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Submission of Lesser Included Offenses to the Jury

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SUBMISSION OF LESSER INCLUDED OFFENSES TO THE JURY

I. INTRODUCTION

The purpose here is briefly to review the law and applicable policy considerations concerning the submission of lesser included offenses to the jury with particular reference to the law of Nebraska. The problem of submission of lesser included offenses to the jury is but a small segment of the broad problem of the respective spheres of judge and jury. Submission of lesser offenses in other words enables a jury to compromise in violation of the court's instructions.

A. Definition of Lesser Included Offense.

An offense is a lesser included offense if (1) the acts necessary to constitute the offense are alleged in the indictment; (2) the offense is not expressly charged in the indictment ;and (3) the penalty for committing the offense is less than the penalty for committing the offense expressly charged in the indictment.

B. Types of Lesser Included Offenses

Lesser included offenses are of two types, those necessarily included in the greater offense charged and those which are not.

The first type of included offense is a refinement of the first element of a lesser included offense, *viz.*, that the acts necessary to constitute the lesser offense must be charged in the indictment. An example of this type of included offense is second degree murder when the only express charge in the indictment is first degree murder. The reason for this necessary inclusion is that all of the elements of second degree murder are contained within the elements of first degree murder which in addition requires the aggravating element of premeditation. The necessarily included offense is an application of the axiom "the whole equals the sum of its parts".

The second type of lesser included offense is one that is not necessarily included in the offense charged because it has additional elements which are not requisites for the commission of the greater offense. It is a lesser included offense only when the indictment sets forth the additional elements necessary to constitute the offense. An example would be adultery under

an indictment charging rape. If the indictment sets forth the acts necessary to constitute rape and also states that defendant was married adultery would be a lesser included offense of rape.

C. Statutes Allowing Conviction of Lesser Included Offenses

While at common law the jury could not convict of a misdemeanor when the indictment charged a felony the jury was permitted to convict of a lesser included misdemeanor on an indictment charging a misdemeanor or of a lesser included felony on a greater felony charge provided the acts necessary to constitute the offense were set out in the indictment, viz., the lesser offense did not have to be of the necessarily included variety.[1] Many states have enacted statutes[2] governing the submission of lesser included offenses some of which, in contrast to the common law rule, have been interpreted to require that the lesser included offense must be necessarily included.[3]

Once it is determined that a lesser offense is of a type which can be submitted to the jury, the next step is to determine whether the lesser offense can be submitted to the jury in a particular factual situation.

II. DEFENDANT'S RIGHT TO HAVE LESSER INCLUDED OFFENSES SUBMITTED TO JURY

A. In General

The defendant is entitled to have lesser included offenses, lesser degrees, or attempts to commit those offenses not specifically charged in the indictment submitted to the jury if the evidence warrants the instruction. If the trial court refuses to

[1] 10 Halsbury, Laws of England, § 791 (3rd Ed. 1955).

[2] Cal. Pen. Code Ann. § 1159 (1956); Iowa Code Ann. §§ 785.5, 785.6 (1950); Mass. Gen. Laws Ann. c. 278, § 12 (1959); Mich. Stat. Ann. § 28.1055 (1954); Neb. Rev. Stat. § 29-2025 (Reissue 1952); N. Y. Pen. Law § 610 (1944); Ohio Gen. Code Ann. § 13448-2 (1938); Okla. Crim. Proc. Stat. Ann. § 916 (1937); Tenn. Code Ann. § 40-2520 (1955).

[3] People v. Greer, 30 Cal.2d 589, 184 P.2d 512 (1947); Giles v. United States, 144 F.2d 860 (9th Cir. 1944); State v. McCall, 245 Iowa 991, 63 N.W.2d 874 (1954). Liberal statutory construction was accorded the included offense statute in Comm. v. Squires, 97 Mass. 59 (1867); Daywood v. State, 157 Tex. Crim. App. 266, 248 S.W.2d 479 (1952); State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953); State v. Costello, 200 Iowa 313, 202 N.W. 212 (1925); People v. Miller, 143 App. Div. 251, 128 N.Y.Supp. 549, affirmed 292 N.Y. 618, 96 N.E. 1125 (1911).

submit the instruction on defendant's timely request it is reversible error.[4]

The requirement that the instruction on the lesser crime must be warranted by the evidence merely means that there must be some evidence which if believed might warrant a conviction of the lesser offense and it does not matter if the evidence is slight or circumstantial.[5] The tendency of the courts is always to instruct on the lesser offense upon defendant's request. In *Bradberry v. State*,[6] for example, the court noted that:

> . . . It is much the safer rule to charge upon all of the degrees of homicide included in the indictmnet, when a party is on trial for murder, unless it is perfectly clear to the judicial mind that there is no evidence tending to bring the offense within some particular degree.[7]

Usually if the lesser offense is of the necessarily included variety,[8] there is a factual question[9] which necessitates an instruction on the lesser included offense. However, if there is total lack of evidence to support an instruction on a lesser offense, it is not error to fail to give the instruction.[10] In *State v. Stidham*,[11] for example, defendant was convicted of first degree mur-

[4] See People v. Pursley, 302 Ill. 62, 134 N.E. 128 (1922); Sigh v. State, 35 Ariz. 432, 280 Pac. 672 (1929).

[5] See 1 Reid's Branson, Instructions to Juries, § 57 (1936) and 5 Wharton, Criminal Law and Procedure, § 2099 (1957). In State v. Stortecky, 273 Wis. 362, 77 N.W.2d 721 (1956), the court's dictum pointed out: "If the evidence in any reasonable view could support any of the lower degrees requested for submission, the refusal would be error, for which prejudice to the defendant would be undeniable."

[6] 37 Ala. 327, 67 So.2d 561 (1953); see also, Kirk v. State, 103 Neb. 484, 172 N.W. 527 (1919).

[7] 37 Ala. App. 327, 67 So.2d 561, 563 (1953).

[8] For example, second degree murder included within a charge of first degree murder.

[9] The element of intent, for example.

[10] In stating that the judge should not instruct the jury on lesser offenses not proved by the evidence the court in People v. Mussenden, 308 N.Y. 558, 127 N.E.2d 551 (1955), said: "As to the jury's proper function or duty, that consists solely of applying the legal definitions of crime, as laid down by the trial court, to the evidence and of conviction of the crime charged, if that is established beyond a reasonable doubt." See also, Key v. State, 211 Ga. 384, 86 S.E.2d 212 (1955); State v. Mitchell, 181 Kan. 193, 310 P.2d 1063 (1957); Moore v. State, 260 P.2d 410 (1953); 97 Okla. Crim. Rep. 187, 347 U.S. 978 (1953); and the annotations in 21 A.L.R. 603, 27 A.L.R. 1097 and 102 A.L.R. 1019.

[11] 305 S.W.2d 7 (1957).

der and the evidence showed that defendant threatened to kill the deceased many times prior to the killing and that he had confessed to premeditated murder. The defense was an alibi. Defendant urged on appeal that the trial court erred in refusing to instruct on second degree murder and manslaughter. The appellate court held however, that the only submissible issue was first degree murder and that it was proper to refuse to instruct on the lesser offenses.

In the opposite situation, where the instruction on the lesser offense is given at defendant's request and there is no evidence to support it, there is no error even though, under the circumstances, there would have been had the instruction not been requested.[12] Hence, if defendant is charged with first degree murder and there is evidence tending to show guilt of a lesser crime and some evidence supporting an acquittal, although in many jurisdictions it will be error for the court on its own initiative to instruct on the lesser offense, it will not be if defendant requests it. The reason usually given is that the defendant invited the error and therefore cannot complain. This doctrine is followed in Nebraska.[13]

If the trial court instructs the jury on any lesser included crimes, the court must instruct the jury that if there is reasonable doubt as between the degrees or grades of crime, they must convict the defendant of the lesser crime.[14]

[12] In State v. Gottstein, 111 Wash. 600, 191 Pac. 766, 767 (1920), the court in refusing to grant a reversal on the grounds that the trial court instructed on second degree murder and manslaughter at the request of the defendant when the evidence did not support the instruction said: "If, under the evidence, it was error to submit the question of murder in the second degree, the defendant by his request invited such error." See also, Stump v. State, 132 Neb. 49, 271 N.W. 163 (1937).

[13] See Stump v. State, 132 Neb. 49, 271 N.W. 163 (1937).

[14] This is the general rule in the great majority of jurisdictions. See 5 Wharton, Criminal Law and Procedure, § 2099 (1957); 1 Reid's Branson, Instruction to Juries, § 57 (1936); Ann. 20 A.L.R. 1258.

Contra: Comm. v. Green, 292 Pa. 579, 141 Atl. 624 (1928). In Pennsylvania the court has no authority to tell the jury the degree or grade of crime of which the defendant may be convicted. This question, under statute, is exclusively for the jury. Apparently it is felt that all matters, including punishment, should be within the province of the jury when determining the guilt or innocence of the accused.

B. NEBRASKA LAW

In Nebraska, as elsewhere, defendant is entitled to an instruction on the lesser included offense if the evidence warrants such an instruction and a refusal to instruct on the lesser offense when properly requested by deefndant is reversible error.[15] Of, course, if there is no evidence tending to show guilt of the lesser offense the court's refusal to so instruct is proper.

Nebraska does not have a general statute making an attempt a lesser included crime. Under Nebraska's statutes, before an attempt is a crime it must expressly be stated to be a crime elsewhere in the statutes.[16] If the proof shows a completed crime a minority of courts hold that the defendant cannot be convicted of attempt because failure is one element of attempt.[17] Most courts however hold to the contrary on a theory of harmless error, harmless because the proof shows a completed offense.[18] The majority position of course, requires the assumption that defendant is in fact guilty of the completed offense notwithstanding that the jury acquitted him and though defendant claims he is not guilty of anything.

Nebraska has not yet ruled on the question.

III. PROVINCE OF TRIAL COURT TO INSTRUCT ON LESSER INCLUDED OFFENSES

The discussion here concerns the right of the trial court to instruct on lesser included offenses in the absence of a request by defendant. Whether the court may lawfully do so depends on the circumstances. Various possible situations will be considered.

[15] In Moore v. State, 147 Neb. 390, 23 N.W.2d 552 (1947), under an indictment charging the defendant with violation of Neb. Rev. Stat. § 28-410 (Reissue 1952) the court held that it was prejudicial error to refuse to give an instruction on assault or assault and battery. The court relied on Neb. Rev. Stat. § 29-2025 (Reissue 1952).

[16] Neb. Rev. Stat. § 29-2025 (Reissue 1952), "Upon an indictment for an offense consisting of different degrees the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto; and upon an indictment for any offense the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense."

[17] See People v. Lardner, 300 Ill. 264, 133 N.E. 375 (1921).

[18] See People v. Baxter, 245 Mich. 229, 222 N. W. 149 (1928).

A. INSTRUCTION WARRANTED; NOT REQUESTED; GIVEN; CONVICTION ON LESSER OFFENSE

In the first situation (1) the instruction on the lesser offense is warranted by the evidence; (2) the court instructs on the lesser offense; (3) defendant does not request the instruction and; (4) defendant is convicted of the lesser crime.

1. *In general*

In this situation the courts are agreed that the trial court may lawfully submit the lesser offense.[19]

When the lesser offense is necessarily included (second degree murder for example, under a first degree murder indictment) there will almost always be evidence warranting an instruction on the lesser offense because the elements making up the lesser offense are also elements of the greater. Degrees of homicide, an example of necessarily included offenses, are distinguished on the basis of the defendant's intent and it is generally said that intent is a question of fact for the jury.[20]

2. *Nebraska Law*

In Nebraska, as elsewhere, the trial court may clearly instruct on lesser offenses if from any view of the evidence the instruction can be supported. In *Kirk v. State*,[21] for example, defendant shot and killed a policeman and was charged with first degree murder. A second degree murder instruction was given,

[19] In People v. Brown, 415 Ill. 23, 112 N.E.2d 222 (1953), the defendant was indicted for murder and convicted of manslaughter. The evidence showed that the defendant was under the influence of drugs and possibly insane at the time of the killing. The Supreme Court of Illinois affirmed the decision, holding that the instruction on manslaughter was rightly submitted to the jury since under the facts the defendant could have been found to not have the mens rea necessary for a conviction of murder but sufficient to constitute manslaughter. See also, People v. Beil, 322 Ill. 434, 153 N.E. 639 (1926).

[20] In State v. Perry, 78 S.C. 184, 59 S.E. 851, 852 (1907), the court stated: "The degree of a homicide in any special case depends upon the motive which prompted the killing, and this is a matter entirely for the jury." and ". . . whether any particular crime as defined by the judge has been committed, or whether the case is one of self-defense, as explained by the judge, is a question of fact, and is alone for the jury."

[21] 103 Neb. 484, 172 N.W. 527 (1919).

however, and defendant was convicted of this offense. In affirming the court stated:

> While the evidence would, no doubt, sustain a conviction of murder in the first degree, there may be a question as to proof of deliberation and premeditation, and it was entirely proper to submit the question of second degree murder for the consideration of the jury.[22]

B. INSTRUCTION UNWARRANTED; NOT REQUESTED; GIVEN; CONVICTION ON LESSER OFFENSE

In the second situation there is (1) no evidence tending to prove the lesser offense; (2) either no evidence supporting an acquittal or some evidence which, if believed, would support an acquittal; (3) the evidence warrants a conviction of the higher offense; (4) the trial court without a request from defendant instructs on the unsupported lesser offense; and (5) the defendant is convicted of the lesser offense.

1. *In general*

Here the cases are conflicting with a majority holding that the instruction on the lesser offense though technical error is not ground for reversal.[23] The reasoning of the majority is simply that the jury doubtless wanted to be lenient and really thought defendant guilty of the higher offense. The possibility of preju-

[22] Id. at 487 and 528.

[23] Showing the general feeling of the courts upholding the conviction of the defendant on a lesser offense unwarranted by the evidence, the court in Irby v. State, 18 Okla. Crim. Rep. 671, 197 Pac. 526 (1920), stated: "From a full consideration of all the evidence we are convinced that the jury would have been fully justified in convicting the defendant of murder, and he has cause to congratulate himself that the jury found him guilty of manslaughter in the first degree only, and assessing the minimum punishment." See also, State v. Quan Sue, 191 Iowa 144, 179 N.W. 972 (1920); Murphy v. People, 9 Colo. 435, 13 Pac. 528 (1887); Houston v. State, 105 Miss. 413, 62 So. 421 (1913). For the effect of a statute allowing the jury to find the degree of homicide (a necessarily included offense) see People v. Muhlner, 115 Cal. 303, 47 Pac. 128 (1896). In New Mexico the question is resolved by statute; New Mex. Stat. § 41-13-1 (1953): ". . . no judgment shall be stayed, arrested or in any manner affected because the evidence shows or tends to show the accused guilty of a higher degree of the offense than that of which he is convicted." Under a statute such as this, it of course would never be reversible error to instruct the jury on the lesser crime even though there is no evidence to support the instruction; State v. Horton, 258 P.2d 371 (1953). Compare that case with the overruled case of State v. Reed, 39 P.2d 1005 (1934).

dice to defendant because the jury compromised is simply ignored. In *Lytton v. State*,[24] for example, the evidence showed that two persons were quarreling and one picked up a razor and advanced toward the other who drew a pistol. Defendant, a bystander, struck the person who drew the pistol knocking it from his hand, picked up the pistol and fired at the prostrate victim, thereby killing him. The indictment charged murder but the jury was also instructed on manslaughter under the theory of self-defense and defendant was convicted of manslaughter. The appellate court affirmed saying:

> . . . if the jury in a homicide case find the defendant guilty of a lower degree where the law and facts make it murder, it is error in favor of the defendant of which he cannot complain.[25]

The minority position seems more realistic: that defendant was prejudiced by the instruction either because the jury compromised or because it led the jury to infer that there was evidence proving the lesser offense.[26] In *De Graaf v. State*,[27] for example, defendant was charged with robbery and the conflicting testimony showed either a completed offense or nothing. An instruction was nevertheless given on assault with intent to rob, and defendant was convicted of that offense. In reversing, the court stated:

> Where some of the members might, under the evidence presented, hesitate or refuse to render a verdict of guilty of the serious offense charged, with its accompanying heavy penalty, such hesitation may be dissipated and overcome if instructions

[24] 12 Okla. Cr. 204, 153 Pac. 620 (1915). For the arguments on how the consideration of the severeness of the penalty by the jury tends to result in compromise verdicts and thereby prejudices the defendant, see 17 U. Chi. L. Rev. 400. See also, 37 Neb. L. Rev. 802.

[25] 12 Okla. Crim. 204, 253 Pac. 620, 622 (1915).

[26] Recognizing the possibility that an instruction on the lesser offense when not warranted by the evidence would mislead the jury the court in Dickens v. People, 67 Colo. 409, 186 P. 277 (1919), adopted this statement: "The instructions should in all cases be based upon the evidence, and an instruction, no matter how correct the principle which it may announce, that impliedly assumes the existence of evidence which is not given, is erroneous. It is calculated to bewilder and mislead the jury by producing the impression that in the mind of the court some such state of facts as the instruction supposes may be inferred from the evidence given, or concealed within it." See the other authorities cited therein. Some courts reverse the conviction without going further than saying that the defendant was prejudiced. See State v. Kruger, 60 Wash. 542, 111 Pac. 769 (1910), and Berry v. State, 122 Ga. 429, 50 S.E. 345 (1905).

[27] 34 Ala. App. 137, 37 So.2d 130 (1948).

be given by the trial court inviting a verdict of guilty of a lesser offense carrying with it a lighter penalty.[28]

2. *Nebraska Law*

The Nebraska court has not yet spoken on the question. While the court has consistently held that defendant cannot complain of an instruction more favorable than is required by law, that rule has not yet been applied to the situation where defendant is convicted of the unwarranted lesser offense when the evidence proves the greater offense or nothing.[29]

C. INSTRUCTION UNWARRANTED; NOT REQUESTED; GIVEN; CONVICTION ON GREATER OFFENSE

In a third situation (1) there is no evidence proving the lesser crime; (2) the trial court without a request from defendant instructs on the unwarranted lesser offense; but (3) defendant is convicted of the greater offense.

1. *In general*

Here the courts uniformly hold that defendant cannot secure a reversal.[30] In *Bassinger v. State*,[31] for example, defendant was charged and convicted of first degree murder, but an instruction

[28] Id. at 142 and 135.

[29] In Denison v. State, 117 Neb. 601, 221 N.W. 683 (1928), under the facts of the case, it tended to show that the question will probably not arise in Nebraska. There, defendant, during a mob attack on a group of Syrians, shot and killed one of the Syrians. The indictment charged the defendant with first degree murder. The trial court instructed the jury on first and second degree murder and manslaughter. The defendant, on a conviction of manslaughter, alleged that the trial court erred in submitting the instruction on manslaughter when there was no evidence to support the instruction. The appellate court affirmed the conviction on the ground that the degrees of homicide were distinguished on the basis of the defendant's intent, and intent was a question of fact and should be resolved by the jury. On this point also see, Moore v. State, 148 Neb. 747, 29 N.W.2d 366 (1947) and State v. Hutter, 145 Neb. 798, 804, 18 N.W.2d 203 (1945), where the court stated: "We are convinced that the correct rule is that §§ 28-401, 28-402 and 28-403, R.S.1943, defining murder in the first degree, murder in the second degree and manslaughter, construed with § 29-2027, R.S.1943, define the degree of criminal homicide, a single offense."

[30] See State v. Quinn, 56 Wash. 295, 105 Pac. 818 (1909); anno. 21 A.L.R. 621, 27 A.L.R. 1099, 102 A.L.R. 1025 and 14 R.C.L. 815.

[31] 142 Neb. 93, 5 N.W.2d 222 (1942). See also, Solesbee v. State, 204 Ga. 16, 48 S.E.2d 834 (1948).

was also given on second degree murder. The proof showed first degree murder or nothing. In affirming, the court said:

> If the trial court by this instruction opened the door and made it possible for the jury to find the defendant guilty of murder in the second degree and escape the penalty for which the law imposes for murder in the first degree, it was not error prejudicial to the defendant.[32]

2. *In Nebraska*

The Nebraska cases are in accord.[33]

IV. THE DUTY OF THE TRIAL COURT TO INSTRUCT ON LESSER OFFENSES

Here (1) some of the evidence supports an instruction on the lesser offense; and (2) defendant does not request and the trial court does not give the instruction.

A. In General

The authorities are conflicting on whether a failure to instruct on a lesser offense warranted by the evidence is reversible error in the absence of a request by the defendant.[34] The better rule would be to make it the duty of the trial court to so instruct. Defendant claims he is innocent of anything and it seems unfair to ask him to possibly dig his own grave by requesting an instruction and thus enabling the jury to compromise. Besides the question is one of fact and so is for the jury to decide.

[32] 142 Neb. 93, 103, 5 N.W.2d 222, 228.

[33] See Bassinger v. State, 145 Neb. 93, 5 N.W.2d 222 (1942).

[34] Supporting the more liberal view the court in State v. Burnett, 213 N.C. 153, 195 S.E. 356, 357 (1938), said: "When there is evidence tending to support a milder verdict than the one charged in the bill of indictment, the defendant is entitled to have the different views presented to the jury under a proper charge, and an error in this respect is not cured by a verdict convicting him of the crime charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree if the different views, arising on the evidence, had been correctly presented by the trial court." The contrary view, where a request must be made before the defendant can claim prejudicial error is advocated by the court in State v. Mitchell, 3 Utah 2d 70, 278 P.2d 618 (1955); People v. Nudo, 38 C.A.2d 381, 101 P.2d 162 (1940).

B. NEBRASKA LAW

The Nebraska Rule however, is to the contrary. Thus in *McIntyre v. State*,[35] the court upheld defendant's conviction for cutting and stabbing with intent to wound notwithstanding the trial court's failure to instruct on assault and battery, a charge supported by the evidence:

> Even if we should assume that there was sufficient evidence of a simple assault or of assault and battery, the failure to request instructions to the jury on these lesser offenses waived error.[36]

V. CONCLUSION

It must be remembered that the problems raised in instructing on lesser included offenses are but a small segment of the broad conflict between the respective spheres of judge and jury. This discussion does not attempt to cover all of the collateral problems raised, but it is hoped that the discussion on the central problems will be beneficial to the reader.

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[35] 116 Neb. 600, 218 N.W. 401 (1928).

[36] Id. at 601 and 402.