TOUCHING THE BASES ON LESSER INCLUDED OFFENSES

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Criminal defense attorneys often must decide in the late innings of a trial whether to "swing for the fences" and argue for an outright acquittal, (hoping they will "knock it out of the park" rather than "strike out" and incur a conviction as charged), or "play it safe" and "settle for a single," so to speak, with a request for a jury instruction on a lesser included offense (LIO).

While counsel undoubtedly will (and should) consult with his/her client on whether to seek a LIO (based on the nature of the charge, the quality of the People's proof and counsel's assessment of the jury's likelihood of letting the defendant walk away when it's over), it is important to keep in mind that the decision to do so (or not) is a STRATEGIC one that belongs to counsel and NOT A FUNDAMENTAL decision that only the defendant can make. (See People v Colville 20 NY3d 20 [2012]). In fact, deferring to the defendant on matters that are for counsel to decide, can deprive defendant of effective assistance of counsel. (People v Benevento 91 NY2d 708 [1998]).

In Colville supra, the trial court denied defense counsel's request for a charge-down instruction on Manslaughter 1st and 2d degrees (as LIO'S of Murder 2d degree), because the defendant objected. In reversing the Appellate Division's affirmance of the conviction, the Court of Appeals held that the trial court deprived the defendant of the expert judgment of counsel guaranteed by the Sixth Amendment because the decision whether to seek a LIO was for counsel rather than the defendant to make. As noted in People v Richardson 143 AD3d 1252 (4th dep't 2016), "it is well settled that if defense counsel solely defers to the defendant with respect to non-fundamental decisions that are for the attorney to make, the defendant is "deprived of the expertise of counsel to which the Sixth Amendment entitles him."

The framework for determining whether a LIO might be available in a given case is set forth in Criminal Procedure Law (CPL) 300.50 (Indictments) and CPL 360.50 (Informations). The starting point, however, is CPL 1.20(37) which states: "(w)hen it is impossible to commit a particular crime without (at the same time) committing, by the same conduct, another offense of lesser (degree), the latter is, with respect to the former, a lesser included offense."

Put another way, if the elements of the lower-level offense are contained within the greater offense (not unlike a Russian Maryoshka doll standing inside increasingly larger versions of itself), the lower offense is a LIO of the greater. Examples include Driving While Ability Impaired (DWAI) which constitutes a much lesser degree of impairment from voluntary consumption of alcohol than its greater counterpart of Driving While Intoxicated (DWI) which requires impairment to the point where a person is incapable of operating a motor vehicle as a reasonable and prudent driver. (People v Cruz 48 NY2d 419 [1979]). Consequently, a person cannot commit DWI without also committing DWAI.

Other examples are Assault 3d degree (PL 120.00[1]): intentionally causing physical injury which is included within the elements of Assault 2d degree (PL 120.05[1][2]): intentionally causing serious physical injury or physical injury with a dangerous instrument; and Criminal Possession of a Weapon 4th degree (PL265.01[1]): possession of a firearm, which is a LIO of Criminal Possession of a Weapon 2d degree (PL 265.03[3]): possession of a loaded firearm outside of one's home or place of business.

The first step, then, is determining whether or not the lower grade offense that you are thinking about asking for meets the statutory definition of a LIO. In People v Glover 57 NY2d 61 (1982), the Court of Appeals stressed that the party seeking the lesser charge, must first demonstrate that it is THEORETICALLY IMPOSSIBLE (in all circumstances, not just in a given case), to commit the greater offense without committing the lesser at the same time. This requires a comparison of the elements of the offenses in question and determining whether, in the abstract, the greater could be committed without, concomitantly, committing the lesser. In Glover, the Court held that the trial court properly denied the defendant's request for a charge-down from Criminal Sale of a Controlled Substance 2d degree (PL 220.41[1]), (undercover sale) to Criminal Facilitation (PL 115.05), because it would be theoretically possible to sell a drug illegally without intending to aid another person in the commission of a Class A felony.

See also People v Bartkow 96 NY2d 770 (2001): Harassment 2d degree (PL 240.26[1]) held not to be a LIO of Menacing (PL120.14) because the crux of Harassment (with intent to harass, annoy or alarm another, D strikes, shoves kicks or otherwise subjects another to physical contact or attempts to do same), is PHYSICAL CONTACT (actual or threatened), while Menacing entails an intent to place another in reasonable fear of physical (or serious) injury or death by displaying a dangerous instrument. (In Bartkow, D swung a baseball bat at a mental health counselor on a home visit). In the Court's view, one can menace another without necessarily committing Harassment. (The dissent felt that one cannot fear the display

of a dangerous instrument without anticipating physical contact from it).

CPL 300.50(1) states that the a court may, in addition to submitting the greatest (i.e. highest level) offense that it is required to submit (as charged in the indictment), submit, in the ALTERNATIVE, any LIO if there is a REASONABLE VIEW of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view to support such finding, the court may not submit the LIO (but any error with respect to such submission is WAIVED unless the defendant objects to it BEFORE jury deliberations).

It should be noted that when reviewing the evidence to see if there is a reasonable view that would support a finding in favor of the lesser but not the greater, the court must review the proof in the LIGHT MOST FAVORABLE to the defendant (People v Martin 59 NY2d 704 [1983]).

Similarly, CPL 360.50(2) states that in submitting a count charging a misdemeanor that has been established by legally sufficient evidence, the court may, in addition to submitting such misdemeanor, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which supports the lesser but not the greater. (If the evidence is not legally sufficient to establish the misdemeanor charged in a particular count, but is legally sufficient to establish a LIO, the may submit such LIO, and must do so if the People so request.

Under CPL 300.50(2), if the court is authorized to submit a LIO and is requested by either side to do so, it MUST do so. (Absent such request, the failure to submit the LIO is not error). Under subdivision 3, the principles of the statute apply even though a LIO is specifically charged in another count of the indictment.

Pursuant to subdivision 4, whenever the court submits two or more offenses in the alternative, it must instruct the jury that it may, based on the evidence, return a guilty verdict with respect to any one but not more than one of such offenses, and that a conviction on one is deemed an acquittal of every greater offense but not of any lesser offenses submitted. In other words, if the jury finds the defendant guilty of the top count submitted (as charged or any lesser offense resulting from an earlier motion to dismiss/reduce), it does not go on to consider any authorized lesser included offense. In order to get to a lesser included offense, the jury must have acquitted the defendant of the higher count.

When reviewing a trial record to determine whether the lower court has abused its discretion in denying a defendant's request for a LIO, the appellate courts are supposed to focus not on the persuasiveness of the evidence of guilt with respect to the submitted count (of which the defendant was convicted), but rather upon whether, under any reasonable view of the evidence, it was possible for the jury to acquit the defendant of the greater offense and convict him of the lesser (People v Henderson 41 NY2d 233 [1976]).

In People v Van Norstrand 85 NY2d 131 (1995), the defendant argued in this Shaken Baby Assault case that the trial court erred in denying his request for a charge-down from Depraved Indifference Assault 1st degree, PL 120.10(3): (recklessly causing serious physical injury to his four-month-old son under circumstances demonstrating a depraved in difference to human life) to Reckless Assault 3rd degree, PL 120.00(3) (recklessly causing physical injury).

The defendant, a multiple convicted felon, was taking care of his son and two other young children of his girlfriend for several days (while she was in the hospital). The infant son ended up in the hospital with severe internal head injuries (brain bleeding, seizures) that put him in a coma for several days. The defendant told hospital staff that the child fell off a bed and struck his head. He also had other bruises to his face and chest. A doctor determined that the child exhibited signs of Shaken Baby syndrome.

After retelling the same story, the defendant eventually admitted to police that he was stressed out and sleep-deprived when his son refused to fall asleep after his feeding. The defendant said he lost his temper and shook the child "pretty hard," (causing his head to snap forward and back) and put him down forcefully on the couch, thus bruising his jaw. He also mentioned that he grabbed his son with both hands which he described as "naturally strong."

The Appellate Division affirmed the defendant's conviction for Depraved Indifference Assault and Endangering the Welfare of a Child. The Court of Appeals reversed and ordered a new trial. Acknowledging the persuasiveness of the proof on the felony assault charge, the Court `held that based on the defendant's own account, specifically, how he lost his temper while tired and stressed, a reasonable juror could infer that while the defendant acted recklessly, he was unaware of a grave risk of death inherent in his conduct. In the Court's view, the jury, on these facts, could rationally have concluded that the defendant committed these acts with "less culpable awareness" that his conduct created a substantial and unjustifiable risk of physical injury but not necessarily serious physical injury or death.

The dissent took the position that the Appellate Division properly determined that there was no reasonable view of the evidence to support a finding that the violent shaking of a four-month-old child as admitted to by the defendant created

anything less than a substantial and unjustifiable risk of death or serious physical injury under circumstances demonstrating a gross deviation from the standard of conduct expected of a reasonable person.

In People v Hoag 51 NY2d 632 (1981), the Court of Appeals held that the City Court committed error as a matter of law in refusing the defendant's request for an instruction on DWAI as a lesser included offense of DWI based on a misapprehension that DWAI (as was the case before a change in the law in 1970), can only be established by chemical test evidence of blood alcohol content (BAC). In this case, the defendant refused to take a breathalyzer test. On appeal, County Court held that the trial court correctly determined that there was no reasonable view of the evidence that would support a finding that the defendant committed the lesser offense (DWAI), but not the greater (DWI).

The Court of Appeals determined that County Court erred in appraising the persuasiveness of the People's proof on the DWI charge rather than assessing whether there was a reasonable view of the evidence to support a verdict of DWAI but not DWI. While the People's evidence (police officer and DSS caseworker who was called to the scene because there was an infant in the car), indicated that the defendant drove erratically, refused to cooperate and was "very intoxicated," the defendant and her mother testified that she was not intoxicated and only became uncooperative when she learned that her child would be taken away.

The Court reasoned that County Court erroneously interpreted the lower court's denial of the LIO instruction as an exercise of discretion when, in fact, it was based, as noted above, on an erroneous interpretation of the law. Moreover, based on the entire trial record, including the defense evidence, there was, in the Court's view, a sufficient basis to justify the submission of DWAI as a LIO for the jury's consideration. As the court observed, "County Court improperly weighed the evidence (as a jury would), and it cannot be said that the proof excluded every possible hypothesis except DWI." (citing People v Malave 21 NY2d 26 [1967]).

It is not unusual for an "ATTEMPT" to commit a crime to qualify as a LIO of a charged crime inasmuch as the intent (to commit the object crime) is the same, and the conduct, for one reason or another (e.g. lack of physical injury in an assault or apprehension of defendant/burglar just before he actually gains entry into a dwelling), comes very close to but falls just short of its intended purpose. (See PL 110.00). This is not always the case, for example, with strict liability crimes (e.g. DWI) or where the result of the crime (e.g. injury or death) is not an intended consequence.

For example, there is no such crime of Attempted Manslaughter 1st degree as a LIO of Manslaughter 1st degree (with intent to cause serious physical to another person, the defendant causes the death of such person), because one cannot intend to cause serious physical injury and, at the same time, attempt to cause death which requires proof of homicidal intent. (See also People v Plastik 48 Misc 3d 409 [Crim. Ct. City of NY 2015]): trial court denied D'S request for charge on Attempted Aggravated Harassment as LIO of Aggravated Harassment (PL 240.30[4]) (with intent to harass, annoy, alarm, threaten another person, D strikes, shoves, kicks or otherwise subjects him/her to physical contact, thereby causing physical injury), because there is no intent to cause injury in the completed crime but an attempt would require an intent to do so).

Lesser included offenses also come in to play in the context of guilty pleas, but the rules are generally less restrictive when it comes to disposing of misdemeanors with pleas to a violation such as Disorderly Conduct or Harassment. Neither one qualifies as a true LIO of Assault, for example, within the meaning of CPL 1.20(37), but countless cases are resolved in the local courts with pleas to lesser charges which, technically speaking, bear no legal resemblance to the crimes charged.

When it comes to guilty pleas to lesser crimes under an indictment or superior court information (SCI) upon a waiver of indictment, the crime must, in the case of an indictment, relate to the crime charged (e.g.. a defendant indicted on a charge of Assault 2d degree cannot, under that count, plead to Grand Larceny, but a plea to Attempted Assault 2d degree would work), and in the case of an SCI, consist of the crime for which the defendant was held for the Grand Jury or a LIO thereof. (See People v Menchetti 76 NY2d 473 [2013]. Otherwise, the waiver of indictment and SCI are jurisdictionally invalid. (People v Seals 135 AD3d 985 [3d dep't 2016).

Prosecutors and defendants desirous of a particular plea not encompassed in a felony complaint filed in the local court, may after dismissal of the complaint, file a new felony complaint in the Superior Court which will temporarily sit as a local criminal court for purposes of arraignment and waiver of a felony hearing after which the court (sitting again in its regular capacity), will accept the defendant's waiver of indictment and guilty plea under an SCI charging the offense for which the defendant was held for the Grand Jury (pursuant to the waiver of hearing), or to a LIO there under. (Counsel should first make sure that the particular Superior Court judge sitting in Criminal Special Term is willing to accommodate this procedural gymnastic by assuming the role of a lower court, however briefly).

Counsel should also be mindful that charges can sometimes, where the evidence before the Grand Jury warrants, be reduced, upon appropriate motion, to a LIO (CPL 210.20, 210.30) if not dismissed altogether for legal insufficiency. With the new discovery laws, counsel can now make the motion upon actual review of the Grand Jury testimony rather than shoot in the dark. The same is true at the close of the People's case (or at the conclusion of all the evidence), where the evidence presented is not legally sufficient to establish the offense charged or any LIO. (CPL 290.10[1]).

Of course, counsel has to know not only the elements of the charged crime but what constitutes a LIO. If the case survives the motion to dismiss (which should also be renewed at the close of all the evidence), counsel will then have to decide (before closing argument) whether to request submission of a LIO based on the two-step analysis set forth in People v Glover supra.

While it is often appropriate to swing for the fences, and always nice to hit one out of the park every once in a while, sometimes the facts and counsel's good judgment call for hedging one's bets on a LIO and settling for a solid single lest the client end up in deep left field with nowhere to go until his/her sentence is served. It is seldom an easy call but often the right one when based on a reasoned analysis of the elements of the crimes charged and the strength of the People's proof.