

Seldom-used felony murder law targets people who cause police shooting deaths

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Henry M. Nellum didn't fire the shot that killed Jimmie M. Sanders Jr. on May 21 at a downtown Appleton bar.

Brian T. Flatoff didn't fire the shot that killed hostage Michael Funk as he fled a motorcycle shop in Neenah on Dec. 5, 2015.

Sanders and Funk were both killed by police who responded to incidents that Nellum and Flatoff are accused of starting.

In both cases, a prosecutor determined that police acted reasonably and weren't criminally responsible for the deaths. And in both cases the gunmen were charged with felony murder — accused of causing the deaths of the men killed by police.

The felony murder statute, which is not used extensively by prosecutors, can be charged when a person's actions are a "substantial factor" in causing death. "Whether an intervening act was negligent, intentional or legally wrongful is irrelevant," according to the statute.

Prosecutors say the charge, which could extend Nellum's sentence by 15 years, is appropriate because Nellum caused the disturbance that brought Appleton Police Lt. Jay Steinke to the bar. The law typically applies to deaths that occur during the commission of a felony.

"This man caused this tragic incident, not Mr. Sanders and not Lt. Steinke," Appleton Police Chief Todd Thomas said in announcing the results of the shooting investigation on June 2.

The Nellum case is the first time Outagamie County District Attorney Carrie Schneider has filed such a charge.

In the Appleton incident, Steinke entered Jack's Apple Pub after learning someone had fired a gun inside the bar. Steinke told investigators he opened fire after he saw Nellum running toward him with a gun in his hand.

Schneider said Steinke shot four times and that as he was shooting, he was pushed by patrons trying to exit the bar. The first bullet hit Nellum in his left arm. The second bullet hit Sanders in his lower back. The third and fourth shots hit the bar and cash register.

Nellum's preliminary hearing is scheduled for June 21.

The felony murder law is intended as a way to impose additional prison time on a defendant, said Appleton attorney Mike Rudolph.

"Felony murder is when somebody dies in the commission of a felony (and) ... the death is not intended," Rudolph said. "But we punish them like it was intended, as opposed to a manslaughter conviction, or if someone dies of negligence.

"It adds exposure to a greater period of incarceration as a way to get more time on a guy because someone died. And that's always been its function."

Milwaukee attorney Ray Dall'Osto said a change to the felony murder law in 1988 diluted the statute by adopting the "substantial factor" language.

"This rolled back Wisconsin's law to more of what existed at common law, eliminating intent and foreseeability," he said.

"It makes Wisconsin felony murder law closer to strict liability, which is not good from a due process, fair notice, fair trial and equal protection perspective."

Former Wisconsin Supreme Court justice Janine Geske said one of the hallmarks of the felony murder law "is that you don't have to personally commit (murder)."

"One of the advantages of charging that particular offense is it doesn't require any proof of intent or proof of motive — only that (a suspect) committed a felony as a substantial actor," Geske said.

Geske said the felony murder law allows prosecutors to hold people accountable for "putting into motion the series of events that led to a death."

"I think it's a good enhancement; otherwise there is no way to charge ... that kind of crime."

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