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The Lesser Included Offense Instruction - Problems with Its Use

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COMMENTS

THE LESSER INCLUDED OFFENSE INSTRUCTION--PROBLEMS WITH ITS USE

In the criminal law, certain types of criminal activity are to be found which admit of degree, the most well known of these being assault and homicide. First degree murder, second degree murder, manslaughter, assault with intent to kill, assault with a deadly weapon, assault and battery, and simple assault are some of the sub-types to be found within the generic crimes homicide and assault. All assault cases have similar elements which arise from a basic kind of factual situation. The seriousness of an assault is determined from nuances within this basic factual situation, the intent of a defendant usually being the most relevant determination. The same can be said of all homicide cases. Given a certain type of factual situation describing assault or homicide, various degrees of assault or homicide are susceptible of being found and this finding is made by a jury.

A jury is guided in its determination of degree by instructions, generally authorized by statute,[1] which are known as lesser included offense instructions,[2] step instructions, or graduated instructions. They entail instructing a jury to consider a defendant's guilt as to a lesser offense included

1. *See, e.g.*, WYO. STAT. § 7-268 (1957).
2. An example of such an instruction will be useful at this point. In Ballinger v. State, 437 P.2d 305 (Wyo. 1968), the court gave the following instruction to the jury:

> You are instructed that under the information filed in this case, it is your duty upon a consideration of all of the evidence in the case:
> 1. To consider and determine whether the defendant is guilty or not guilty of the crime charged: aggravated assault and battery with a deadly weapon upon the person of Jim Abernatha.
>
> If you should find the Defendant not guilty of the crime of aggravated assault and battery with a deadly weapon upon the person of Jim Abernatha, it would then be your duty to further consider and determine:
> 2. Whether the Defendant is guilty or not guilty of the crime of assault and battery upon the person of Jim Abernatha.
>
> If you should find the Defendant not guilty of the crime of assault and battery upon the person of Jim Abernatha, it would then be your duty to further consider and determine:
> 3. Whether the Defendant is guilty or not guilty of the crime of assault to the person of Jim Abernatha.
>
> If you should find the Defendant not guilty of the crime of aggravated assault and battery while armed with a deadly weapon against the person of Jim Abernatha, and not guilty of the crime of assault and battery against the person of Jim Abernatha, and not guilty of the crime of assault as to the person of Jim Abernatha, it will be your duty to find the Defendant not guilty.

within a charged greater offense. They are used in a substantial number of criminal trials so their use or misuse has a significant import. The purpose of this comment is to discuss the use of the lesser included offense instruction, particularly as such use relates to possible invasion of the province of the jury.

After a background discussion of the relevant law, this comment will focus upon two issues. The first involves the question of when instructions on lesser included offenses should be given. The second involves restrictions on a jury's ability to consider lesser included offenses once instructions have been given.

GENERAL BACKGROUND

The determination of the degree of a crime is a question of fact and is exclusively for the jury.[3] This is not to say that there are no restrictions on the jury's ability to consider lesser included offenses. Most courts which have passed on the issue, including Wyoming,[4] have held that this question of fact is to be submitted to the jury only when a request is made for an instruction.[5] In addition, the vast majority of courts hold that instructions on lesser included offenses are to be given only when there is evidence to substantiate the defendant's being guilty only of a lesser offense.[6] The requirement for evidence to substantiate a lesser charge is sometimes phrased in the following terms: Instructions on lesser included offenses will not be given if the defendant, if guilty at all, is guilty only of the greater offense.[7]

3. Gallegos v. People, 316 P.2d 884 (Colo. 1957), in which the court stated: "The defendant was entitled to have the jury . . . determine, under proper instructions, all questions of fact including the question of the degree of the offense, . . ." *See also* State v. Marion, 174 Neb. 698, 119 N.W.2d 164 (1963); People v. Ogg, 159 Cal. App. 2d 38, 323 P.2d 117 (1958); People v. Munoz, 202 N.Y.S.2d 743 (App. Div. 1960); Strader v. State, 210 Tenn. 669, 362 S.W.2d 224 (1962).
4. Brantley v. State, 9 Wyo. 102, 61 P. 139 (1900).
5. Reynolds v. State, 147 Ind. 3, 46 N.E. 31 (1897); People v. Jordan, 125 App. Div. 522, 109 N.Y.S. 840 (1908); State v. Ellis, 105 N.E.2d 65 (Ohio Ct. App. 1951); People v. Walker, 155 Cal. App. 2d 273, 318 P.2d 77 (1957); State v. Anderson, 82 Idaho 293, 352 P.2d 972 (1960).
6. 5 WHARTON, CRIMINAL LAW AND PROCEDURE § 2099 (12th ed. 1957); Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U.L. REV. 62 (1962).
7. State v. Schoeder, 95 Ariz. 255, 389 P.2d 255 (1964), in which the Supreme Court of Arizona said: "Under our holdings, instructions on lesser offenses are justified only when there is evidence upon which the jury could convict of a lesser offense . . . . In other words, the state of the record must not be such that defendant can only be guilty of the crime charged or not guilty at all." *See also* State v. Gonzales, 46 Wyo. 52, 23 P.2d 354 (1933).

In some states, the trial court must instruct on lesser included offenses regardless of request,[8] and in at least one state, the trial court must instruct on lesser included offenses regardless of whether or not there is any evidence tending to show the defendant guilty only of a lesser offense.[9]

Another common rule in this area deserves mention. Most courts, on request of defense counsel, permit an instruction telling the jurors that if they are convinced of the defendant's guilt, but are unsure of the degree, then they may only convict of the lesser degree.[10] Failure to honor such a request will result in reversible error.[11]

Although substantial authority supports the proposition that it is reversible error for lesser included offense instructions to be given when the admitted evidence shows no guilt of a lesser offense,[12] some courts do not concur.[13] Further, most courts qualify the above proposition when the defendant is convicted of the greater offense charged, finding no reversible error on the ground that the defendant is not prejudiced by the instruction.[14] If instructions are not given on the lesser degrees of a crime and the evidence in a case supports such instructions, there is reversible error.[15]

Courts do not often discuss the purpose and effect of step instructions, but some comments have been made. Statements are found which term these instructions a protection for defendants since the jury may convict of a lesser offense if

8. State v. Hicks, 241 N.C. 156, 84 S.E.2d 545 (1954); Tarter v. State, 359 P.2d 596 (Okla. Crim. App. 1961); Strader v. State, 210 Tenn. 669, 362 S.W.2d 224 (1962).

9. State v. Barnes, 182 So.2d 260 (Fla. 1966). California, in some cases, approaches this standard, *see* People v. Smith 16 Cal. Rptr. 12 (Cal. App. Div. 1961).

10. 5 WHARTON, *supra* note 6.

11. 5 WHARTON, *supra* note 6. *See* People v. Dewberry, 7 Cal. Rptr. 548, 334 P.2d 852 (Cal. Sup. Ct. 1959); Delaney v. State, 14 Wyo. 1, 81 P. 792 (1905); Eagen v. State, 58 Wyo. 167, 128 P.2d 215 (1942).

12. Green v. United States, 218 F.2d 856 (D.C. Cir. 1955); People v. Brown, 415 Ill. 23, 112 N.E.2d 122, *appeal dismissed*, 346 U.S. 804 (1953); People v. Jones, 384 Ill. 407, 51 N.E.2d 543 (1943); State v. Reed, 39 N.M. 44, 39 P.2d 1005 (1934); State v. Alston, 228 N.C. 555, 46 S.E.2d 567 (1948).

13. Killen v. State, 92 So.2d 825 (Fla. 1957); Robinson v. State, 109 Ga. 506, 34 S.E. 1017 (1900).

14. Lewis v. Commonwealth, 270 Ky. 72, 109 S.W.2d 25 (1937); Stump v. State, 132 Neb. 49, 271 N.W. 163 (1937); State v. Robinson, 182 Kan. 505, 322 P.2d 767 (1958). *See* Annot., 102 A.L.R. 1019 (1936), which sets down the general rule for homicide cases.

15. 5 WHARTON, *supra* note 6. *See* Gallegos v. People, 316 P.2d 884 (Colo. 1957); People v. Yancy, 171 Cal. App. 2d 371, 340 P.2d 328 (1959); State v. Ulibarri, 67 N.M. 339, 355 P.2d 275 (1960).

doubt exists as to the greater offense.[16] Other authorities state that the intsructions are prosecution-oriented and allow the prosecution to gain a conviction when some element of a crime is not proven.[17] Perhaps the most accurate statement of the effect of a lesser included offense instruction is to be found in a New York case, *People v. Munoz,*[18] in which it was said:

> Consequently, although originally "intended merely to prevent the prosecution from failing where some element of the crime charged was not made out" . . . the doctrine . . . redounds to the benefit of defendants as well, since its effect actually is to empower the jury "to extend mercy to an accused by finding a lesser degree of crime than is established by the evidence.[19]

There are two obvious situations in which the use or non-use of lesser included offense instructions may be unfair to either the defendant or the prosecution. First, when facts are put in evidence which support instructions as to lesser degrees and they are not given, the jury may be faced with the choice either of acquitting a man who is obviously guilty of some wrong or of finding guilty a man who is not guilty of the crime charged. For example, when there is evidence to support second degree murder but only first degree murder is instructed upon, the jury may have to choose between setting free a man whom they believe to be guilty of second degree murder or convicting a man whom they do not believe guilty of first degree murder. Second, when no evidence exists to substantive instructions on lesser degrees but they are given, the jury may compromise its doubt as to a greater degree by convicting of a lesser degree. From the defendant's standpoint, the first seems to be the greater evil in most cases.

16. People v. Netzel, 295 Mich. 353, 294 N.W. 708, 711 (1940) (dissenting opinion), wherein it was stated: "The statute protects the accused by giving the jury a leeway to convict him of a lesser offense when they are convinced that a crime has been committed, although they may have some doubt that the proofs make out the major crime."

17. People v. Miller, 143 App. Div. 251, 253, 128 N.Y.S. 549, 550, *aff'd* 202 N.Y. 618, 96 N.E. 1125 (1911), in which the court said: "These two sections . . . were both declaratory of the rule which had always obtained at common law, which was that the prosecution never was allowed to fail because all the alleged facts were not proved, if such as were proved made out a crime though of an inferior degree." *See also* Comment, *Jury Instructions on Lesser Included Offenses, supra* note 6.

18. 202 N.Y.S.2d 743 (App. Div. 1960).

19. *Id.* at 746.

When there is evidence to substantiate the commission of a lesser offense, the giving of a lesser included offense instruction serves a dual beneficial purpose. It helps to prevent a defendant from being convicted of a greater offense than his guilt warrants and at the same time, enables the prosecution to gain conviction of an offense which corresponds more closely to the actual guilt of a defendant.

Since the question of degree is a question of fact and is held to be within the jury's province, an important problem arises as to when a trial court can prevent a jury's consideration of lesser included offenses. A trial court's affirmative prevention, by instruction, of a jury's consideration of lesser offenses, when there is evidence to support those offenses, is an invasion of the province of the jury,[20] and as some courts have held, is a violation of a defendant's constitutional right to trial by jury.[21]

When the jury has been prevented from considering lesser offenses, the crucial issue for most courts is whether or not the evidence in a case shows an instruction on lesser offenses to be justified. Varying requirements are made for the quantum of evidence sufficient to support an instruction. At one end of the spectrum, submission of lesser degrees is required when there is any evidence, no matter how lacking in credibility, to substantiate such a charge.[22] At the other end, submission of an instruction on lesser degrees will only be allowed when there are *reasonable grounds* for believing a lesser offense to have been committed.[23] This latter position raises questions as to the invasion of the province of the jury as a fact-finder.

The jury's province is supposedly that of the exclusive trier of fact, but it is necessary to determine how far this principle has been extended. Can the jury decide "facts" contrary to the weight of evidence? A United States District Court has noted that juries have the "inherent" power to find a defendant not guilty regardless of how overwhelming

20. People v. Guillett, 342 Mich. 1, 69 N.W.2d 140 (1955); State v. Shea, 226 S.C. 501, 85 S.E.2d 858 (1955).

21. Henwood v. People, 54 Colo. 188, 129 P. 1010 (1913); Strader v. State, 210 Tenn. 669, 362 S.W.2d 224 (1962).

22. Gallegos v. People, 316 P.2d 884 (Colo. 1957); Strader v. State, 210 Tenn. 669, 362 S.W.2d 224 (1962).

23. Zenou v. State, 4 Wis.2d 655, 91 N.W.2d 208 (1958).

the evidence of guilt might be.[24] In a case decided by the Supreme Court of Florida, submission of a lessor included offense was approved even though there was no evidence of the commission of a lesser offense.[25] The court stated that this was merely "an affirmance of the power of the jury" to find a defendant guilty of a lesser offense despite the weakness of evidence as to a lesser degree. The California Supreme Court has stated that the jury has the power, "because of obvious extralegal factors or for no apparent reason," to go against what the evidence seems to show and to find a defendant only guilty of a lesser degree of a crime.[26]

WHEN LESSER INCLUDED OFFENSE INSTRUCTIONS SHOULD BE GIVEN

Two Ohio cases present the primary issues deserving discussion in this area. In *State v. Patterson,*[27] the jury was only instructed as to second degree murder, but the Ohio Supreme Court held that there was no error in refusing to instruct as to first degree manslaughter even though the facts might have warranted such instruction. The court reasoned that the refusal to so instruct was tantamount to a directed verdict of not guilty of the lesser included offense and was therefore beneficial to the defendant. In *State v. Loudermill,*[28] the Ohio Supreme Court overruled this holding on the basis that it went against the statutory commandment and that it was "the duty of the court to give, as well as that of the jury to consider, a charge on the lesser included offenses which are shown by the evidence to have been committed."[29]

The decision in *State v. Patterson* clearly marked the furthest extension of a court's affirmative exclusion of lesser offenses from the jury's consideration. The *Patterson* court's justification is obviously not true in all situations and the Ohio Supreme Court recognized this in *Loudermill.* The *Loudermill* court expressed concern over the situation in which a defendant was obviously guilty of a lesser charge, but was not clearly guilty of the greater crime charged and instruc-

24. United States v. Fielding, 148 F. Supp. 45, 56 (1957).
25. Killen v. State, 92 So.2d 825, 827-28 (Fla. 1957).
26. People v. Powell, 34 Cal. 2d 196, 208 P.2d 974, 980 (1949).
27. 172 Ohio St. 319, 175 N.E.2d 741 (1961).
28. 2 Ohio St. 2d 79, 206 N.E.2d 198 (1965).
29. *Id.* at 199.

ted upon. It felt that a jury might fabricate the elements of the charged crime rather than turn a defendant loose upon society, and pointed out that this possibility is a consequence to be expected when there has been a failure to instruct on a lesser included offense and there is evidence of the commission of that offense. If there is an adherence to the maxim that it is better that ten guilty men go free than that one innocent man is convicted (and this innocence must extend to innocence of a particular degree of a crime), then it is clear that the *Loudermill* decision is an emminently fair one.

The *Loudermill* court, however, does not go far enough. The court felt it was the duty of a jury to consider lesser charged offenses "which are shown by the evidence to have been committed." Here lies the rub. The trial court, by the upper court's statement, must determine whether or not the evidence shows a lesser crime to have been committed before submitting on lesser degrees, and this is the rule in most jurisdictions. But the statement seems to authorize discretion on the part of the trial court which could be subject to abuse. A trial court could as effectively keep from the jury's consideration questions of fact concerning lesser offenses by rigidly construing the evidence as it could by deciding that the jury has no power to determine degree. So we are confronted with a back door invasion of the province of the jury.

Florida has recognized the possible evils inherent in a trial court's treatment of the evidence in a case, but has produced a solution to the problem that creates further problems. Florida has determined that the jury must be instructed as to a lesser included offense even when there is no evidence to support guilt of a lesser offense. In some cases a defendant's only defense will be an alibi or insanity, and in those cases, he is either guilty of the greater offense or not guilty at all. A jury may, however, compromise its doubt as to the defendant's guilt of a greater offense by convicting of a lesser crime, a crime of which the defendant cannot logically be guilty.

A number of courts, also recognizing the possible evils involved in a trial court's treatment of the evidence, require a trial court to instruct on lesser included offenses when there is any evidence to support such instruction. This position

seems to be the best solution to the dilemma. It avoids abuses by the trial court and still prevents the jury from considering a lesser offense when there can be no guilt of a lesser offense.

RESTRICTIONS ON THE JURY'S CONSIDERATION OF LESSER OFFENSES

The situation in which a jury is inhibited from determining the degree of a crime will now be examined. Two cases, *State v. Hacker*[30] and *Ballinger v. State*,[31] provide convenient vehicles for such an examination.

In *State v. Hacker*, an assault case, the trial court instructed the jury that if it found the defendant not guilty of assault with intent to kill, then it was to consider his guilt as to common assault. The Supreme Court of Missouri found that this instruction was not erroneous, and approved instructions which ordered the jury to first consider and decide the defendant's guilt as to a greater charged offense before proceeding to consider a lesser charge.[32] The appellant argued that the instruction took the burden of proof away from the prosecution. This is clearly incorrect since the jury, when considering the greater offense, was still subject to instructions on reasonable doubt and burden of proof. The Court, however, did little to show why such an instruction might be proper, merely quoting a section out of Corpus Juris Secundum which generally stated the court's conclusion.[33]

The effect of such an instruction is that it orders the jury's deliberations by first forcing the jury to acquit of the greater offense before it can even consider a lesser one. This puts a great burden on the jury's ability to determine

30. 214 S.W.2d 413 (Mo. 1948).

31. 437 P.2d 305 (Wyo. 1968).

32. This type of instruction seems to be in fairly common usage. *See* Mathes & DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.10 (1965). Ohio courts use this type of instruction, *see* Reid, BRANSON INSTRUCTIONS TO JURIES § 3851, at 597 (3rd ed. 1962), as do Oklahoma and Wisconsin courts. *See* Thoreson v. State, 69 Okla. 128, 100 P.2d 896 (1940); Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1940). This list is not intended to be exhaustive but is intended merely to show the widespread use of the Hacker type instruction.

33. 41 C.J.S., *Homicide*, § 390 n.7, at 206. This section cited Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909). This case merely stated that an instruction which ordered the jury's deliberation was proper, giving no reason for the conclusion. Another case, Thoreson v. State, 69 Okla. 128, 100 P.2d 896 (1940), also mentioned such instructions, but this was pure dictum in a case in which the form of the instruction was not challenged. Extensive research has been unable to produce any other cases which mention the ordering aspect of step instructions.

the degree of a crime since they cannot consider all the degrees until they have decided on a greater degree.

As a general rule, a jury is not given instructions on lesser included offenses unless the evidence makes out neither a perfect case for the commission of a greater offense nor makes out a perfect case for the commission of a lesser offense. This necessarily follows from the fact that most courts do not allow instructions on lesser offenses unless there is evidence to show the defendant only guilty of a lesser offense. Given the above statements, an analogy can be constructed showing a situation similar to that which is produced by the giving of a *Hacker* type instruction: A person is handed a peg and is shown three holes, none of which quite fit the peg perfectly. He is told that it is his exclusive duty and province to decide which of the three holes most tightly accommodates the peg. After he inserts the peg in the first hole, the individual is asked to decide if this hole most tightly fits the peg. He is told that he must decide on the first hole before he can even consider the tightness of the fit in the other two holes. Of course, the other two holes could be seen but this would be of little help unless there was an obvious misfit. Upon such a restriction of deliberation one would wonder about his "exclusive duty and province," and would strongly suspect that a strong bias for the first hole was being demonstrated.

The instruction in *Hacker* directed the jury to first determine the defendant's guilt as to the greater charge before deliberating on the lesser charge. What is a jury to do, when given a *Hacker* type instruction, if it cannot agree on the defendant's guilt or innocence on the greater charge? This was exactly the problem in *Ballinger v. State*.[34] The jurors were given an instruction which told them that if they were to find the defendant not guilty of aggravated assault (assault with a deadly weapon), then it was their duty to consider the lesser offense of assault and battery. After four and one half hours of deliberation, the jury asked the trial court this question: "If we are unable to reach a unanimous decision on one charge, do we vote on the next lesser charge?"[35] The trial court then told them: "Only if you all agree to

34. 437 P.2d 305 (Wyo. 1968). *See* instructions given by the court *supra* note 2.
35. *Id.* at 309.

consider a lesser charge."[36] Two hours later the jury found the defendant guilty of assault with a deadly weapon. The Supreme Court of Wyoming upheld this supplemental instruction although Justice Gray dissented, stating that he believed the supplemental instruction to be prejudicial error.

The jury was first told that it could not consider lesser charges until it acquitted of the greater charge. It was then told that if it was deadlocked, it could not vote on a lesser charge unless all the members agreed to consider a lesser charge. The jury was forced to follow a formal procedure requiring unanimous agreement to vote on the lesser degree and could be stopped by any juror who wished to convict of the greater offense. Justice Gray said of this procedure: "Its effect was simply to direct the jury either to convict or acquit the defendant of the primary charge when obviously the members were in serious disagreement on that charge."[37] The combined restrictions on the jury's deliberations imposed by the *Ballinger* court fly in the face of pronouncements declaring it to be the exclusive province of the jury to determine degree.

The majority of the court in *Ballinger* reasoned that courts have the power to control litigation before them and to adopt suitable rules for that control. This broad statement does not meet the issue. A court could not adopt a rule requiring the jurors to deliberate in separate groups of three. A court could not adopt a rule disallowing consideration of the case by seven of the twelve jurors. The court asked itself what better reply the trial court could have given. The obvious answer to this query is that the trial court could have told the jurors that if they were unable to reach an unanimous decision, they should vote on the next lesser charge. The trial court should not have imposed its arbitrary requirement upon the deliberations of the jurors. Justice Gray, in his dissenting opinion, appropriately quoted *State v. Carroll*,[38] in which the Wyoming Supreme Court admonished against a trial court's attempting in any way to influence a jury toward either a greater or lesser verdict.

36. *Id.*
37. *Id.* at 311.
38. 52 Wyo. 29, 69 P.2d 542, 563 (1937).

ANALYSIS

Understandably, many courts fear the license of the jury, and indirectly attempt to influence and control the jury by instruction. There is evidence that juries do reach compromise verdicts when unable to agree on the degree of a crime.[39] There is also evidence that juries will convict of lesser offenses because of considerations other than the merits.[40] But these supposed faults of the jury are found in other areas of litigation. It appears that we are forced to accept these jury characteristics if we are to have the jury in the form it is known in the United States.

In America, the jury has a great vitality, assured by the great discretion allowed jurors in their deliberations and findings. This discretion and consequent vitality could be curtailed by placing rigid restrictions on jury procedure. The trial court could be allowed to enter the jury room and supervise the deliberations of the jurors. The trial court could also be allowed to instruct the jury in such a way that their deliberations would be confined to the consideration of narrow, specific fact determinations, with a general verdict thereby being prevented. All these methods have been employed in Europe and have resulted in the emasculation of juries.[41]

In the United States, the jury is obviously not allowed complete discretion, but the reach of the European methods far exceeds any restrictions imposed on the jury in this country, and, in fact, is alien to our traditional attitudes toward the jury. Nevertheless, when a trial court is given wide discretion to determine whether a question of fact as to degree is present in a factual situation, when a trial court can, by instruction, carefully order and restrict a jury's deliberations within the jury room, European methods are being approached with their assured emasculation of the jury. If the jury is to be the *exclusive* trier of fact, as is claimed in this country, and is to be a bulwark against official tyranny, as is also claimed, it is absolutely necessary that the trier of facts not be fettered with arbitrary procedural restrictions.

39. KALVEN & ZEISEL, THE AMERICAN JURY 477 n.4 (1966).
40. *Id.* at Chs. 15-27.
41. *Id.* at 13 n.3.

CONCLUSION

In the step instruction type case, such as assault or homicide, a problem is encountered of no less magnitude than that of the preservation of the integrity of the American jury. Rules which allow clear fact questions to be taken away from the jury and instructions that order and direct the deliberations of the jury combine to emasculate juries. If administered properly, the theory behind lesser included offense instructions is sound and can result in greater fairness to both sides in a criminal dispute. But in order for the lesser included offense instruction to be a useful tool in the administration of criminal justice, it is necessary that: 1) Instructions on lesser included offenses be given when there is *any* evidence to support the defendant's guilt of a lesser offense; and (2) Courts refrain a) from giving instructions which first direct a jury to determine the guilt of a defendant as to a greater offense before considering his guilt of a lesser offense, and b) from giving instructions which inhibit a jury from considering a lesser offense when unable to agree on a greater offense.

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