T]his court has rejected the concept that circumstantial evidence must be 'irreconcilable with any reasonable theory of innocence in order to support a conviction.'").

Circumstantial evidence alone may be sufficient to support a homicide conviction. E.g., State v. Richey, 64 Ohio St.3d 353, 363, 595 N.E.2d 915 (1992), cert. denied, 507 U.S. 507 U.S. 989 (1993); State v. Apanovitch, 33 Ohio St.3d 19, 27, 514 N.E.2d 394 (1987) ("[A] conviction based upon purely circumstantial evidence may be just as reliable as a conviction based on direct evidence, if not more so."); State v. Hankerson, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), cert. denied, 459 U.S. 870 (1982).

This is true of a murder conviction even in the absence of the victim's body. E.g., State v. Nicely, 39 Ohio St.3d 147, 150, 529 N.E.2d 1236 (1988) ("It is well-established that murder can be proven in the absence of a body."); State v. Dudley, 19 Ohio App.2d 14, 25, 249 N.E.2d 536 (1969) ("[U]nder present day concepts, production of a 'body' is not absolutely essential to convict, even in a murder case."); Perkins, The Corpus Delicti of Murder, 48 Va. L. Rev. 173 (1962).

Circumstantial Evidence: Mens Rea

The intent to kill ("purpose") need not be proved by direct testimony, but may be deduced from the surrounding circumstances, including the instrument used, its tendency to destroy life if designed for that purpose, and the manner in which the wound was inflicted. State v. Burke, 73 Ohio St.3d 399, 653 N.E.2d 242 (1995). See also State v. Phillips, 74 Ohio St.3d 72, 82, 656 N.E.2d 643 (1995) ("A blunt force traumatic injury to Sheila's chest bruised internal organs and caused them to bleed. The use of such substantial force by an adult on a three-year-old victim is certainly sufficient evidence from which a jury could reasonably find a purpose to kill."); State v. Shue, 97 Ohio App.3d 459, 468, 646 N.E.2d 1156 (1994) ("A jury can reasonably infer that a defendant formed the specific intent to kill from the fact that

a firearm is an inherently dangerous instrument, the use of which is likely to produce death, coupled with relevant circumstantial evidence."); State v. Brown, 112 Ohio App.3d 583, 604, 679 N.E.2d 361 (1996) ("Further substantial evidence showed that appellant became angry with [her 8 year old son] on the morning of his murder, struck him in the chest causing injury, drove him to the end of Union Chapel Road, and ran him over with her station wagon, leaving him to die.").

The Ohio Supreme Court has written:

> The law has long recognized that intent, lying as it does within the privacy of a person's own thoughts, is not susceptible of objective proof. The law recognizes that intent can be determined from the surrounding facts and circumstances, and persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts. Intent "can never be proved by the direct testimony of a third person and it need not be. It must be gathered from the surrounding facts and circumstances."

State v. Garner, 74 Ohio St.3d 49, 60, 656 N.E.2d 623 (1995) (quoting State v. Huffman, 131 Ohio St. 27, 1 N.E.2d 313 (1936)(syllabus 4)), cert. denied, 116 S. Ct. 1444 (1996). The Court also wrote: "We unhesitatingly find that the natural, reasonable and probable consequence of Garner's having set three separate fires in an apartment occupied by six children age thirteen and under is that those children would die. There was thus sufficient evidence to support the jury's finding that Garner possessed the requisite mental elements of the crime of aggravated murder." Id.

Instructions

A trial court's instruction in a murder prosecution that the purpose with which a person acts or brings about a result may be determined from the manner in which it was done, the means used, and other facts and circumstances in evidence, does not operate to relieve the prosecutor of the burden of persuasion or create a mandatory presumption. State v. Wilson, 74 Ohio St.3d 381, 659 N.E.2d 292 (1996). The word "presumption" or "presume" should never be used in a jury instruction.

An instruction informing a jury that it may infer "purpose" from the use of a deadly weapon is constitutional. According to the Ohio Supreme Court, the trial "court used the word 'may,' indicating that the presumption was permissive — one the jury could accept, not one that the jury was required to accept." State v. Getsy, 84 Ohio St.3d 180, 196, 702 N.E.2d 866 (1998)(The instruction provided: "If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life the purpose to kill may be inferred from the use of the weapon."). Accord State v Loza, 71 Ohio St.3d 61, 81, 641 N.E.2d 1082 (1994).

Transferred Intent

When an actor aims at one person but misses and hits a second person, the law usually holds the actor guilty of the murder of the second person. Thus, "when one person (A) acts (or omits to act) with intent to harm another person (B), but because of bad aim he instead harms a third person (C) whom he did not intend to harm, the law considers him (as it ought) just as guilty as if he had actually harmed the intended victim." 1 LaFave & Scott, Substantive Criminal Law § 3.12(d), at 400 (1986). This is called "transferred intent": A's intent to kill B is transferred to C. "The doctrine of transferred intention is firmly rooted in Ohio law." State v. Richey, 64 Ohio St.3d 353, 364, 555 N.E.2d 915 (1992), cert. denied, 507 U.S. 989 (1993). See also State v. Sowell, 39 Ohio St.3d 322, 331, 530 N.E.2d 1294 (1988) ("[T]he indictment is accurate in that appellant acted with prior calculation and design in killing Graham under the doctrine of transferred intent.").

AGGRAVATED MURDER: PRIOR CALCULATION & DESIGN

There are five types of aggravated murder: (1) a purposeful killing that is the product of prior calculation and design, (2) a purposeful killing during the commission of specified felonies, (3) a purposeful killing of a child under thirteen years of age, (4) a purposeful killing while the actor is under detention (or is breaking detention) as a result of a felony conviction, and (5) a purposeful killing of a law enforcement officer if the victim is engaged in official duties at the time of the offense, or if the offender's specific purpose was to kill a law enforcement officer. R.C. 2903.01. Aggravated murder is the only capital offense in Ohio; the penalty for aggravated murder is death or life imprisonment. 3 Katz & Giannelli, Baldwin's Ohio Practice, Criminal Law chs.115-17 (1996).

Mens Rea: "Purpose"

The first culpable mental state for all types of aggravated murder, like murder under R.C. 2903.02, is "purpose." Accordingly, the above discussion of that mental state applies here as well. The difference between murder and the first type of aggravated murder is the additional mental state of "prior calculation and design," an element thought to demonstrate cold bloodedness.

Mens Rea: "Prior Calculation and Design"

There were no degrees of murder at common law. When first adopted in this country, first degree murder statutes used the term "premeditation."

The substitution of the term "prior calculation and design" in the Ohio statute in lieu of the term "premeditation," the traditional phraseology in this country, was intended to exclude from the definition of aggravated murder those killings where the intention is formed without some pre-planning. See Ohio Jury Instructions § 503.01(A) (defining prior calculation and design). Without this distinction, there is no difference between aggravated murder and murder, and juries can be given no meaningful direction. This change in language represents a rejection of the judicial interpretation of the former Code section, which held that murder could be "premeditated" even though the fatal plan was conceived and executed on the spur of the moment; the only requirement was that the malicious purpose be formed before the homicidal act, however short in time — "a matter of seconds." State v. Stewart, 176 Ohio St. 156, 198 N.E.2d 439 (1964), cert. denied, 379 U.S. 947 (1964). The statute

> restates the former crime of premeditated murder so as to embody the classic concept of the planned, cold-blooded killing while discarding the notion that only an instant's prior deliberation is necessary. By judicial interpretation of the former Ohio law, murder could be premeditated even though the fatal plan was conceived and executed on the spur of the moment.

Legislative Service Commission (1973) ("See, State v. Schaffer, 113 Ohio App 125 (Lawrence Co App, 1960). The section employs the phrase, "prior calculation and design," to indicate studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of

the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must amount to more than momentary deliberation.").

The Ohio Supreme Court has acknowledged that "prior calculation and design" is a more stringent element than the prior judicial interpretation of "premeditation." In State v. Cotton, 56 Ohio St.2d 8, 11, 388 N.E.2d 755 (1979), the Court recognized that the intent of the legislature was "to require more than a few moments of deliberation . . . and to require a scheme designed to implement the calculated decision to kill." The Court went on to say that "instantaneous deliberation is not sufficient to constitute 'prior calculation and design.'" Id. This does not mean, however, that a considerable time lapse between the time a decision to kill is made and the actual killing is required. Nor, does the Ohio Supreme Court focus upon the details of the plan and the care taken in its execution as some states have. E.g., People v. Anderson, 70 Cal.2d 15, 447 P.2d 942 (1968).

For example, in *Cotton*, the defendant ran from a store and was pursued by two officers. After striking one of the officers who had caught him, the defendant grabbed that officer's gun and shot the second officer. Cotton then wrestled the first officer to the ground and fired two shots at him. The defendant next ran to his car where he came upon the second officer who was wounded. The defendant assumed a shooting position and fired the fatal shot into the second officer. Obviously, the defendant did not plan the killing; nor did he have considerable time to think about his actions. The Court nevertheless affirmed an aggravated murder conviction, holding that the evidence revealed "sufficient time and opportunity between the appearance of the police officers on the scene and the fatal shot . . . for the planning of the killing and for the planning to constitute prior calculation." See also State v. Stoudemire, 118 Ohio App.3d 752, 757-58, 694 N.E.2d 86 (1997) ("Instantaneous deliberation is insufficient to constitute prior calculation and design. . . . In effect, he maintains that the circumstances of the killing were so poorly thought out that no rational person would have premeditated them. The absence of foresight does not necessarily prove the lack of a coherent plan to murder a person—there is such a thing as a bad plan. One could also conclude that defendant simply did not care who saw him commit the murder . . . .").

In another case, State v. Robbins, 58 Ohio St.2d 74, 78-79, 388 N.E.2d 755 (1979), the Supreme Court upheld an aggravated murder conviction where an angry defendant assaulted his victim in the hallway of the defendant's apartment house. While the victim was on the floor, the defendant rushed into his own apartment and retrieved a long knife or sword from under his mattress. He then returned to the hall, where his victim was still on the floor asking to be let alone, and stabbed the victim to death. In rejecting the defense contention that death occurred after only momentary deliberation during a heated brawl, the Court stated that the initial aggression followed by the defendant's return to his apartment to secure the weapon, which he used instants later, was sufficient to support a finding of "prior calculation and design." See also State v. Awkal, 76 Ohio St.3d 324, 330, 667 N.E.2d 960 (1996) ("Prior to the shooting, Awkal threatened to kill his wife and her family, and bought a gun."); State v. Ballew, 76 Ohio St.3d 244, 250, 667 N.E.2d 369 (1996) ("Ballew 'adopted a plan to kill.'")(quoting State v. Toth, 52 Ohio St.2d 206, 213, 371 N.E.2d 831 (1977)); State v. D'Ambrosio, 67 Ohio St.3d 185, 196, 616 N.E.2d 909 (1993) ("'[P]rior calculation and design' requires a scheme designed to implement the calculated decision to kill.") (quoting *Cotton*).

In State v. Taylor, 78 Ohio St.3d 15, 20, 676 N.E.2d 82 (1997), cert. denied, 118 S.Ct. 143 (1997), the Ohio Supreme Court wrote that "it is not possible to formulate a bright-line test that emphatically distinguishes between the presence or absence of 'prior calculation and design.' Instead, each case turns on the particular facts and evidence presented at trial." The Court held that there was sufficient evidence in the record for the jury to find prior calculation and design. As to the time interval, the Court noted that "[e]ven though most of the evidence indicates that the time between the jukebox incident and the shooting was only two or three minutes, there was more than sufficient evidence for the jury to reasonably have found that appellant, with prior calculation and design, decided to shoot Alexander in that space of time." Id. at 22. This statement, however, must be read in light of other factors cited by the Court. First, the accused and the victim had a prior hostile relationship. Second, the accused brought a gun into the bar where he knew the victim drank. Third, several of the shots were fired after the victim was already wounded and lying on the floor. As the victim tried to crawl away, the accused "walked closer and fired three or four shots into his back." Under these circumstances, there was more than "instantaneous deliberation."

Other courts have also found short breaks in an initial confrontation preceding a fatal shooting sufficient evidence of prior calculation and design. In State v. Balfour, No. 45478 (8th Dist. Ct. App., 5-12-83), the defendant encountered the victim twice briefly and then went out to his car to obtain a sawed-off shotgun, and in State v. Whitehead, No. C-810183 (1st Dist. Ct. App., 1-13-82), the lapse of several minutes between an initial fist fight and a shooting were sufficient to show prior calculation and design. For aggravated murder, the reflection need not be long, nor the plan elaborate, but it must exist. In contrast, a court of appeals found insufficient prior calculation and design where (1) a shooting took place after a tussle at a bar entrance, (2) there was no break between the fight and the shooting, and (3) the defendant did not go to the bar with the intent to kill. The court found that the shooting occurred during "an almost 'instantaneous eruption of events,'" which the court said did not "reflect the studied analysis that must reinforce prior calculation." State v. Richardson, 103 Ohio App.3d 21, 658 N.E.2d 321 (1995).

In determining the existence of prior calculation and design, the relevant factors include: (1) whether the accused knew the victim prior to the crime, as opposed to a random meeting; (2) whether the relationship between the accused and victim was strained; (3) whether the accused used thought and preparation to decide on a weapon or the site of the homicide; and (4) whether the act was drawn out over a period of time as opposed to an almost instantaneous eruption of events. State v. Richardson, 103 Ohio App.3d 21, 658 N.E.2d 321 (1995).

See also State v. Goodwin, 84 Ohio St.3d 331, 344, 703 N.E.2d 1251 (1999) ("It was an action that required thought on his part to place the gun at the victim's forehead, and he took additional time to decide to pull the trigger in order to carry out a calculated plan to obtain money from the store. This was not a spur-of-the moment accidental shooting on the part of a robber."); State v. Palmer, 80 Ohio St.3d 543, 570, 687 N.E.2d 685 (1997)("The events giving rise to the

death of each victim may have been of a short duration, but the duration of the events was quite long enough for appellant to have conceived of, adopted, and executed a calculated plan to kill each victim.").

AGGRAVATED MURDER: FELONY-MURDER

The difference between murder and this type of aggravated murder is the commission of one of the enumerated felonies. This type of aggravated murder includes a purposeful killing (1) during a kidnaping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, or escape; (2) an attempt to commit one of these enumerated offenses; or (3) while fleeing after committing or attempting to commit one of these enumerated offenses.

Related Crimes

The culpable mental state for this type of aggravated murder, like murder under R.C. 2903.02, is "purpose." See State v. Tyler, 50 Ohio St.3d 24, 36, 553 N.E.2d 576 (1990) ("Murder, under R.C. 2903.02, is any purposeful killing. As such, it is clearly a lesser included offense of aggravated murder under R.C. 2903.01(B).")

In Ohio, involuntary manslaughter "is a lesser included offense to aggravated murder." State v. Williams, 74 Ohio St.3d 569, 574, 660 N.E.2d 724 (1996). See also State v. Thomas, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988) (syllabus, para. 1). It is defined as causing the death of another as the proximate result of committing a felony. The primary difference between aggravated murder and involuntary manslaughter is that the former requires the *purpose* to kill, while involuntary manslaughter only requires a death as the proximate result of a felony. State v. Campbell, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994). The killing need not be purposeful.

An instruction on involuntary manslaughter as a lesser-included-offense of aggravated murder is justified only when the jury can reasonably find against the prosecution on the element of purpose and still find that the defendant's act proximately caused the death. State v. Campbell, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994). A defendant is entitled to an instruction on the lesser included offense of involuntary manslaughter, where there is evidence of the defendant's intoxication while committing an armed robbery and homicide because intoxication might lead a jury to conclude that the defendant did not act with the purpose to kill. State v. Young, No. C-830757 (1st Dist. Ct. App., 5-14-86).

Mens Rea: "Purpose"

Ohio's variation of felony-murder differs from common-law felony-murder as well as the statutory felony-murder recognized in most states. The Ohio rule does not punish accidental deaths committed during the commission of the enumerated offenses. The statute limits culpability to purposeful killings and thus requires an intent to kill. "The requirement that the killing must be purposeful is retained." See Legislative Service Commission (1973) ("The section expands upon the former offense of felony murder by listing kidnaping and escape, in addition to rape, arson, robbery and burglary, as the felonies during which a purposeful killing constitutes aggravated murder.").

However, in State v. Thompson, 55 Ohio App.2d 17, 22, 379 N.E.2d 245 (1977), the language of the statute was ignored. In that case, arsonists were held culpable for aggravated murder in the death of a firefighter, who died while responding to a fire caused by the defendants. The court of appeals held that where an actor has actual knowledge that other persons are exposed to a substantial risk of serious physical harm caused by the burning of a building, the element of purpose to kill may be "presumed" from the natural and probable consequences of the actor's conduct. Arsonists have traditionally been held culpable under the common law for the resultant death of firefighters because it is foreseeable that firefighters will respond to a fire alarm and risk death combating the fire. The court in *Thompson* asked whether the deaths were so remote

> that such deaths could not be a natural and probable consequence of the act of arson? How do you show purpose such as we have here, for it is a rare call indeed for a defendant to step forward and say I intended to kill? Purpose certainly is shown by the acts, conduct and the knowledge exhibited in carrying out whatever is done by the person.

Although it may be sound policy to hold arsonists responsible for the deaths of firefighters resulting from an arsonist's *recklessness*, it is not consistent with the aggravated murder statute, which limits culpability to deaths that are *purposely* caused. The defendants in *Thompson* were outrageously reckless; however, they did not purposely cause the death of the firefighter.

Time Limitation

The statute requires that the killing occur "while" the felony is being committed or attempted, or "while" the actor is "fleeing immediately" thereafter.

> The term "while" does not indicate . . . that the killing must occur at the same instant as the attempted rape, or that the killing must have been caused by the attempt, but, rather, indicates that the killing must be directly associated with the attempted rape as part of one continuance occurrence . . . . The evidence here showed that the murders were associated with the kidnaping, robbery, and rapes "as part of one continuous occurrence."

State v. Cooey, 46 Ohio St.3d 20, 23, 544 N.E.2d 895 (1989) (quoting State v. Cooper, 52 Ohio St.2d 163, 179-80, 370 N.E.2d 725 (1977)). See also State v. Rojas, 64 Ohio St.3d 131, 131 32, 592 N.E.2d 1376 (1992) (defendant did not rob his victim until hours after he had stabbed her and case reflects that he did not stab her in order to rob her).

In State v. Williams, 74 Ohio St.3d 569, 577, 660 N.E.2d 724 (1996), the Supreme Court applied the felony-murder rule, even though the murder was accomplished before the attempted rape and the evidence did not suggest that the intent to rape was formed prior to the fatal assault. The term "while," as used in the felony-murder statute, means that the death must occur as part of the acts leading up to, during, or immediately after the felony. Neither the felony-murder statute nor the case law requires that the intent to commit the felony precede the murder:

> [E]ach of the crimes of which Williams was convicted occurred during one continuous incident. Accordingly, Williams should not be able to escape the felony-murder rule by claiming the rape was merely an afterthought . . . . In this case, the murder of Mr. Melnick was "associated" with the attempted rape of Mrs. Melnick "as part of one continuous occurrence."

See also State v. McNeill, 83 Ohio St.3d 438, 440-41, 700 N.E.2d 596 (1998) ("Because the killing and predicate

felony need not be simultaneous in order to constitute a felony-murder, the technical completion of one before the commission of the other does not remove a murder from the ambit of R.C. 2903.01(B).")("R.C. 2903.01(B) does not require that the felony be the motive for the killing.");State v. Palmer, 80 Ohio St.3d 543, 570, 687 N.E.2d 685 (1997)("[A]ppellant urges that the term 'while,' as that term appears in R.C. 2903.01(B) and 2929.04(A)(7), requires proof that he intended to rob his victims at the time he killed them. However, in prior cases, this court has rejected any [such] notion . . . ."); State v. Biros, 78 Ohio St.3d 426, 678 N.E.2d 891 (1997) (*Williams* "rejected any notion that R.C. 2903.01(B) and 2929.04(A)(7) require proof that the offender formed the intent to commit the pertinent underlying felony before or during the commission of the acts which resulted in the murder victim's death.").

Accomplice Liability

The 1981 amendment addressed the felony-murder culpability of an accomplice in the felony. Culpability for aggravated murder under the felony-murder statute requires that the aider and abettor have the specific intent to cause death. There can be no presumption, conclusive or otherwise, of the specific intent (purpose to kill) merely because the offender participated in a crime "by force and violence or because the offense and the manner of its commission would be likely to produce death." R.C. 2903.01(D). This language appears to reject the position taken by the Ohio Supreme Court in State v. Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976), modified, Lockett v. Ohio, 438 U.S. 586 (1978), which stated that an aider and abettor may be found to have the purpose to kill by engaging in a common design to commit robbery where the manner of its commission would be reasonably likely to produce death. The language of the amendment seems to satisfy the concerns of the United States Supreme Court which, though not addressing the culpability issue, concluded that the Eighth Amendment's constitutional prohibition against cruel and unusual punishment precludes imposition of the death penalty on an aider and abettor who (1) does not himself kill, (2) does not attempt to kill, (3) does not intend that a killing occur, or (4) does not intend that lethal force be used. RC 2903.01(D) was deleted by statutory amendment in 1998. The deletion may be negligible because it involved only an instruction, not a substantive change.

In In re Washington, 81 Ohio St.3d 337, 341, 691 N.E.2d 285 (1998), the Ohio Supreme Court examined the mens rea ("purpose") as applied to an accomplice. "Washington and four others planned and rehearsed an armed robbery. They intended to scare the victim into complying with their demands by brandishing a weapon, as it turn out, Watkins's loaded shotgun. Watkins's shotgun had been demonstrated to be capable of firing when Robinson shot the windshield of a parked car. Based on this and other evidence in the record, . . . a rational trier of fact could have found the essential element of intent to kill proven beyond a reasonable doubt." The Court held that the 1981 amendment was consistent with State v. Scott, 61 Ohio St.2d 155, 165, 400 N.E.2d 375 (1980), in which the Court had held that a "jury can infer an aider and abettor's purpose to kill where the facts show that the participants in a felony entered into a common design and either the aider or abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony or the felony and the manner of its accomplishment would be reasonable likely to produce death."

1997 AMENDMENT

A 1997 amendment added a third type of aggravated murder: the purposeful killing of a child under thirteen years of age at the time of the offense. The death penalty statute was also amended at the same time. See R.C. 2929.04(A)(9).

1998 AMENDMENT

A 1998 amendment added two more types of aggravated murder: (1) a purposeful killing while under detention or breaking detention (as defined in 2921.01) as a result of a having been found guilty or having plead guilty to a felony, and (2) a purposeful killing of a law enforcement officer (as defined in 2911.01) with knowledge or reasonable cause to know that the victim was a law enforcement officer and if either (a) the victim was engaged in official duties at the time of the offense or (b) the offender's specific purpose was to kill a law enforcement officer.