

1 Albertson. I have them. Let me see what yours says.

2 Let me hear from you.

3 MR. ALBERTSON: Judge, my modified
4 instruction includes an additional paragraph or
5 additional statement after reasonable doubt of any of the
6 above, it says offenses but I guess it should be
7 elements, but I've added or that she acted in self
8 defense or that she acted in defense of another. I would
9 point out that in this particular case that both of those
10 issues have been raised both by the Commonwealth's
11 evidence and the defendant's evidence. I'm going to have
12 a similar argument when it comes down to the finding
13 instruction as to the gradations of homicide and have
14 virtually the same language about defense of others and
15 self defense therein. If the Court wants me to expand on
16 my reasons for that at this point I will.

17 COURT: Go ahead.

18 MR. ALBERTSON: Judge, the case is pretty
19 clear from the defendant's statement that the comment was
20 I'm going to kill you, or I'm going to kill your fucking
21 son and then I'm going to go kill you. He made that
22 statement. He made an overt act which is required in
23 self defense and defense of others. He went towards the
24 door. This is immediately after thrashing Ms. Hockman,
25 after being abusive to her, after making previous threats

1 against her son, threats against her, and a pattern of
2 abuse. Certainly at that point, and her testimony that
3 she did not bring on the fight. And so those allegations
4 at this point combined with the overt act and the
5 testimony, the knife that was found at the scene, her
6 statement that she thought the knife was open when she
7 initially saw it, all provides the more than scintilla of
8 evidence that's required to support both of those
9 theories.

10 COURT: Ms. Garst, you wish to respond?

11 MS. GARST: Judge, my objection would be
12 that at this point the testimony is not that she was
13 certain that the knife blade was open but that she
14 thought it was.

15 COURT: All right. Mr. Albertson, do you
16 have a clean copy of your instruction? I've got
17 photocopies here.

18 MR. ALBERTSON: Judge, yeah, I think I gave
19 you the ...

20 MS. GARST: And, Judge, as to the
21 instruction I think on its face the model jury
22 instruction is acceptable and then there can be a
23 separate instruction if the Court so deems as to self
24 defense. That in and of itself states that the jury
25 shall find not guilty. I don't think it's necessary to

1 MR. ALBERTSON: Yes, sir.

2 COURT: Okay. Now we're getting down to
3 the crime of first degree murder. And these go into your
4 request for manslaughter, right?

5 MR. ALBERTSON: Yes, sir.

6 COURT: Ms. Garst of course has not
7 included that. The instruction that she has I feel is
8 in proper form. The issue is whether or not there's at
9 least a scintilla, and that's the requirement we have to
10 give this to the jury on the issue of manslaughter.

11 MS. GARST: And I'd object.

12 COURT: I want to hear from both of you on
13 this obviously. It's Mr. Albertson's instruction.

14 MS. GARST: Yes, sir.

15 COURT: Actually yours is fine, Ms. Garst.
16 The only issue is whether or not I give that.

17 MS. GARST: And I suppose ...

18 COURT: Let me hear from Mr. Albertson.
19 He's the party who is moving to do so.

20 MR. ALBERTSON: Judge, once again the issue
21 of manslaughter comes down to the heat of passion issue
22 which I put in my jury instruction. I have a follow up
23 jury instruction on malice. The Commonwealth's one on
24 malice excludes the paragraph on heat of passion, mine
25 includes it. And that paragraph states heat of passion

1 excludes malice when the heat of passion arises from
2 provocation that reasonably produces an emotional state
3 of mind such as hot blood, rage, anger, resentment,
4 terror or fear so as to demonstrate an absence of
5 deliberate design to kill or to cause one to act on
6 impulse without conscious reflection. Heat of passion
7 must be determined from circumstances as they appeared to
8 the defendant. Those circumstances must be such as would
9 have aroused heat of passion in a reasonable person. My
10 argument is much the same when it comes down to self
11 defense because my allegations on self defense, once
12 again there's an additional element to that is the
13 reasonableness to use the force at that time. I'd point
14 out the same factors, the threats toward her son, the
15 threat that he was going to kill her son, the beating
16 that she took beforehand before he heads off into the
17 house, and her statement that she just grabbed it.
18 Deputy Hensley says the words were, "I just snapped.".
19 All heat of passion indicators. All elements that tend
20 to exhibit a manslaughter issue rather than the malice
21 that's required to only have it go down to a second
22 degree and then stop. So for those reasons, Judge, I
23 think it's clear in this case that just as those factors
24 support self defense and defense of others, those same
25 factors support heat of passion.