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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 kidnapping, 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;
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 kidnapping.

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 unpreamerided 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 unquestioned, 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.2d 174, 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) ("Under 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 (kidnapping, 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.

Muder 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."). 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. Taylor, 49 Ohio St.3d 7, 644 N.E.2d 226 (1989) ("[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 posses 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) ("[I]f the evidence is confusing and incorrect, reasonable doubt is sufficient to negate guilt.").

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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 355, 363, 595 N.E.2d 915 (1992), cert. denied, 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. 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).

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. 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).

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 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. 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 premolated 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 premolated 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 criti-
cal 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 re-
quire more than a few moments of deliberation ... and to re-
quire a scheme designed to implement the calculated deci-
sion 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 con-
siderable 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.,

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 of-
cifer's gun and shot the second officer. Cotton then wres-
tled 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 con-
viction, holding that the evidence revealed "sufficient time
and opportunity between the appearance of the police offi-
cers on the scene and the fatal shot ... for the planning of
the killing and for the planning to constitute prior calcu-
lation." 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 apart-
ment house. While the victim was on the floor, the defen-
dant 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 momen-
tary 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 in-
stantes later, was sufficient to support a finding of "prior cal-
culation 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 evi-
dence presented at trial." The Court held that there was suf-
ficient evidence in the record for the jury to find prior calcu-
lation 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 appel-
unt, 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 ac-
cused "walked closer and fired three or four shots into his
back." Under these circumstances, there was more than "in-
stantaneous 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 encoun-
tered 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 suf-
ficient to show prior calculation and design. For aggravated
murder, the reflection need not be long, nor the plan elabo-
rate, 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 defen-
dant did not go to the bar with the intent to kill. The court
found that the shooting occurred during "an almost instanta-
aneous eruption of events," which the court said did not "re-
fect the studied analysis that must reinforce prior calcula-
tion." State v. Richardson, 103 Ohio App.3d 21, 658 N.E.2d

In determining the existence of prior calculation and de-
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

See also State v. Goodwin, 84 Ohio St.3d 331, 344, 703
N.E.2d 1251 (1999) ("I'll 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 appel­
ant to have conceived of, adopted, and executed a calculat­
ed plan to kill each victim.

AGGRAVED MURDER: FELONY-MURDER

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

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 of­
fense 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) (syl­
labus, 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 in­
toxication 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 pur­
poseful killings and thus requires an intent to kill. "The re­
quirement 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
kidnapping 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 ig­
nored. In that case, arsonists were held culpable for aggra­
vated 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 ele­
ment 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 in­
deed for a defendant to step forward and say I intend­
ed 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 at­
tempt, but, rather, indicates that the killing must be di­
rectly associated with the attempted rape as part of one
continuance occurrence . . . . The evidence here
showed that the murders were associated with the kid­
napping, 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 183, 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 after­
thought . . . 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) (“Appellant 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, 429, 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.

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.