

Winter 1965

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Recommended Citation

Lee E. Stanford, *Manslaughter: Adequacy of Provocation in Missouri*, 30 MO. L. REV. (1965)
Available at: <https://scholarship.law.missouri.edu/mlr/vol30/iss1/14>

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MANSLAUGHTER: ADEQUACY OF PROVOCATION IN MISSOURI

The present Missouri requirements of adequate provocation necessary to reduce a homicide from murder to manslaughter need reconsideration. The result in the *Brookshire* case is a cogent example of this need.

*State v. Brookshire*¹

Defendant's version of the facts,² briefly stated, are as follows. Defendant and deceased engaged in an argument and deceased threatened to kill defendant with a knife. Defendant became worried and obtained a gun. Later, another argument developed and deceased began chasing defendant. As deceased was gaining ground defendant whirled and shot, killing deceased. A large black-handled knife was found beside the body of deceased.

Defendant was tried on first degree murder. The trial court instructed the jury on the degrees of murder, on self-defense and on defense of home. However, following a long line of Missouri decisions³ the court refused to instruct on manslaughter. Defendant was convicted of second degree murder and sentenced to ten years in the penitentiary. One of the grounds for his appeal was the refusal of the court to give a manslaughter instruction.

The Missouri Supreme Court affirmed the trial court's refusal because the evidence failed to disclose personal violence, i.e., a battery, to defendant. For this reason it was held there was not adequate provocation to reduce the killing to manslaughter.

I. THE MISSOURI BATTERY TEST

The Missouri requirement of a battery for adequate provocation was stated as long ago as 1866 in the leading case of *State v. Starr*.⁴ The trial court found no evidence of personal violence and the supreme court found no error in the refusal to instruct on manslaughter, saying,

Where there is lawful provocation, the law, out of indulgence to human frailty, will reduce the killing from the crime of murder to manslaughter; but neither words of reproach, how grievous soever, nor indecent provoking actions or gestures, however much calculated to excite indignation or arouse the passions, are sufficient to free the party killing from the guilt of murder. To have the effect to reduce the guilt of killing to the lower grade, the provocation must consist of personal violence . . . There must be an assault upon the person, as where the provocation was by

1. 368 S.W.2d 373 (Mo. 1963).

2. The state presented substantial evidence conflicting with defendant's story and the jury may have correctly disregarded his account. Nevertheless, an instruction on manslaughter may be based solely on defendant's testimony. For Missouri cases on this point see *State v. Brookshire*, *supra* note 1, at 384.

3. *State v. Brookshire*, *supra* note 1, and cases cited therein; *State v. Haynes*, 329 S.W.2d 640 (Mo. 1959), and cases cited therein; *State v. Bongard*, 330 Mo. 805, 51 S.W.2d 84 (1932), and cases cited therein.

4. 38 Mo. 270 (1866).

pulling the nose, purposely jostling the slayer aside in the highway or other direct and actual battery. . . .⁵

The personal violence or battery test for adequate provocation has persisted in Missouri down to the present day.⁶ There have been exceptions, notably *State v. Brown*⁷ and *State v. Garrison*,⁸ wherein apprehension of apparent, imminent danger has been held to be sufficient provocation. These cases, unfortunately, have long been overruled.⁹

The battery requirement can become somewhat absurd in certain fact situations.¹⁰ *State v. Wright*¹¹ is such a case. The defendant shot deceased who, after making suggestive advances towards her, began unzipping his trousers. The court found a technical touching when deceased placed his arm around defendant. However, the court went on to say that a close male relative of defendant would be entitled to a manslaughter instruction if he killed deceased upon encountering his female kin in such circumstances. Therefore, since defendant should be in no less position than her brother or father she deserved a manslaughter instruction.

The irrationality of the battery test occurred to the supreme court in *State v. Bongard*.¹² But after attaining recognition the problem was summarily set aside. The court found no error in the refusal of an instruction on manslaughter where deceased had threatened defendant with a knife thereby placing defendant in fear of imminent danger. The court stated:

It may seem illogical to say the insulting but comparatively harmless jostling of a person on the highway, or a mere tweaking of the nose, may be sufficient to constitute lawful provocation, whereas a hostile demonstration with a deadly weapon threatening imminent danger to life will not, though accompanied by vile and insulting language. But the law cannot have a rule exactly accommodating itself to the varied dispositions of people and altogether putting a premium on turbulent tendencies.¹³

The time has come when Missouri should again recognize, but this time remedy, the inadequacy and unfairness of its present law on provocation. The awkwardness in reaching the correct result in the *Wright* case is not necessary. Rather,

5. *Id.* at 277.

6. See cases cited *supra* note 3.

7. 64 Mo. 367 (1877).

8. 147 Mo. 548, 49 S.W. 508 (1898).

9. *State v. Brown* was expressly overruled by *State v. Bongard*, *supra* note 3; *State v. Garrison* was overruled by the holding of *State v. Biswell*, 352 Mo. 698, 179 S.W.2d 61 (1944).

10. *State v. Haynes*, *supra* note 3. Defendant testified that deceased pointed a gun at her and pulled the trigger twice, only to have the gun misfire. Defendant knocked the gun away, picked it up and shot deceased. The supreme court, relying on *State v. Bongard*, *supra* note 3, held that a manslaughter instruction was not called for since there was no personal violence to the defendant. At the other extreme is *State v. Creighton*, 330 Mo. 1176, 52 S.W.2d 556 (1932), where the supreme court reversed for failure to instruct on manslaughter when the evidence showed deceased had brushed against defendant, taking hold of his coat.

11. 336 S.W.2d 714 (Mo. 1960).

12. *Supra* note 3.

13. *Id.* at 816, 51 S.W.2d at 89.

it is hoped that Missouri will recognize that apprehension of apparent, imminent, substantial bodily injury is sufficient provocation to reduce a homicide from murder to manslaughter.

II. THE NEED FOR CHANGE

The shortcomings of the battery requirement are made manifest by the distinction between manslaughter and murder. Manslaughter has been the subject of various ill-suited definitions.¹⁴ But it is generally agreed that manslaughter is differentiated from murder by the absence of malice.¹⁵ This distinction is pointed out by the Missouri court in *State v. Smart*¹⁶ wherein manslaughter is concisely defined as "the killing of another intentionally, but in a sudden heat of passion due to adequate provocation and without malice."¹⁷

Mindful of this element distinguishing the two crimes, it becomes apparent that fear or apprehension of substantial bodily harm should certainly be as effective in eliminating malice as is the heat of passion arising from a sudden battery.¹⁸ Indeed, Missouri has correctly recognized fear or terror as an emotion included in the phrase "heat of passion."¹⁹

However, in many cases where defendant acted from fear or terror of suffering substantial bodily harm there has been no battery.²⁰ In fact, one of the most obvious situations giving rise to fear is an apparent assault with a deadly weapon as in the *Brookshire*²¹ and *Haynes*²² cases. Clearly, such circumstances could frighten the average just and reasonable man and render his mind "incapable of reflection." If so, then by definition,²³ the victim of the assault would be incapable of malice and the subsequent killing should be reduced to manslaughter.

In situations where defendant has killed after being assaulted with a deadly

14. Cf. § 559.070, RSMo 1959. For a critical examination of the Missouri statutes see Hunvald, *Criminal Law in Missouri—Manslaughter, A Problem of Definition*, 27 Mo. L. REV. 1, 2 (1962).

15. Hunvald, *supra* note 14. This is an excellent discussion of the difficult term "malice."

16. 328 S.W.2d 569 (Mo. 1959).

17. *Id.* at 574.

18. See excellent reasoning in MORELAND, *THE LAW OF HOMICIDE*, 77 (1952).

19. *State v. Smart*, *supra* note 17, at 574, and cases cited therein. The court relied on WHARTON, *HOMICIDE*, § 172 (3d ed. 1907):

A provocation is deemed to be adequate, so as to reduce the offense from murder to manslaughter, whenever it is calculated to excite the passion beyond control. It must be of such a character as would, in the mind of an average just and reasonable man, stir resentment likely to cause violence endangering life, or as would naturally tend to disturb and obscure the reason and lead to action from passion rather than judgment, or to create anger, rage, sudden resentment or *terror* rendering the mind incapable of reflection. (Emphasis added.)

20. For a general discussion, see Comment, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1024-28 (1958).

21. *State v. Brookshire*, *supra* note 1.

22. The facts of this case are set out in note 10, *supra*.

23. WHARTON, *op. cit. supra* note 19.

weapon the United States Supreme Court²⁴ and the courts of many of our sister states²⁵ would require an instruction on manslaughter.

This same approach has seemingly been adopted by the American Law Institute in its Proposed Official Draft of the *Model Penal Code*. Section 210.3 states:

Criminal homicide constitutes manslaughter when: . . .

- (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is *reasonable explanation or excuse*. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be. (Emphasis added.)

In the Comment to this section the authors declare:

We thus treat on a parity with provocation cases in the classic sense, situations where the provocative circumstance is something *other than an injury* inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance.²⁶ (Emphasis added.)

In Missouri, if there has been no battery, the defendant who kills out of fear caused by an assault with a deadly weapon must rely solely on the defense of justifiable or excusable homicide—self-defense. The Missouri Supreme Court took this position in *State v. Bongard*, stating:

Where the defendant believes and has reasonable ground for belief that an impending assault imminently threatens his life or great bodily harm, he can act in self-defense and be completely exculpated though there be no battery. Juries can be depended upon to deal with the particular facts as justice demands. It is hard to improve on the common law rule.²⁷

The plea of self-defense may provide for the person who is completely free of any responsibility for the affray and who had reasonable ground to believe that at the time he killed the deceased he was in imminent danger of his life or great bodily injury. But what of defendants who may carry some culpability? For instance, what about the person who was unreasonable in his belief that his life was imminently threatened,²⁸ or who was menaced only with substantial bodily harm,²⁹ yet who nevertheless took the life of his assailant? If the apprehension of danger was sufficient to exclude the possibility of malice

24. *Stevenson v. United States*, 162 U.S. 313 (1896).

25. See particularly *Commonwealth v. Colandro*, 231 Pa. 343, 80 Atl. 571 (1911). See also *Davis v. State*, 214 Ala. 273, 107 So. 737 (1926); *Swain v. State*, 151 Ga. 375, 107 S.E. 40 (1921); *Beasley v. State*, 64 Miss. 518, 8 So. 234 (1886); *State v. Simpson*, 39 N.M. 271, 46 P.2d 49 (1935).

26. MODEL PENAL CODE § 201.3, comment (Tent. Draft No. 9, 1959).

27. *State v. Bongard*, *supra* note 3 at 816, 51 S.W.2d at 89. It is strange that while battery is necessary to mitigate homicide, such is not required to completely excuse.

28. WHARTON, *op. cit. supra* note 19, § 194.

29. MORELAND, *op. cit. supra* note 18, at 77.

can there be a just conviction of murder? Clearly not. But a murder conviction may very well be the result if a battery is required in addition to fear of danger.

The battery test precludes the Missouri jury from considering all the evidence necessary to reach a just determination. For instance, the evidence may show that the homicide was committed under mitigating circumstances. Yet, if the killing was wrongful and the jury does not want to release the defendant back into society it has little choice but to convict of murder without even considering the mitigating evidence pointing to manslaughter.

It is the defendant who has been wronged for he has been convicted of murder. This crime carries the most severe penalty in the law and should be reserved for the cold-blooded homicide where no evidence of mitigation exists. When defendant has killed in hot blood under the influence of emotional confusion an instruction on the lesser crime of manslaughter is essential to a fair result.

*Commonwealth v. Colandro*³⁰ directly embraces this contention. Defendant shot and killed deceased who had placed defendant in imminent peril. The Supreme Court of Pennsylvania, in reversing a murder conviction for failure to instruct on manslaughter, said,

While the evidence might not have been sufficient to satisfy the jury that the plea of self-defense had been sustained, it might have appealed to them as sufficient to negative or to throw such doubt upon the element of malice as to reduce the crime to manslaughter The dividing line between self-defense and this character of manslaughter seems to be the existence, as the moving force, of a reasonably founded belief of imminent peril to life or great bodily harm, as distinguished from the influence of an uncontrollable fear or terror, conceivable as existing, but not reasonably justified by the immediate circumstances. If the circumstances are both adequate to raise and sufficient to justify a belief in the necessity to take life in order to save oneself from such a danger, where the belief exists and is acted upon, the homicide is excusable upon the theory of self-defense . . . ; while, if the act is committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter³¹

The facts in *State v. Brookshire*³² fall well within the language of the Pennsylvania court. After much boasting by deceased of his infamous accomplishments with a knife, defendant armed himself before returning to see if deceased was still downstairs. When deceased turned and reaching for his hip pocket threatened, "I am going to finish you off," defendant fled in fear of his life. Defendant testified that he did not actually see deceased with a knife during the chase. Thus, his original apprehension may have been unreasonable. Yet, the evidence indicates that he fled in fear just the same. Fear, it is suggested, which rendered his mind incapable of clear thought. But because there was no

30. *Supra* note 25.

31. *Supra* note 25, at 352, 80 Atl. at 574.

32. *Supra* note 1.