



Judge's cure could make things worse

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NEWS ANALYSIS; Judge's cure could make things worse; Experts say the new instructions issued to jurors at an impasse in the Spector trial may put a conviction at risk of being overturned.

In the highest profile case of his career, Los Angeles County Superior Court Judge Larry Paul Fidler this week did something judges seldom do: He admitted he had made a mistake and said he wasn't sure what to do about it.

The mistake was an erroneous jury instruction that some jurors cited as confusing after they announced Tuesday that they were deadlocked on a second-degree murder charge against Phil Spector. Fidler decided that the instruction, which was proposed by the defense and approved by the judge, was improper after jurors disclosed they were at an impasse.

It was the sort of problem faced by a cook standing over a stove trying to make gumbo for his wife's birthday. After two hours, he tastes it and discovers that he has put in too much garlic. He tries to pluck out some of the garlic or mask it with several splashes of hot sauce. He won't know for a while whether it will work.

Fidler spent most of three days trying to fix the problem, finally deciding to nullify the problematic instruction and issue a new one in its place.

Spector, 67, is accused of firing a single bullet through the mouth of actress Lana Clarkson, 40, whose body was found slumped in a chair in the foyer of the famous music producer's Alhambra home Feb. 3, 2003. The jurors, who sat in the downtown courtroom without deliberating during the long debate over instructions, resumed their discussions for less than an hour Thursday before recessing. They are due back at 9:30 a.m. today.

Several legal experts interviewed by The Times said it was clear that Fidler was trying to salvage a trial that began in April, heard from 75 witnesses and generated more than 10,000 pages of transcript. But in the process, he could be putting any conviction that might result at risk of being overturned.

"If a judge has given an erroneous instruction, that's the surest path to a reversal," said Arizona State University law professor Michael J. Saks, an expert on jury issues.

"If a judge withdraws an instruction, he is telling the jury there is something wrong. There is a real danger that it will be unduly emphasized," said Santa Rosa, Calif., criminal defense lawyer Thomas F. Lundy, another expert on jury issues.

"I certainly think there is the specter of coercion" by the judge, said USC criminal law professor Jean Rosenbluth, who has followed the case closely.

Rosenbluth mused about the effect of televising the trial.

At one point Thursday, Fidler said he was not sure whether the public understood what was going on.

"This judge is always very careful and very deliberative," Rosenbluth said. "I wonder, since it is being televised, if that is causing him to think more than he normally would about everything and second-guess himself."

"Superior Court judges are very busy. Here, there seems to be a lot of hand-wringing going on."

The original instruction told the jurors that in order to convict Spector they had to conclude that the music producer had held the gun that went off in Clarkson's mouth. Fidler said that he decided the instruction improperly hemmed in the jury.

So, on Thursday afternoon, after hours of sparring with lawyers on both sides, Fidler told the jurors that he was withdrawing that instruction. They should "treat it as if you had never heard of it," he said.

In its place, he read jurors a modified instruction, which stated that to convict Spector, they would need to find that he "committed an act with a firearm that caused the death of Lana Clarkson, such as:

"a. Placing the gun in her mouth or forcing her to place the gun in her mouth at which time it discharged;

"b. Pointing the gun at or against her head, at which time it entered her mouth and discharged;

"c. Pointing the gun at her to prevent her from leaving his house, causing a struggle which resulted in the gun entering her mouth and discharging."

Fidler cautioned the jurors that "by using these examples, I am not suggesting that any of these acts took place. These are inferences you may draw from the evidence but are not required to do so. You may reject them. These are only possibilities that you may consider."

Fidler told the jurors that Spector had to have done "more than drawing or exhibiting a firearm" in Clarkson's presence "in a rude, angry or threatening manner." If members decided to convict, he said, they had to conclude that he had acted with "malice aforethought."

Fidler said the jurors could find implied malice if Spector had intentionally committed an act whose natural consequences were dangerous to human life, was aware of the consequences and "deliberately acted with conscious disregard for human life."

Three law professors said that in his attempt to correct the problem, Fidler may have added too many ingredients to the pot.

Rosenbluth said Fidler more wisely might have withdrawn the original instruction and reminded the jury about the elements required to prove second-degree murder, without presenting scenarios.

"I don't think he needed to put anything else in," said Rosenbluth, a former federal prosecutor.

Loyola Law School professor Laurie Levenson agreed that the scenarios were excessive.

"When you start trying to integrate the facts of the case, you get into trouble," she said. "You already have put the spice into the pot. Putting another one in doesn't necessarily change it. The more you futz with these instructions, the riskier it is."

Fidler told the trial attorneys earlier in the day that he feared the jurors would be confused if he did not give them something more detailed.

Before Fidler decided on the new instruction, the defense vehemently protested, and attorney Bradley Brunon asked for a mistrial. Fidler denied it.

"There is no viable alternative than to mistry it and do it correctly the next time," Brunon said. "We can't instruct our way out of it. It's not a situation where Mr. Spector can fairly have the jurors consider a rescrambling of the egg."

The veteran defense lawyer urged the judge not to attempt to "jury-rig" a solution. Brunon also said Fidler was "taking the dog by the tail and waving it. . . . We can't retry the case after it has been submitted to the jury and they are a week into their deliberation."

Dennis Riordan, the defense's appellate specialist, objected most strenuously to the phrase "forcing her to place the gun in her mouth" in the new instruction. He said the defense presented numerous experts who testified that Clarkson held the gun and shot herself.

Now, Riordan said with indignation, "every piece of evidence the defense offered showing Lana Clarkson holding the gun" would, in effect, turn on its head without giving Spector's lawyers a chance to respond.

Prosecutor Alan Jackson countered that it was "perfectly reasonable" for the jurors to consider various scenarios, given the testimony of five prosecution witnesses that Spector had pulled guns on them. One of the women, Spector's former assistant, Dianne Ogden, testified that he said "he was going to blow my brains out," pointing to her forehead, cheek and nose, where she said he had placed the gun.

"He forced some upstairs. He forced some to take their clothes off," Jackson said.

Fidler agreed with Jackson. "It a reasonable inference."

But with the scenarios, the jury will have to engage "in some cognitive gymnastics to come up with a legally and factually correct answer," Saks said.

He also said research has shown that it's hard for jurors to cast out something they were told, particularly if they are instructed to act as if they had never heard it.

"That sounds bizarre," Saks said. "It is like telling someone to ignore the elephant in the room."

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Credit: Times Staff Writers