Oklahoma Law Review

Volume 38 | Number 4

1-1-1985

Lesser Included Offenses in Oklahoma

Christen R. Blair

LESSER INCLUDED OFFENSES IN OKLAHOMA

CHRISTEN R. BLAIR*

Introduction

The lesser included offense doctrine in criminal law generally allows the trier of fact to convict a defendant of an offense that is less serious than the offense with which he was charged in the accusatory pleading.[1] While the doctrine originally developed as an aid to the prosecution when there was insufficient evidence to convict on the charged offense,[2] today it is more often used by defendants seeking a conviction for an offense less serious than that actually charged.[3] Regardless of who invokes the doctrine in a criminal trial, however, its application has caused considerable confusion among courts and commentators alike.[4] Commentators have called it a "Gordian Knot"[5] and a "many-headed hydra."[6] The Florida Supreme Court has stated: "The doctrine [of lesser included offense] is one which has challenged the effective administration of criminal justice for centuries,"[7] while the District of Columbia Circuit Court of Appeals has said that the doctrine "[is] not without difficulty in any area of the criminal law."[8] The primary cause of this confusion is the existence of several different definitions of a lesser included offense, sometimes even within the same jurisdiction.[9] Oklahoma is one of those jurisdictions.

* J.D., 1976, Ohio State University; LL.M., 1982, Columbia University. Associate Professor of Law, University of Tulsa College of Law.—*Ed.*

1. 4 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 1888 (12th ed. 1957); Comment, *The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied*, 59 IOWA L. REV. 684 (1974) [hereinafter cited as Comment, *Iowa Doctrine*].

2. United States v. Harary, 457 F.2d 471, 478 (2d Cir. 1972); Fuller v. United States, 407 F.2d 1199, 1230 n.40 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969); Kelly v. United States, 370 F.2d 227, 229 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967); Barnett, *The Lesser-Included Offense Doctrine: A Present Day Analysis For Practitioners*, 5 CONN. L. REV. 255 (1972).

3. Barnett, *supra* note 2, at 255-56. *See also* United States v. Harary, 457 F.2d 471, 478 (2d Cir. 1972); United States v. Methvin, 441 F.2d 584, 585 (5th Cir. 1971); People v. Mussenden, 308 N.Y. 558, 562, 127 N.E.2d 551, 553 (1955).

4. *See, e.g.*, Koenig, *The Many-Headed Hydra of Lesser Included Offenses: A Herculean Task for the Michigan Courts*, 1975 DET. C.L. REV. 41, 41-42; Barnett, *supra* note 2, at 256.

5. Comment, *Iowa Doctrine, supra* note 1.

6. Koenig, *supra* note 4.

7. Brown v. State, 206 So. 2d 377, 380 (Fla. 1968).

8. Fuller v. United States, 407 F.2d 1199, 1228 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969).

9. Comment, *The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts*, 84 DICK. L. REV. 125, 134 (1979) [hereinafter cited as Comment, *Pennsylvania Doctrine*]. Pennsylvania courts apparently employ the strict statutory theory in which the greater offense must "necessarily involve" the lesser. *Id.* They have, however, upon occasion departed from this theory and applied the "evidence approach," Commonwealth v. Nace, 222 Pa. Super.

This article will first set forth the various definitional approaches to the lesser included offense doctrine. The following sections will then discuss the definitional approaches used in Oklahoma, followed by a suggestion of the lesser included offense theory that Oklahoma should utilize. The final section will discuss some procedural aspects of the lesser included offense doctrine.

I. *The Lesser Included Offense Doctrine*

The major cause of the confusion surrounding the concept of lesser included offenses is that at least four different approaches to the problem have been adopted by various jurisdictions in the United States.[10] This problem is exacerbated in those jurisdictions that apply more than one approach, a situation made possible by the overlapping nature of the definitions.[11]

Strict Statutory Interpretation

Under the common law theory, better known as the strict statutory approach, all of the elements of the lesser included offense must be contained in the greater offense so that it would be impossible to commit the greater offense without first having committed the lesser.[12] Theoretically, the strict statutory approach is the easiest of the different approaches to apply because its application involves merely comparing the elements of the individual offenses in the abstract. Difficulties in statutory interpretation can arise, however, that make application of the rule less than certain in many cases.[13]

The major problem with the strict statutory interpretation approach is its inherent inflexibility. For example, in *State v. Zdiarstek*,[14] the Wisconsin defendant was charged with and convicted of battery upon a peace officer after the defendant had injured a jailor while confined in the county jail.[15] At trial the defendant requested that the jury be instructed that it could convict on the lesser included offense of resisting or obstructing an officer.[16] The court refused to so instruct the jury because the offense of resisting or obstructing an officer had as a requirement that the defendant knew or believed that he

---

329, 295 A.2d 87 (1972), and the "pleadings theory," Commonwealth v. Stots, 227 Pa. Super. 279, 324 A.2d 480 (1974). *See* Comment, *supra*, at 134-35.

10. Much of the background material on the lesser included offense doctrine is taken from Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445 (1984) and sources cited therein.

11. *See* Comment, *Pennsylvania Doctrine, supra* note 9, at 127.

12. People v. Rosario, 625 F.2d 811, 812 (9th Cir. 1979); Theriault v. United States, 434 F.2d 212, 214 (5th Cir. 1970); Olais-Castro v. United States, 416 F.2d 1155, 1157-58 (9th Cir. 1969); Giles v. United States, 144 F.2d 860, 861 (9th Cir. 1944); Koenig, *supra* note 4, at 44; Comment, *Pennsylvania Doctrine, supra* note 9, at 129.

13. Comment, *Pennsylvania Doctrine, supra* note 9, at 129.

14. 53 Wis. 2d 776, 193 N.W.2d 833 (1972).

15. For the elements needed to sustain a conviction for battery to a peace officer, see *id.* at 785-86, 193 N.W.2d at 838. *See also* WIS. STAT. § 940.205 (1982).

16. State v. Zdiarstek, 53 Wis. 2d 776, 778, 193 N.W.2d 833, 834 (1972). For the elements of resisting or obstructing a police officer, see WIS. STAT. § 946.41 (1982).

was resisting or obstructing an officer, acting in his official capacity at the time of defendant's arrest, while the offense of battery on a peace officer did not contain that element.[17] Thus, resisting or obstructing an officer was not a lesser included offense of battery upon a peace officer under the strict statutory interpretation approach. The latter offense did not include every element of the former offense, even though the facts of the case clearly showed that the defendant knew the jailor was an officer acting in his official capacity. The strict statutory approach is therefore concerned not with the facts of the case but only with the elements of the offenses.

Iowa met with equally inflexible results before it abandoned the strict statutory approach.[18] For example, in *State v. Everett*,[19] the Iowa Supreme Court held that the offense of operating a motor vehicle without the owner's consent was not a lesser included offense of larceny of a motor vehicle.[20] Because larceny of a motor vehicle could occur without anyone operating it, by being towed away, for example, the greater offense of larceny could not be said to contain all the elements of the lesser offense of operating a motor vehicle without the owner's consent.[21] The test for lesser included offenses under the strict statutory approach is therefore whether, under all *possible* circumstances, the commission of the greater crime will also entail the commission of the lesser offense, regardless of whether any of these circumstances actually occurred in the case at bar.[22]

Cognate Theory

The rigid results mandated by the strict statutory interpretation theory conflict with a principal function of the lesser included offense doctrine, which is to "[e]nable the jury to correlate more closely the criminal conviction with the act committed."[23] As a result, a majority of jurisdictions in the United States have developed a more liberal approach to lesser included offenses known as the cognate theory.[24] In determining whether a lesser included offense exists under the cognate theory, the court looks not only to the elements of the offenses but also to either the facts alleged in the accusatory pleading or to the facts actually proved at trial.[25]

17. See *supra* notes 15-16 and accompanying text (setting forth elements of offenses).

18. In 1973 the Iowa Supreme Court abandoned the strict statutory approach in State v. Hawkins, 203 N.W.2d 555 (Iowa 1973), for an evidence approach stating, "[t]he evidence of the case must be considered in determining whether one offense is includable within another." *Id.* at 557.

19. 157 N.W.2d 144 (Iowa 1968).

20. *Id.* at 149.

21. *Id.*

22. *Id.*

23. Note, *Criminal Procedure—Recognizing the Jury's Province to Consider the Lesser Included Offense: State v. Ogden*, 58 OR. L. REV. 572, 577 (1980).

24. The cognate theory has been designated the majority view in Barnett, *supra* note 2, at 291, and in Koenig, *supra* note 4, at 43.

25. *See* Koenig, *supra* note 4, at 43. *See also* Spencer v. State, 501 S.W.2d 799, 800 (Tenn.

Cognate-Pleading Theory

There are two approaches followed in applying the cognate theory. Under the pleadings approach, the court looks to the facts alleged in the accusatory pleading, rather than merely to the statutory elements of the offense, to determine whether there exists a lesser included offense of the greater charged offense. The Connecticut Supreme Court has described the cognate-pleading approach: "The lesser offense must not require any element which is not needed to commit the greater offense in the manner alleged in the information or bill of particulars."[26] For example, if an indictment for grand larceny of an automobile alleged that the automobile had been driven away, operating a motor vehicle without the owner's consent would be considered a lesser included offense of grand larceny,[27] even though it would not be so considered under the strict statutory approach.[28]

Another example of the cognate-pleading approach is *Commonwealth v. Stots*,[29] in which the defendant was indicted for "attempt with intent to kill" by means of a firearm. He was subsequently convicted of "willfully and wantonly pointing a pistol." The defendant objected that such an offense was not a lesser included offense of that charged in the indictment because that offense could be committed by means other than a pistol. Under the strict statutory approach, the defendant would have been correct. However, under the cognate-pleading approach, since the method of commission of the "attempt with intent to kill" was alleged in the indictment to be a pistol, "willfully and wantonly pointing a pistol" was a lesser included offense.

Cognate-Evidence Theory

Because the prosecution can, to some extent, control the language of the accusatory pleading, some jurisdictions have adopted a second approach to the cognate theory. This approach focuses on the evidence supporting the charge. Under the cognate-evidence theory, the court looks at the evidence actually adduced in the case, rather than just to the statutory elements or the language of the accusatory pleading, to determine the existence of any lesser included offenses.[30] Consequently, under the cognate-evidence approach, if an indictment for grand larceny of an automobile failed to allege how the

---

1973) (joyriding lesser included offense of grand larceny since information showed that property taken was automobile driven away).

26. State v. Brown, 163 Conn. 52, 62, 301 A.2d 547, 553 (1972).

27. State v. Hawkins, 203 N.W.2d 555 (Iowa 1973); Commonwealth v. Nace, 222 Pa. Super. 329, 295 A.2d 87 (1972); Koenig, *supra* note 4, at 43. Whether the court actually instructed the jury on the lesser included offense would still depend upon the evidence adduced at trial because most jurisdictions require that there be a rational basis in the evidence justifying the instruction. *See* Hopper v. Evans, 456 U.S. 605 (1982); Comment, *Pennsylvania Doctrine, supra* note 9, at 132; Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U.L. REV. 61, 62, 65 (1962) [hereinafter cited as Comment, *Jury Instructions*].

28. See *supra* notes 12-22 and accompanying text explaining the strict statutory approach.

29. 227 Pa. Super. 279, 324 A.2d 480 (1974).

30. *See* Koenig, *supra* note 4, at 44.

automobile was stolen, but the evidence at the trial showed it to have been driven away, the offense of operating a motor vehicle without the owner's consent would be considered a lesser included offense of grand larceny.

Though the strict statutory interpretation theory has been criticized for being too inflexible, the cognate theory has been criticized as being too flexible.[31] Because the existence of the lesser included offense depends upon the facts that will be proved during the trial, it is sometimes difficult to ascertain the bounds of the cognate theory. Thus its application becomes more difficult than the more mechanical strict statutory approach. It has been argued that the cognate-evidence approach may put the defendant at an unfair disadvantage. The defendant will either have to prepare to defend against all the possible lesser included offenses, or else take the risk of only preparing to defend against the charged offense.[32] This disadvantage, however, is not unique to the defendant. In such cases the prosecution must also be prepared for all the possible lesser included offenses, in the event the defense seeks to have the jury charged on one or more of them.

Model Penal Code Approach

Section 1.07(4)(c) of the Model Penal Code has adopted a novel and broad test for determining when a lesser included offense exists.[33] Under the Code, an offense is a lesser included offense of the charged offense when: "(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission."[34]

31. *Id.* at 45; Comment, *Jury Instructions, supra* note 27, at 63.

32. Comment, *Jury Instructions, supra* note 27, at 63. Another problem raised by the possibility of numerous lesser included offenses is the adequacy of the notice of the offenses to the defendant, which is discussed *infra* notes 104-116 and accompanying text. *See also* State v. Hooks, 69 Wis. 182, 33 N.W. 57 (1887) (state cannot compel defendant to contest any issue the state is not bound to prove in order to convict him of offense charged).

33. MODEL PENAL CODE § 1.07(4), 10 U.L.A. 456-57 (1974) (Proposed Official Draft 1962) provides:

> A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:
>
> (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

Paragraph (a) corresponds to either the strict statutory or cognate theory, depending on whether it is concerned with the facts actually proved or in the abstract. Paragraph (b) includes attempt and solicitation as lesser included offenses, although they traditionally have not been so considered because they are not elements contained within the greater offense. *See* Comment, *Pennsylvania Doctrine, supra* note 9, at 130.

34. MODEL PENAL CODE § 1.07(4)(c), 10 U.L.A. 457 (1974) (Proposed Official Draft 1962).

Although neither courts nor legislatures have widely adopted this theory,[35] the District of Columbia Circuit Court of Appeals has praised this general approach for providing a "more natural, realistic and sound interpretation of the scope of 'lesser included offense'."[36] Utilizing this approach, the court held that an offense can be a lesser included offense when it is established by the evidence adduced at trial in proof of the greater offense, regardless of the legal elements of the two offenses or the language of the accusatory pleading.[37] The only limitation the court imposed is

> [t]hat there must also be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.[38]

Since this theory is even broader than the cognate theory, the flexibility objection is greater. Because the elements of the offenses need not be the same, but need only have an "inherent" relationship, the possible range of lesser included offenses is even greater under this theory than under the cognate theory.

II. *Lesser Included Offense Tests Applied in Oklahoma*

Oklahoma has codified the lesser included offense doctrine in section 916 of title 22 of the Oklahoma Statutes (1981), which provides: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

Whether any particular offense is "necessarily included" depends upon the lesser included offense test applied. As indicated above, an offense may be a lesser included offense of a greater charged offense under one test but not under another.[39] Thus the effective application of the lesser included offense doctrine turns, in the first instance, on the test used to define a lesser in-

35. *See* ALA. CODE § 13A-1-9 (1975); N.J. STAT. ANN. § 2C:1-8d (West 1982), for two states that have adopted the Model Penal Code language.

36. United States v. Whitaker, 447 F.2d 314, 319 (D.C. Cir. 1971). *See also* United States v. Zang, 703 F.2d 1186 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983) (adopting the "inherent relationship" test in a case on appeal from the United States District Court for the Northern District of Oklahoma).

37. United States v. Whitaker, 447 F.2d 314, 319 (D.C. Cir. 1971).

38. *Id.*

39. For example, joyriding would be a lesser included offense of larceny of an automobile under the cognate-evidence test if the evidence indicated that the automobile had been driven away. See *supra* text accompanying notes 30-32. Under the cognate-pleading test, it would be a lesser included offense if the accusatory pleading alleged that the automobile had been driven away. See *supra* text accompanying notes 26-28. It would not be a lesser included offense under the strict statutory interpretation test. See *supra* text accompanying notes 12-22.

cluded offense. Although more recent cases seem to employ the cognate-evidence test, Oklahoma has, at one time or another, purported to utilize all of the tests except the Model Penal Code approach.[40]

Strict Statutory Interpretation

Cochran v. State appears to be the first case in which the Oklahoma Court of Criminal Appeals applied what was, in effect, the strict statutory interpretation approach to lesser included offenses.[41] In that case the court had to determine whether the offense of riot was necessarily included in the offense of robbery. In deciding that it was not, the court noted that although the crime of riot required the use of force or violence, that was only one of the possible ways in which a robbery could be committed.[42] The court obviously was not concerned with how the robbery was *actually* committed, but rather only with whether it could *possibly* be committed in some way that would not also result in the commission of riot. This hypothetical approach to the elements of the offenses distinguishes the strict statutory interpretation test.

In *Thoreson v. State*,[43] the court relied upon the *Cochran* rationale in applying the strict statutory interpretation test in deciding that assault was not a lesser included offense of robbery. Since assault could only be committed with force or violence, but robbery could, in addition, be committed by fear, assault was not a necessarily included offense.[44] A more recent case in which the Court of Criminal Appeals discussed the strict statutory interpretation test is *Harris v. State*.[45] Here the court concluded that burglary in the second degree was not a lesser included offense of burglary in the first degree.[46] In reaching its conclusion, the court reasoned in classic strict statutory interpretation fashion "that there are instances where the crime of burglary in

40. Oklahoma has, of course, not adopted the Model Penal Code.

41. 4 Okla. Crim. 379, 111 P. 974 (1910).

42. *Id.* at 382, 111 P. at 975. "Robbery" was defined as the wrongful taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force *or* fear. Snyder's Comp. Laws Okla. § 2309 (1909). "Riot" was defined as "[a]ny use of force or violence, or any threats to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law." Snyder's Comp. Laws Okla. § 2497 (1909). The defendant was charged along with three codefendants.

43. 69 Okla. Crim. 128, 100 P.2d 896 (1940).

44. "Assault is defined as any willful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another. Section 1865, O.S. 1931, 21 Okl. St. Ann. § 641." *Id.* at 138, 100 P.2d at 901. "Section 2542, O.S. 1931, 21 Okl. St. Ann. § 791 defines robbery as follows: Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will by means of force or fear." *Id.* at 137, 100 P.2d at 901.

45. 291 P.2d 372 (Okla. Crim. App. 1955).

46. Burglary in the first degree was defined:

> Every person who breaks into and enters in the nighttime the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either:

the first degree could be committed under circumstances which would not also include the elements of burglary in the second degree."[47] Although the court discussed the strict statutory approach, the decision was also based on the premise that there was no basis in the evidence to justify an instruction on burglary in the second degree.[48] Since this lack of evidence would also prevent a lesser included offense instruction under the cognate theory, *Harris* is not a pure example of the strict statutory interpretation approach to lesser included offenses.

Cognate-Pleading Test

Smith v. State is a good example of the application of the cognate-pleading test.[49] Smith was charged with murder based on procurement of an illegal abortion,[50] but was found guilty of manslaughter in the first degree.[51] Since one element of the murder involved the commission of a felony, while one element of the manslaughter required the commission of a misdemeanor, manslaughter would not have been a lesser included offense under the strict statutory interpretation test because it might be *possible* to commit the murder without also committing the manslaughter. The *Smith* court, however, held that the manslaughter charge was a lesser included offense of the charged murder.

The court reached this conclusion by looking to the factual allegations in the accusatory pleading. Although the information only charged murder, it alleged facts indicating that the defendant had committed a misdemeanor because she was not a "licensed medical doctor" and she did not have legal authority to practice medicine.[52] Thus, because the information alleged facts indicating the commission of a misdemeanor, manslaughter in the first degree was, under those circumstances, a lesser included offense of murder.

---

1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house or the lock or bolts of such door, or the fastening of such windows or shutter. . . .

21 OKLA. STAT. § 1431 (1951). (21 OKLA STAT. § 1431 (1981) is identical).

Burglary in the second degree was defined: "Every person who breaks and enters any building or any part of any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection in which any property is kept, with intent to steal therein or to commit any felony." 21 OKLA. STAT. § 1435 (1951).

47. 291 P.2d 347, 374 (Okla. Crim. App. 1955). By way of example, the court pointed out that if a person broke into and entered during the night the dwelling house of another, in which there was a human being, with the intent to commit some misdemeanor other than petit larceny, he would be guilty of first degree burglary but not second degree burglary.

48. See *infra* notes 117-130 and accompanying text for a discussion of the necessity of an evidentiary basis for a lesser included offense instruction.

49. 83 Okla. Crim. 209, 175 P.2d 348 (1946).

50. Under 21 OKLA. STAT. § 701 (1941), homicide was murder: "3. When perpetrated without any design to effect death by a person engaged in the commission of any felony."

51. Under 21 OKLA. STAT. § 711 (1941), homicide was manslaughter in the first degree: "1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor." (21 OKLA. STAT. § 711(1) (1981) is identical).

52. 59 OKLA. STAT. § 491 (1941) (59 OKLA. STAT. § 491 (1981) is identical).

A number of other Oklahoma cases discuss the importance of looking at the factual allegations in the accusatory pleading in determining whether an offense is a lesser included one of that charged.[53] Those cases, however, also seem to turn on the question of the sufficiency of the indictment or information to support a conviction of the lesser offense. Under Oklahoma law, if the pleading does not adequately apprise the defendant of the facts constituting the commission of a lesser offense, the pleading is insufficient to charge and support a conviction of that offense.[54] Thus the cognate-pleading test will support a lesser included offense charge when proper facts are alleged. If they are not, it is usually the law with respect to the sufficiency of the pleading that denies the lesser included offense charge.[55]

Cognate-Evidence Test

The cognate-evidence test is only needed to support a lesser included offense instruction in the relatively rare situation in which the facts adduced at trial indicate the commission of a lesser offense, but those facts have not been alleged in the accusatory pleading. If the facts are properly alleged, the cognate-pleading test would support the instruction. If the facts are not properly alleged, the accusatory pleading would be insufficient to support the instruction, at least in instances in which the prosecution is requesting the instruction.[56]

Although the cognate-evidence test is thus at least partially inconsistent with the law concerning the sufficiency of accusatory pleadings, a recent case from the Court of Criminal Appeals has, in effect, cited that test with approval. In *Wilson v. State*,[57] the court concluded that carrying a concealed weapon[58] was not a lesser included offense of carrying a firearm into an establishment where beer and intoxicating liquor are consumed.[59] In reaching this conclu-

53. *See, e.g.*, Morris v. State, 603 P.2d 1157 (Okla. Crim. App. 1979); Stokes v. State, 86 Okla. Crim. 21, 189 P.2d 424 (1948), *modified*, 190 P.2d 678; Kelly v. State, 12 Okla. Crim. 208, 153 P. 1094 (1916).

54. *See, e.g.*, Morris v. State, 603 P.2d 1157 (Okla. Crim. App. 1979); Stokes v. State, 86 Okla. Crim. 21, 189 P.2d 424 (1948), *modified*, 190 P.2d 678; Kelly v. State, 12 Okla. Crim. 208, 153 P. 1094 (1916).

55. See *infra* text accompanying notes 104-115 for the proposition that such lack of notice should only prevent the state, not the defendant, from seeking a lesser included offense instruction.

56. See *supra* text accompanying notes 53-55.

57. 649 P.2d 784 (Okla. Crim. App. 1982).

58. 21 OKLA. STAT. § 1289.8 (1981), which provides: "It shall be unlawful for any person, except a law enforcement officer, a registered security officer or a person employed by an armored car firm licensed by the Corporation Commission, to carry a concealed weapon other than permitted by this act."

59. 22 OKLA. STAT. § 1272.1 (1981), which provides in part:

> It shall be unlawful for any person, except a peace officer, as defined in Section 99 of Title 21 of the Oklahoma Statutes, when in the county or counties of his employment or residence, or the owner or proprietor of the establishment being entered, to carry into or to possess in any establishment where beer or alcoholic beverages are consumed any of the weapons designated in Section 1272, Title 21 of the Oklahoma Statutes.

sion the court held that the test is whether each offense requires proof of some fact or element that the other does not require to sustain a conviction.[60]

This is the same test that was adopted by the United States Supreme Court in *Blockburger v. United States*[61] for use in determining whether two offenses are the "same offense" under the double jeopardy clause.[62] The *Blockburger* test for the "same offense" seems to parallel the strict statutory interpretation approach to lesser included offenses[63] by emphasizing the elements of the offenses rather than the facts either alleged or proved; however, several Supreme Court cases have applied the *Blockburger* "same offense" test in a way that is essentially the equivalent of the cognate-evidence approach to lesser included offenses.[64] Therefore, by adopting the *Blockburger* "same offense" test in *Wilson*, the Court of Criminal Appeals seems to have implicitly adopted the cognate-evidence approach to lesser included offenses.

Another indication that the Court of Criminal Appeals has utilized the cognate-evidence test is the innumerable cases in which the court has held that a lesser included offense instruction should be given only when warranted by the evidence in the case.[65] Although most of those cases involve the application of a separate procedural requirement,[66] they also indicate a need to look to the evidence, and not just the statutory elements or the accusatory pleading, in order to adequately apply the lesser included offense doctrine.

III. *Oklahoma Should Apply the Cognate Theory*

As the preceding discussion shows, Oklahoma has not always been consistent in the application of the lesser included offense doctrine. Earlier cases seemed to prefer the strict statutory interpretation approach,[67] with later cases opting for the cognate-pleading test,[68] with some occasional indication of the cognate-evidence test.[69] To be consistent, the Court of Criminal Appeals should make it clear which lesser included offense theory should be utilized. This clarification must be made consistent with the constitutional limitations on the lesser included offense doctrine. Such limitations appear to dictate that the cognate theory be utilized,[70] with the pleadings approach being applied

60. 649 P.2d at 786, citing to 22 OKLA. STAT. § 916, (1981), Oklahoma's necessarily included offense statute.

61. 284 U.S. 299 (1932).

62. U.S. CONST. amend. V, provides in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

63. See *supra* text accompanying notes 12-22 (discussing strict statutory interpretation approach to lesser included offenses).

64. *See* Missouri v. Hunter, 459 U.S. 359 (1983); Hopper v. Evans, 456 U.S. 605 (1982).

65. See *supra* text accompanying notes 30-32 (discussing the cognate-evidence approach to lesser included offenses).

66. See *infra* text accompanying notes 116-129.

67. See *supra* text accompanying notes 41-48.

68. See *supra* text accompanying notes 49-55.

69. See *supra* text accompanying notes 56-66.

70. Much of the information for this section is from Blair, *supra* note 10, and sources cited therein.

to prosecution requests for a lesser included offense instruction and the evidence approach applied to at least some defendant requests.

Double Jeopardy

The primary reason for this proposal is the double jeopardy clause.[71] If an offense is a lesser included one of the offense charged, a conviction or acquittal of the charged crime would bar a subsequent prosecution of the lesser offense.[72] Conversely, a conviction or acquittal of the lesser included offense would bar a subsequent prosecution of the greater offense.[73] Thus, a greater and lesser included offense are the "same offense" for double jeopardy purposes.[74] However, since different lesser included offense theories yield different results, it remains to be determined which one is the equivalent of the double jeopardy "same offense" test.

In the landmark case of *Blockburger v. United States*,[75] the Supreme Court fashioned the following rule for determining when two offenses were the "same offense" under the double jeopardy clause: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[76] As discussed above, although this "same offense" test might initially seem to parallel the strict statutory interpretation theory of lesser included offense, several recent Supreme Court cases have applied the "same offense" test in a way that is the functional equivalent of the cognate-evidence theory of lesser included offenses. In *Brown v. Ohio*,[77] the Court held that the double jeopardy clause barred prosecution and punishment for the offense of auto theft following prosecution and punishment for the lesser included offense of operating the same vehicle without the owner's consent. As discussed previously, the offense of operating a vehicle without the owner's consent has not been con-

71. U.S. CONST. amend. V, quoted *supra* at note 62.

72. *In re* Neilsen, 131 U.S. 176, 188 (1889).

73. *Id.* at 188. The Court endorsed the rule that "[w]here . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Id.*

In Brown v. Ohio, 432 U.S. 161 (1977), the Court stated that: "The [*Neilsen*] opinion makes it clear that the sequence is immaterial." *Id.* at 168. The Court went on to hold that "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Id.* at 169. The *Brown* opinion did leave open the possibility of an exception to this rule "[w]here the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." *Id.* at 169 n.7 (citing Diaz v. United States, 223 U.S. 442, 448-49 (1912); Ashe v. Swenson, 397 U.S. 436, 453 n.7 (1970) (Brennan, J., concurring)). *See also* Hall v. State, 650 P.2d 893 (Okla. Crim. App. 1982) (sequence of cases is immaterial to double jeopardy claim).

74. U.S. CONST. amend. V.

75. 284 U.S. 299 (1932).

76. *Id.* at 304.

77. 432 U.S. 161 (1971).

sidered a lesser included offense of the crime of auto theft or grand larceny in jurisdictions that adhere to the strict statutory approach.[78] Under the cognate-evidence test, however, if the evidence adduced at trial indicated that the car had been driven away, the offense of operating the same vehicle without the owner's consent would be a lesser included offense of the greater offense of auto theft.[79] Moreover, it would also be the "same offense" under the *Blockburger* test as applied in *Brown*.

Missouri v. Hunter also implicitly supports the similarity between the cognate-evidence test and the "same offense" test for double jeopardy.[80] In *Hunter* the defendant was convicted in a single trial of robbery, under a statute that required that the perpetrator put the victim "[i]n fear of some immediate injury to his person,"[81] and of armed criminal action, under a statute that punished an underlying felony, in this case, robbery, committed "[w]ith, or through the assistance, or aid of a dangerous or deadly weapon."[82] Because it would be possible to commit the offense of robbery by putting the victim in fear of immediate injury by some method other than through use of a dangerous or deadly weapon,[83] armed criminal action could not be a lesser included offense of robbery under the strict statutory interpretation theory. Under the cognate-evidence theory, however, because the robbery was proved at trial to have actually been committed with a deadly weapon, armed criminal action would be a lesser included offense of robbery. The Supreme Court agreed with the Missouri Supreme Court[84] that the two offenses were also the "same offense" for double jeopardy purposes.[85]

Thus, although the *Blockburger* test for determining the "same offense" is phrased in terms of the elements of the offenses, Supreme Court application of the test emphasizes the facts or evidence adduced at trial in support of the elements, rather than merely the elements themselves, when determining whether offenses are the "same offense." Likewise, the cognate-evidence theory emphasizes the evidence adduced at trial in determining whether one offense is a lesser included offense of a greater offense.

78. See *supra* text accompanying notes 20-24.

79. See *supra* text accompanying note 30.

80. 459 U.S. 359 (1983).

81. Mo. Rev. Stat. § 560.120 (1969).

82. Mo. Rev. Stat. § 559.225 (Supp. 1976).

83. One could merely threaten the victim with his fists or an object not considered to be a deadly weapon.

84. State v. Hunter, 622 S.W.2d 374, 375 (Mo. 1981).

85. Missouri v. Hunter, 459 U.S. 359 (1983). Additional authority in support of the proposition that the "same offense" test is the equivalent of the cognate-evidence theory may be found in Hopper v. Evans, 456 U.S. 605 (1982), in which the Court emphasized the importance of the *evidence* adduced at trial in determining whether due process requires that a lesser included offense instruction be given. Thus, the facts or evidence used to prove the elements of the offense, rather than the elements themselves, are of importance to the Supreme Court when determining what are "same offenses" and lesser included offenses. For more on the import of *Hopper v. Evans* and Beck v. Alabama, 447 U.S. 625 (1980), in which the Court first applied due process to the requirement of a lesser included offense instruction, see Blair, *supra* note 10, at 462-75. See also *infra* notes 90-103 and accompanying text.

Although a test that can be applied in the same manner as the double jeopardy test seemingly would provide greater efficiency, this does not mean that the double jeopardy clause *requires* Oklahoma to adopt the cognate-evidence theory of lesser included offenses. Oklahoma could still use the strict statutory interpretation theory. The use of that theory, however, does entail the risk that double jeopardy will bar a subsequent prosecution for an offense for which the strict statutory interpretation approach had previously barred consideration by the jury. For example, as discussed above, joyriding is not considered a lesser included offense of grand larceny of an automobile under the strict statutory interpretation theory.[86] It is, however, a lesser included offense under the cognate-evidence test[87] (and also under the cognate-pleading test if the appropriate facts are alleged).[88] Since it is also the "same offense" as the larceny under the double jeopardy clause, an acquittal on the larceny charge would bar a subsequent prosecution for joyriding.[89] If the basis for the acquittal was that the jury thought the defendant was only joyriding, not stealing, the strict statutory interpretation theory, along with the double jeopardy clause, would prevent a conviction for the crime actually committed by the defendant. Under the cognate-evidence theory, of course, the jury could have considered the lesser offense of joyriding and convicted the defendant of that crime at the same trial without running afoul of the double jeopardy clause.

Although the double jeopardy clause does not require Oklahoma to adopt the cognate-evidence theory, in some circumstances, due process may provide a strong constitutional limitation.

Due Process—Reliability of the Guilt Determination

In *Beck v. Alabama*,[90] the defendant was charged with "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant."[91] Felony murder was a lesser included offense of the capital offense of robbery-intentional killing.[92] There was sufficient evidence to support a lesser included offense instruction.[93] The Alabama capital offense statute, however, prevented the jury from considering any lesser included offenses.[94] Instead, the jury was

86. See *supra* text accompanying notes 19-22.

87. See *supra* text accompanying note 30.

88. See *supra* text accompanying notes 26-28.

89. See *supra* text accompanying note 77.

90. 447 U.S. 625 (1980).

91. *Id.* at 627 n.1 (*quoting* ALA. CODE § 13-11-2(a)(2) (1975)).

92. This is because, under the Alabama death penalty statute, the requisite intent to kill could not be supplied by the felony-murder doctrine. *Id.* at 628 n.2 (*quoting* ALA. CODE § 13-11-2(b) (1975)).

93. According to Beck's version of the facts, he and an accomplice entered the victim's home in the afternoon, and after he had seized the man, intending to bind him with a rope, his accomplice unexpectedly struck and killed the man. Beck consistently denied that he killed the man or that he intended his death. *Id.* at 629-30.

94. ALA. CODE § 13-11-2(a) (1975). This statute was invalidated in *Beck*, 447 U.S. 625, 638 (1980).

given the choice of either convicting Beck of a capital crime and imposing the death penalty, or acquitting him and allowing him to escape all penalties for his alleged participation in the crime.[95]

The Supreme Court reversed Beck's conviction and death sentences, specifically holding that the death penalty may not be imposed constitutionally after a jury verdict of guilty of a capital offense when the jury was not permitted to consider a verdict of guilty of a lesser included offense.[96] The Court relied on a reservation expressed in *Keeble v. United States*,[97] i.e., when a lesser included offense instruction is not given and "the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."[98] Because such a possibility diminished "the reliability of the guilt determination"[99] and enhanced "the risk of an unwarranted conviction,"[100] the Court held that Alabama was constitutionally prohibited from withdrawing the lesser included offense option from the jury in a capital case.[101]

Although the Supreme Court carefully confined its holding in *Beck* to capital cases and specifically stated that it "need not and [does] not decide whether the Due Process Clause would require the giving of such instruction in a noncapital case,"[102] it would seem that the failure to give such an instruction in a noncapital case would affect the "reliability of the guilt determination" just as much as in a capital case. If so, then due process would dictate that Oklahoma utilize the cognate-evidence theory with respect to defense requests for lesser included offense instructions in cases in which there is a "risk of an unwarranted conviction" if the jurors are not allowed to consider any lesser included offenses.[103] For example, in the joyriding-larceny example, if the

95. Beck v. Alabama, 447 U.S. at 628-29 n.3 (*quoting* ALA. CODE § 13-11-2(a) (1975), providing: "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses"). The jury was specifically instructed that if Beck was acquitted of the capital crime of intentional killing in the course of a robbery, "he can never be tried for anything that he did to [the victim]." *Id.* at 630.

96. *Id.* at 638.

97. 412 U.S. 205 (1973). In *Keeble* the defendant was convicted of assault with intent to commit serious bodily injury after the court refused to instruct the jury on the lesser included offense of simple assault. *Id.* at 205-06.

98. 447 U.S. at 634 (*quoting* Keeble v. United States, 412 U.S. at 212-13). The complete text of the quote from *Keeble* is: "A defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction . . . . We cannot say that the availability of a third option—convicting the defendant of [a lesser offense]—could not have resulted in a different verdict. 412 U.S. at 212-13.

99. Beck v. Alabama, 447 U.S. 625, 638 (1980).

100. *Id.*

101. *Id.*

102. *Id.* at 638 n.14.

103. See *infra* notes 104-115 and accompanying text for a discussion of why the cognate-evidence theory should generally be limited to defense requests for a lesser included offense instruction.

evidence clearly indicated that the defendant took the car but did not intend to steal it, it might be necessary to give an instruction on the joyriding charge. Thus the jury would be prevented from convicting the defendant on the larceny charge, not because he committed larceny but because he committed some offense and he should not go completely free.

Due Process—Notice

The primary reason for suggesting that the cognate-pleading test be utilized when the prosecution requests a lesser included offense instruction is the due process requirement of notice.[104] The lesser included offense doctrine, by definition, raises a due process notice problem because no matter which particular theory of the doctrine is applied, the defendant must prepare a defense against a charge for which he has not specifically been given notice. However, the lesser included offense doctrine itself, through the accusatory pleading of the state, can provide sufficient notice to the defendant. The District of Columbia Circuit Court of Appeals has held that "[t]he indictment is, for legal purposes, sufficient notice to the defendant that he may be called to defend the lesser included charge."[105] Similarly, the United States District Court for the Southern District of New York has stated: "It is axiomatic that an indictment for one crime carries with it notice that lesser offenses included within the specified crime are also charged and must be defended against."[106]

Oklahoma certainly puts a defendant on notice that he might have to defend against *some* lesser included offense,[107] but due process requires more specificity.[108] The cognate-pleading theory, by relying on the factual allegations of the accusatory pleading, can provide that notice. The cognate-evidence theory might not.

Turning to the joyriding-larceny example once again,[109] if the accusatory pleading alleges that the method of larceny was by driving the car away, the accusatory pleading in conjunction with section 916 of title 22 of the Oklahoma Statutes provides adequate notice that the defendant might also have to defend

104. The sixth amendment states that "[i]n all criminal prosecution, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. CONST. amend. VI. *See, e.g., In re* Oliver, 333 U.S. 257, 273 (1948) (right to reasonable notice of charges basic to our system of jurisprudence); Powell v. Alabama, 287 U.S. 45, 68 (1932) (notice is an essential element of due process); Holden v. Hardy, 169 U.S. 366, 389 (1897) (same). Because this right of notice is basic to our adversary system of criminal justice, it is part of the "due process of law" that is guaranteed by the fourteenth amendment to defendants in the criminal courts of the states. Faretta v. California, 422 U.S. 806, 818 (1975).

105. Walker v. United States, 418 F.2d 1116, 1119 (D.C. Cir. 1969).

106. Mildwoff v. Cunningham, 432 F. Supp. 814, 817 (S.D.N.Y. 1977).

107. *See* 22 OKLA. STAT. § 916 (1981), which provides: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that which he is charged, or of an attempt to commit the offense."

108. *See, e.g.*, Russell v. United States, 369 U.S. 749, 768 (1962) (indictment must set forth specific offense with which defendant charged); United States v. Milk Distributors Ass'n, 200 F. Supp. 792, 802 (D. Md. 1961) (same).

109. See *supra* notes 20-21, 27-28, 30-31, & 103 and accompanying text.

against the lesser included offense of joyriding.[110] On the other hand, if the accusatory pleading fails to allege the method of the larceny, but the evidence shows the car to have been driven away, it is questionable whether the defendant has received adequate notice of the joyriding charge. Although the defendant may have a right to a lesser included offense instruction under these circumstances,[111] the prosecutor may not because of the lack of notice.

This option of using one lesser included offense test for prosecution requests and another for defense requests has been adopted by Florida in *Anderson v. State*.[112] In *Anderson*, the Florida Supreme Court held that where the existence of a lesser included offense is determined by the language of the accusatory pleading, the prosecution is entitled to a lesser included offense instruction only if that offense was sufficiently included in the accusatory pleading to satisfy the due process notice requirement.[113] However, the court held that because the prosecution's accusation constitutes only an ex parte claim, the defendant is entitled to such an instruction on any offense within the "general scope" of the crime charged and of which there is sufficient evidence.[114] This is possible because even though there may have been insufficient notice, notice is the defendant's constitutional right, not the prosecutor's, and the defendant is generally free to waive his constitutional rights.[115]

IV. *Procedural Aspects of the Lesser Included Offense Doctrine*

Instruction Must Be Warranted By the Evidence

Even after it has been determined what offenses might be lesser included offenses of the greater charged offense, a lesser included offense instruction is not rendered automatically. Many Oklahoma cases have held that the instruction should be given only where, under the evidence in the case, it would be reasonable for the jury to find that the defendant did not commit the greater

110. See *supra* note 107.

111. See *supra* notes 90-103 and accompanying text (discussion of due process right to lesser included offense instruction when the "reliability of the guilt determination" would be otherwise affected).

112. 255 So. 2d 550 (Fla. 1971). One obstacle to this dual approach is the doctrine of mutuality, which essentially requires that both parties have the identical right to request a lesser included offense instruction. The right of the prosecutor to a lesser included offense instruction is "limited to the offense of which defendant has been given notice by the indictment," Kelly v. United States, 370 F.2d 227, 229 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967). Under the doctrine of mutuality, the defendant should be subject to this same notice requirement. United States v. Whitaker, 447 F.2d 314, 321 (D.C. Cir. 1971). The test for mutuality, the *Whitaker* court said, is "whether the prosecutor could have rightly requested the lesser included offense charge; therefore, whether the defense was entitled to it on request." *Id.* There do not appear to be any Oklahoma cases adopting the mutuality doctrine. It is one premise of this article that the doctrine of mutuality would violate due process if it were used to deny the defendant a lesser included offense instruction in a situation in which the "reliability of the guilt determination" would be otherwise affected. See *supra* notes 90-103 and accompanying text.

113. 255 So. 2d at 556.

114. *Id.*

115. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

offense but did commit the lesser one.[116] Thus, where the evidence indicates that the defendant is either guilty of the greater charged offense or nothing, the instruction should not be given.

In *Paregien v. State*,[117] the defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor.[118] At the trial three different investigating officers testified that the defendant appeared to be intoxicated or highly intoxicated at the time of his arrest.[119] The defense testimony indicated that the defendant had not drunk any alcohol on the day and evening in question.[120] Since the evidence indicated that the defendant was either intoxicated as he operated his vehicle, or cold sober, the trial court's failure to give an instruction on the lesser included offense of driving while impaired was not error.[121]

A number of cases have indicated that when the defense is an alibi a lesser included offense instruction is inappropriate. In *Campbell v. State*,[122] for example, the defendant claimed an alibi to a charge of first degree burglary. Because under the alibi, the evidence indicated that the defendant either was guilty of the charged offense, or nothing, it was not error to refuse his requested instruction on the lesser included offense of breaking and entering.[123] Likewise, in *Seegars v. State*,[124] a murder prosecution, when the defendant testified that although he was in the room when the victim was shot, another person had done the shooting, it was not error to refuse his requested instruction on the lesser included offense of manslaughter in the first degree.[125]

In most instances, the requirement that the lesser included offense instruction be warranted by the evidence may require the defendant to introduce some evidence tending to prove the commission of the lesser offense. This is not always the case, however. It is sufficient if the state's evidence indicates

116. *See, e.g.*, Lawrence v. State, 703 P.2d 950 (Okla. Crim. App. 1985); Liles v. State, 702 P.2d 1025 (Okla. Crim. App. 1985); Seegars v. State, 655 P.2d 563, 565 (Okla. Crim. App. 1983); Campbell v. State, 640 P.2d 1364, 1366 (Okla. Crim. App. 1982); Boling v. State, 589 P.2d 1089 (Okla. Crim. App. 1979); Case v. State, 555 P.2d 619, 624-25 (Okla. Crim. App. 1976), *cert. denied*, 431 U.S. 965 (1977); McKee v. State, 531 P.2d 343, 345 (Okla. Crim. App. 1975).

117. 630 P.2d 326 (Okla. Crim. App. 1981).

118. 47 OKLA. STAT. § 11-902 (1971).

119. 630 P.2d at 327.

120. *Id.*

121. *Id.* Under appropriate circumstances the Court of Criminal Appeals has held that driving while impaired, 47 OKLA. STAT. § 761 (1981), is a lesser included offense of driving under the influence, 47 OKLA. STAT. § 11-902 (1981), Jackson v. State, 554 P.2d 39 (Okla. Crim. App. 1976). In *Paregien*, however, Judge Bussey stated that he was in error in concurring in that conclusion in *Jackson*. 630 P.2d 327 n.1. In Bailey v. State, 633 P.2d 1249 (Okla. Crim. App. 1981), the court overruled *Jackson* and held that driving while impaired was not a lesser included offense of driving under the influence, since the former requires proof of evidence of bad effects on public safety while the latter does not.

122. 640 P.2d 1364 (Okla. Crim. App. 1982).

123. *Id.* at 1366.

124. 655 P.2d 563 (Okla. Crim. App. 1983).

125. *Id.* at 565.

the commission of the lesser offense. In *Atterberry v. State*,[126] a prosecution for unauthorized use of a motor vehicle, the state introduced evidence that the automobile owner did not give permission for her car to be moved and that the car was found in a ditch with the defendant in it. The state did not, however, introduce any evidence linking the defendant to the car prior to finding it in the ditch. Therefore, it was error to refuse the defendant's requested instruction on the lesser included offense of tampering with a motor vehicle.[127] In a similar vein is *Donaldson v. State*,[128] a rape prosecution in which the victim's testimony could have indicated that the defendant tried to commit rape but failed. Under such evidence the trial court should have instructed the jury on the lesser included offense of assault with intent to commit rape.

Defendant Has a Right to the Lesser Included Offense Instruction

Once an offense is determined to be a lesser included one and the evidence warrants giving the instruction, the defendant has a right to have the jury so instructed.[129] Nevertheless, a question remains whether that right can be waived by failure to request the instruction, or whether the trial court should give the instruction *sua sponte*.

Many Oklahoma cases have held that when the defendant is entitled to the instruction, it is error to fail to give it even if no request has been made.[130] More recent cases, however, have held that the failure to request the instruction will act as a waiver of the right to the instruction.[131] Although these two theories are inconsistent, the Court of Criminal Appeals has made no attempt to reconcile them. Apparently, however, the more recent trend is to treat the lack of a request as a waiver rather than require the trial court to instruct irrespective of a request.[132]

126. 555 P.2d 1301 (Okla. Crim. App. 1976).

127. *Id.* at 1303-04.

128. 73 Okla. Crim. 41, 117 P.2d 555 (1941).

129. *See, e.g.*, Jackson v. State, 554 P.2d 39 (Okla. Crim. App. 1976); Gibson v. State, 501 P.2d 891 (Okla. Crim. App. 1972); Davis v. State, 481 P.2d 161 (Okla. Crim. App. 1970); Tarter v. State, 359 P.2d 596 (Okla. Crim. App. 1961); Harris v. State, 291 P.2d 372 (Okla. Crim. App. 1955).

130. *See, e.g.*, Jackson v. State, 554 P.2d 39 (Okla. Crim. App. 1976), *overruled on other grounds* in Bailey v. State, 633 P.2d 1249 (Okla. Crim. App. 1981); Dixon v. State, 545 P.2d 1262, 1264 (Okla. Crim. App. 1976) ("The evidence presented by the State requires such an instruction whether requested or not."); Gibson v. State, 501 P.2d 891 (Okla. Crim. App. 1972); Davis v. State, 481 P.2d 161 (Okla. Crim. App. 1970); Tarter v. State, 359 P.2d 596 (Okla. Crim. App. 1961) ("the court should instruct the jury on the law of each degree of homicide which the evidence tends to prove, whether it is requested on the part of the defendant or not"), *quoting* Welborn v. State, 70 Okla. Crim. 97, 105 P.2d 187 (1940) (same).

131. *See, e.g.*, Eby v. State, 702 P.2d 1047 (Okla. Crim. App. 1985); Jeffries v. State, 679 P.2d 846 (Okla. Crim. App. 1984); Tedder v. State, 540 P.2d 582 (Okla. Crim. App. 1975); Vickers v. State, 538 P.2d 1134 (Okla. Crim. App. 1975).

132. The most recent decision on this issue, Eby v. State, 702 P.2d 1047 (Okla. Crim. App. 1985) decided on July 5, 1985, approves of the waiver theory.

This modern trend is probably the best approach to the problem. If a defendant wants the instruction, he need only request it. On the other hand, the waiver theory does not force him to have the instruction if, as a matter of tactics, he does not want it. A defendant might choose to forego a lesser included offense instruction in the hope of being acquitted altogether on the greater charge. If the jury were allowed to consider the lesser charge, there is always the chance that the jury could reach a compromise and convict the defendant of that lesser charge. In order to avoid that possibility, the defendant may not want to request a lesser included offense instruction. The waiver theory allows him that option.

There does appear to be one exception to the waiver theory. In 1975, in *Morgan v. State*,[133] the Court of Criminal Appeals held that in every future prosecution for murder, whenever the evidence necessitates an instruction on self-defense the trial court shall also instruct on voluntary or first degree manslaughter committed in the heat of passion as a lesser included offense. The court further held that the instruction need not be requested and should be given regardless of an objection thereto.[134] In this one instance, then, the instruction is mandatory and cannot be waived by the defendant.

Lesser Included Offense Barred by Statute of Limitations

Even if the defendant makes an appropriate request for a lesser included offense instruction that is warranted by the evidence, there is at least one instance in which the instruction may still not be given. That is when the lesser included offense is barred by a statute of limitations.

Although there do not appear to be any reported cases in Oklahoma on this issue, most jurisdictions in the United States refuse to give an otherwise valid lesser included offense instruction for an offense barred by a statute of limitations, even when requested by the defendant.[135] A few jurisdictions, however, will allow the instruction but require the defendant to waive the statute of limitations defense.[136]

In a jurisdiction that allows the option of waiving the statute of limitations, a defendant may wish to make the tactical decision to waive the statute

133. 536 P.2d 952 (Okla. Crim. App. 1975).

134. *Id.* at 959.

135. *See, e.g.*, Chaifetz v. United States, 288 F.2d 133 (D.C. Cir. 1960), *rev'd in part on other grounds*, 366 U.S. 209 (1961); Padie v. State, 557 P.2d 1138 (Alaska 1976); People v. Morgan, 75 Cal. App. 3d 32, 141 Cal. Rptr. 863 (1977); Holloway v. State, 362 So. 2d 333 (Fla. Dist. Ct. App. 1978); State v. Chevlin, 284 S.W.2d 563 (Mo. 1955); State v. Aircraft Supplies, Inc., 45 N.J. Super. 110, 131 A.2d 571 (1957); People v. Soto, 76 Misc. 2d 491, 352 N.Y.S.2d 144 (1974); Hickey v. State, 131 Tenn. 112, 174 S.W. 269 (1915); McKinney v. State, 96 Tex. Crim. 342, 257 S.W. 258 (1923); State v. Crank, 105 Utah 332, 142 P.2d 178 (1943); State v. King, 140 W. Va. 362, 84 S.E.2d 313 (1954).

136. *See, e.g.*, United States v. Williams, 684 F.2d 296 (4th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); United States v. Akmakjean, 647 F.2d 12, 14 (9th Cir.), *cert. denied*, 454 U.S. 964 (1981); United States v. Wild, 551 F.2d 418, 422 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977); United States v. Doyle, 348 F.2d 715, 719 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

and get the lesser included offense instruction in order to avoid the possibility that the jury will convict on the greater offense because the jurors are convinced the defendant did commit some offense, and conviction on the greater offense is the only choice.[137] The prosecutor could not force the defendant to waive the statute.[138]

Because a major purpose of the lesser included offense doctrine is to "[e]nable the jury to correlate more closely the criminal conviction with the act committed,"[139] the best approach would be to allow the defendant to waive the statute of limitations, especially in those situations in which "the reliability of the guilt determination" would be otherwise affected.[140] Although it has been argued that the defendant should be able to get the lesser included offense instruction without having to waive the statute of limitations,[141] the Supreme Court has recently held in *Spaziano v. State* that the failure to give the instruction in the face of a refusal to waive the statute is not a violation of due process.[142]

One reason why this issue has not appeared in any reported Oklahoma cases is because of the limited number of fact situations in which it could arise. There is no limitation on prosecutions for murder.[143] The prosecution of all other offenses, with the exception of some specialized offenses involving governmental assets and some crimes against children, must be commenced within three years.[144] Thus the only likely situation in which the greater charged offense will not be barred by the statute of limitations, but the lesser included offense will be, is when the charged offense is murder and the lesser offense is some lesser degree of homicide covered by the three-year statute of limitation.[145] If this situation should arise, it is suggested, as discussed above, that the defendant at least have the option of waiving the statute of limitations and receiving the lesser included offense instruction, provided, of course, that all the other requirements for the instruction have been met.

Order in Which the Offenses Are Considered

Once the lesser included offense instruction has been given, the question arises in what order, if any, the jury should consider the greater and lesser offenses. Oklahoma follows the general trend in requiring the jury to first

137. Comment, *Waiver of the Statute of Limitations in Criminal Prosecutions: United States v. Wild*, 90 HARV. L. REV. 1550, 1557 (1977).

138. *Id.* at 1557.

139. Note, *Criminal Procedure—Recognizing the Jury's Province to Consider the Lesser Included Offense: State v. Ogden*, 58 OR. L. REV. 572, 577 (1980).

140. See *supra* notes 90-103 and accompanying text.

141. Blair, *supra* note 10, 472-75.

142. 104 S. Ct. 3154 (1984).

143. 22 OKLA. STAT. § 151 (1981), provides: "There is no limitation of the time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed."

144. *See* 22 OKLA. STAT. § 152 (Supp. 1984).

145. Osborn v. State, 86 Okla. Crim. 259, 194 P.2d 176 (1948).

acquit the defendant of the greater offense before it considers the lesser included offense.[146] As stated by the Court of Criminal Appeals in *Love v. State*,[147] the jury should be instructed that "if after a fair and impartial consideration of all evidence in the case they were not convinced beyond a reasonable doubt of the defendant's guilt as charged . . . , then it would be their duty to consider as to whether he was guilty of the next lower offense embraced in the charge."[148]

This instruction is in keeping with that in other states. California, for example, requires that the jury be instructed that if it cannot agree on the greater offense, it cannot return a verdict on the lesser offense.[149] Likewise, for double jeopardy purposes, a conviction of the lesser offense is treated as an implicit acquittal of the greater offense.

Conclusion

The application of the lesser included offense doctrine has proven to be somewhat difficult, primarily because of the existence of several different tests for determining lesser included offenses. The confusion is compounded in a jurisdiction, like Oklahoma, that uses more than one of the tests. Clearer thinking concerning the doctrine can be fostered by simply choosing a specific test and applying it consistently.

Double jeopardy and the due process concerns of notice and reliability of the fact-finding process do combine, however, to require certain limitations. In light of these limitations, the cognate-pleading test should be applied to prosecution requests for a lesser included offense instruction, while the cognate-evidence test should be applied to requests by the defendant. In determining whether an instruction should actually be given, certain procedural aspects of the doctrine, such as whether the instruction is warranted by the evidence, the necessity of a request, the order of deliberation by the jury, and the time-barred offense problem must be considered. An understanding of all of these aspects of the lesser included offense doctrine will promote a clearer, more efficient application of the doctrine.

146. The Oklahoma Uniform Jury Instructions—Criminal provides, in part, with respect to lesser included offenses:

> The defendant(s) [is] [are] charged with (list highest crime for which sufficient evidence has been introduced). You are instructed that, in addition to the state's having submitted evidence concerning the crime of (crime listed above), evidence has also been introduced concerning the crime of (lesser included crime). If you have a reasonable doubt of the defendant's guilt on the charge of (highest crime charged), you must then consider the charge of (lesser included crime).

147. 12 Okla. Crim. 1, 150 P. 913, 916 (1915), cited with approval in Thoreson v. State, 69 Okla. Crim. 128, 135, 100 P.2d 896, 900 (1940).

148. *Id.*

149. Stone v. Superior Court of San Diego County, 31 Cal. 3d 503, 519, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982).