



Ohio Legislative Service Commission

122nd Final Bill Analysis

Effective Date update from the LSC Status Sheet: 06/30/1998

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Sub. H.B. 5

122nd General Assembly
(As Passed by the General Assembly)

Reps. Taylor, O'Brien, Jerse, Batchelder, Lucas, Cates, Fox, Garcia, Myers, Grendell, Brading, Householder, Pringle, Thomas, Carey, Hottinger, Mottl, Roman, Core, Metelsky, Johnson, Colonna, Lewis, Verich, Brady, Thompson, Mason

Sens. Blessing, Latta, Gaeth, Oelslager, Mumper, Ray, Cupp, Watts, Suhadolnik, Drake

Effective date: June 30, 1998

- Expands the offense of murder to also prohibit a person from causing the death of another as a 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, that is not the offense of voluntary manslaughter or involuntary manslaughter, and that does not become a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.
- Repeals a provision of the aggravated murder statute that deals with jury instructions regarding conclusive and permissive inferences and proof of specific intent to cause death.
- Increases the penalty for the offense of improperly discharging a firearm at or into a habitation or school, when the offender has no prior conviction of that offense, from a felony of the third degree to a felony of the second degree.

CONTENT AND OPERATION

Murder

Preexisting law

Formerly, the offense of "murder" was committed only when a person purposely caused the death of another or the unlawful termination of another's pregnancy. The Criminal Sentencing Law, unchanged by the act, specifies that a person who is convicted of murder must be imprisoned for an indefinite term of 15 years to life or, in certain circumstances under the Sexual Predator Law, a term of life imprisonment without parole. In addition, the person also may be fined an amount fixed by the court but not more than \$15,000. (R.C. 2903.02, and R.C. 2929.02(B), not in the act.)

Operation of the act

The act adds a "felony murder" prohibition to the murder statute. The new prohibition prohibits a person from causing the death of another as a proximate result of the offender's committing or attempting to commit an "offense of violence" (see COMMENT 1) that is a felony of the first or second degree and that is not the offense of voluntary manslaughter or involuntary manslaughter. The act specifies that the new prohibition does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense. (See COMMENT 2 and 3.) (R.C. 2903.02(B) and (C).)

Proof in an aggravated murder case

Preexisting law

Prohibitions that constitute the offense. The preexisting aggravated murder statute contains three prohibitions, none of which are changed by the act (R.C. 2903.01(A), (B), and (C)):

- (1) It prohibits a person from purposely, and with prior calculation and design, causing the death of another or the unlawful termination of another's pregnancy.
- (2) It prohibits a person from purposely causing the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
- (3) It prohibits a person from purposely causing the death of another who is under 13 years of age at the time of the commission of the offense.

Penalty for the offense. The Criminal Sentencing Law, unchanged by the act, specifies that a person convicted of aggravated murder must be sentenced, depending on the circumstances of the case and the offender, to death, life imprisonment without parole, life imprisonment with parole eligibility after 30 full years of imprisonment, life imprisonment with parole eligibility after 25 full years of imprisonment, or life imprisonment with parole eligibility after 20 years of imprisonment (R.C. 2903.01(C), and R.C. 2929.02, 2929.022, and 2929.03, not in the act).

Specific intent requirement; inferences regarding intent. Formerly, the aggravated murder statute also contained a provision with respect to the proof of a defendant's intent to cause the death of another in a prosecution for aggravated murder and with respect to how a jury could determine whether that intent had been proved when the defendant was charged under the second prohibition, above. The provision contained three components (R.C. 2903.01(E)):

- (1) It prohibited a conviction of aggravated murder unless the person charged with the offense was specifically found to have intended to cause the death of another or, with respect to the first two prohibitions above, the unlawful termination of another's pregnancy.
- (2) It prohibited a trial judge from instructing a jury that the jury could conclusively infer that a person who committed or attempted to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape (see the second prohibition, above) intended to cause the death of another person killed during or after the commission of the offense because the person engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death.
- (3) It (a) permitted a court to instruct a jury that the jury could infer that a person who committed or attempted to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape intended to cause the death of another person killed during or after the commission of the offense because the person engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death but (b) required the court also to instruct the jury that the inference was nonconclusive, that the inference could be considered in determining intent, that the jury was to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution was required to prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

Operation of the act

The act repeals R.C. 2903.01(E) in its entirety (the provision regarding proof of specific intent, the prohibition against a conclusive inference, and the provision regarding a permissive inference). (See **COMMENT 4**.)

Improperly discharging a firearm at or into a habitation or school

Preexisting law

The preexisting offense of "improperly discharging a firearm at or into a habitation or school" is committed when a person, without privilege to do so, knowingly discharges a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual or a school. The prohibition does not apply to any officer, agent, or employee of Ohio, any other state, or the United States, or to any law enforcement officer, who discharges the firearm while acting within the scope of the officer's, agent's, or employee's duties. Formerly, improperly discharging a firearm at or into a habitation or school was a felony of the third degree or, if the offender previously had been convicted of or pleaded guilty to the offense, a felony of the second degree. (R.C. 2923.161.)

Operation of the act

The act increases the penalty for improperly discharging a firearm at or into a habitation or school to a felony of the second degree *when the offender has no prior conviction of the offense*. Thus, under the act, the offense is a felony of the second degree *in all cases*, regardless of whether the offender previously has been convicted of the offense. (R.C. 2923.161(C).)

COMMENT

1. "Offense of violence," as defined in preexisting law (R.C. 2901.01(A)(9)), unchanged by the act, means any of the following offenses:

(a) Aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, felonious assault, aggravated assault, assault, aggravated menacing, menacing by stalking, menacing, kidnapping, abduction, extortion, rape, sexual battery, gross sexual imposition, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary under certain circumstances, inciting to violence, aggravated riot, riot, inducing panic, domestic violence, intimidation, intimidation of crime victim or witness, escape, and improperly discharging a firearm at or into a habitation or school, and the former offense of felonious sexual penetration;

(b) A violation of an existing or former municipal ordinance or law of Ohio, any other state, or the United States, substantially equivalent to any offense listed in (a);

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of Ohio, any other state, or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense described in 1 (a), (b), or (c).

2. The offenses of violence listed in **COMMENT 1** that are felonies of the first or second degree and that do not become felonies of the first or second degree only if the offender previously has been convicted of that offense or another specified offense are voluntary manslaughter (but see below), involuntary manslaughter in certain circumstances (but see below), felonious assault, kidnapping, rape, aggravated arson, aggravated robbery, robbery in certain circumstances, aggravated burglary, burglary in certain circumstances, and the former offense of felonious sexual penetration as it existed prior to September 3, 1996. As described above in "***Murder***," the act specifies that the "felony murder" prohibition it adds to the offense of murder does not apply in circumstances in which a person causes the death of another as a proximate result of the offender's committing or attempting to commit voluntary manslaughter or involuntary manslaughter. Note that the act, as described in "***Improperly discharging a firearm at or into a habitation or school***," makes the offense of improperly discharging a firearm at or into a habitation or school a felony of the second degree regardless of whether the offender has a prior conviction of that offense; under former law, the offense generally was a felony of the third degree and became a felony of the second degree only if the offender previously has been convicted of that offense.

3. The new "felony murder" prohibition the act adds to the murder statute is similar to the preexisting offense of "involuntary manslaughter," contained in R.C. 2903.04, and unchanged by the act. That offense prohibits a person from doing either of the following: (a) *causing the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony*, or (b) causing the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor. *A violation of the first prohibition is a felony of the first degree*, and a violation of the second prohibition is a felony of the third degree. Additional sanctions are provided if the felony or misdemeanor that the offender committed or attempted to commit, that proximately caused the death of the other person or the termination of another's pregnancy, and that is the basis of the offender's violation of the first or second prohibition included, as an element of that felony or misdemeanor offense, the offender's operation or participation in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft while the offender was under the influence of alcohol, a drug or abuse, or both.

4. R.C. 2903.01(E), enacted in 1981, is a statutory affirmation of the holdings of several decisions of the United States Supreme Court made shortly before 1981. The last phrase of the division reflects the holding in *State v. Winship* (1970), 397 U.S. 358, that the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged (which in a prosecution for aggravated murder would include proof beyond a reasonable doubt of the accused's intent to cause the death of another). The two provisions regarding jury instructions and conclusive and permissive inferences reflect holdings in *County Court of Ulster County v. Allen* (1979), 442 U.S. 140, and *Sandstrom v. Montana* (1979), 442 U.S. 510, to the effect that a presumption or inference must not undermine the factfinder's responsibility at trial, based on the evidence adduced by the prosecution, to find the ultimate facts beyond a reasonable doubt. A presumption or inference that shifts the burden of proof to the accused to prove that the accused lacked the requisite intent to cause death would relieve the prosecution from its burden of proving that the accused had the requisite intent and would unconstitutionally deny due process of law to the accused.

In *Lockett v. Ohio* (1978), 438 U.S. 586, Justices White, Blackmun, and Marshall criticized Ohio case law that permitted a jury to find that a person had a purpose to cause the death of another solely because the person had an intent to engage in a common design with others to commit an offense that was likely to cause death. R.C. 2903.01(E) was enacted also to prohibit a jury from making such a finding in an aggravated murder case unless other convincing evidence is present in the case.

HISTORY

ACTION DATE JOURNAL ENTRY

Introduced 01-21-97 p. 96

Reported, H. Criminal Justice 06-11-97 p. 1087

Passed House (85-12) 06-18-97 pp. 1133-1134

Reported, S. Judiciary 03-17-98 p. 1730

Passed Senate (32-0) 03-17-98 p. 1737

House concurred in Senate

amendments (91-6) 03-18-98 pp. 2278-2279

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