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State of Utah v. Fred Matteri : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

FRED MATTERI,
Defendant and Appellant.

Case No.
7413

RESPONDENT'S BRIEF

Appeal from the Third Judicial District Court
Salt Lake County, State of Utah

Hon. Albert H. Ellett, Presiding

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ILED

FEB 9 1950

Supreme Court, Utah

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In the Supreme Court of the State of Utah

STATE OF UTAH,
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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Defendant was tried before a jury in the Third District Court on a charge of murder. From a verdict and judgment of guilty of murder in the first degree, and sentence thereon, he has appealed.

Plaintiff agrees, generally, with the statement of facts as incorporated in the brief of appellant. But inasmuch as the sufficiency of the evidence to sustain the verdict has been questioned, and such sufficiency has thus become a point of law, it

will be necessary to include in the argument a portion of the evidence produced by the state.

POINTS

1. The evidence was sufficient to support a verdict of guilty of murder in the first degree.

2. In instructing the jury concerning the degrees of murder, and reasonable doubt as to degree, the court was not required to use the exact language of 105-32-5 Utah Code Annotated 1943.

3. It is not prejudicial error for a court to inform the jury of the steps the court may take in deciding whether to follow a mercy recommendation.

4. There is nothing in the record to show that the court abused its discretion in refusing to follow the mercy recommendation of the jury.

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT A VERDICT OF GUILTY OF MURDER IN THE FIRST DEGREE.

There is no quarrel with defendant's cited cases insofar as they are used to indicate the elements of first and second degree murder. Nor can we take issue with the statement that first degree murder requires a showing—except in specified instances

—that the defendant killed the deceased with malice aforethought, deliberation and premeditation. State v. Russell, 106 Utah 116, 145 P. 2d 1003; State v. Trujillo (Utah) No. 7269.

Murder is defined, and its elements set out, by statute in Utah. The statutory provisions are found in 103-28-1, 2 and 3 Utah Code Annotated 1943:

“Murder is the unlawful killing of a human being with malice aforethought.” (103-28-1).

“Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (103-28-2)

“Every murder perpetrated by poison, lying in wait or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life;—is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.” (103-28-3)

These sections have been analyzed by this court in the two cases cited above [State v. Russell, 106 Utah 116, 145 P. 2d 1003; State v. Trujillo (Utah) No. 7269]

In the court below the case was submitted to the jury on

the theory that the evidence might show a "willful, deliberate, malicious and premeditated killing" only. There was no instruction concerning poison, or killing while committing one of the designated felonies. There is no pretense that the defendant was attempting to kill any person other than Delk, or that he was behaving in a depraved manner toward a group of persons. As far as the sufficiency of the evidence is concerned, then, the question is resolved into one of whether there is enough evidence to support a verdict that the defendant willfully, deliberately, maliciously and premeditatedly killed Levi P. Delk. The defense contends that the evidence indicates "no acts of preparation, no securing of weapons, no lying in wait," "no boasts, no threats, no arguments, nor other difficulties between the accused and Delk."

It is admitted that if any of the elements above listed had appeared the state's case would have been strengthened. But that argument goes to what evidence *might have been used*, if available, to convict the defendant. Our problem is concerned with the sufficiency of the evidence actually presented.

The record of the proceedings discloses the following evidence and testimony of facts and circumstances upon which the jury could rely in reaching its verdict:

When the deceased was found, he had been brutally beaten. There were several injuries on the body, the most severe of which was located on the left side of the *rear* part of the head. At that point there was an "irregular laceration of the scalp from the top of the head down below the left ear"—about 7

inches in length. The posterior part of the left side of the skull was broken in several places. On the front of the skull there was a laceration three quarters of an inch long which extended inward to the bone. The throat was punctured, apparently with a sharp instrument and after the death of deceased. Abrasions and contusions were found on various parts of the body. On the right side of the forehead there was a bruise of two inches diameter. Also on the forehead were three abrasions, "two which measured one inch in diameter each and a third which was one and a half inches long and about one-eighth inch in width." There was another abrasion on the nose. On the right knee there was one large abrasion and eight linear abrasions which were one-half to one inch long. An abrasion was found on the anterior part of the left leg, surrounded by an area of hemorrhage in the tissues. (R. 86-89).

An expert testified that the death of Delk resulted from the injury on the back of the head, that is, the seven-inch laceration and skull fracture (R. 90). This was caused by a blow with a "blunt object, possibly with a sharp or jagged edge." The blow must have been struck with great force (R. 90), and the injury was such that it would have necessarily been fatal (R. 91). The force of the blow was so great that it could not have resulted from a fall to the ground after a blow to the chin. To cause such an injury by falling, the fall would have to have been from a great height (R. 97, 98). It was improbable that a blunt instrument made the laceration on the forehead (R. 98).

The body of deceased was found by two small boys on

May 6 while they were playing along Little Cottonwood creek (R. 110). The body was in the creek, and about half under water (R. 115), but death did not result from drowning (R. 90).

From the facts and circumstances surrounding the killing, the nature and number of the wounds, the location of the body outside of any populous area, and the apparent placing of the body in a creek, the jury might at this point fairly conclude that the death of Delk was caused by a criminal agency, and that the agency responsible (whoever it was) had premeditatedly, maliciously, and deliberately perpetrated the killing. It is not contended that there was anything in the record to show or tend to show mitigation, provocation, or justification for the killing.

In addition to the facts and circumstances which immediately surrounded the killing, there is additional evidence which points toward premeditation and toward the defendant.

It could be concluded that the defendant was either acquainted with Delk, or that he was familiar with his habits. The two lived at the same tourist court and trailer camp at 3115 South State Street in Salt Lake County (R. 136, 137, 138). The deceased was regular in his habits, usually leaving the court about 9 or 10 in the morning and returning about 5 or 6 p. m. (R. 139).

Next to the apartment of defendant was an unfinished

apartment. After the discovery of Delk's body investigators found on the floor of this vacant unit indications of blood and vomit (R. 260). The deceased's blood was type "A" in the International Blood Grouping system (R. 317). On the floor of the unfinished apartment were found a paint stick and some paper stained with blood of type "A" (R. 320, 321). There was evidence of blood on the floor, but it was present in such small quantities that it did not admit of typing. An expert testified that vomiting often accompanies a fracture of the skull (R. 358, 359).

From the automobile of Levi P. Delk the state took some pieces of rubber matting (R. 340) which appeared to be stained with blood. These stains "tested positive" for the possible presence of blood (R. 319). On the panel of the left door of the truck were similar stains, which also "tested positive" (R. 341, 267, 323). The truck had been washed on the inside prior to the time it was examined by investigating officers (R. 267).

It was brought out that the key possessed by defendant for his apartment fitted, also, the unfinished unit, next to his, in which the stains were found (R. 142).

The tourist court operators last saw deceased alive on the evening of April 29 (R. 140). On the morning of April 30, defendant, in the presence of a notary public, signed the name of Levi P. Delk to a title certificate of Delk's truck and stated that he was Delk (R. 167). Later the same day the defendant represented himself to be Delk and sold the Willys panel truck to a dealer (R. 207-212). Defendant was unsuccessful in his

attempt to sell a watch which had belonged to deceased (R. 237), so he then pawned the watch in his own name (R. 246). When his landlady visited him on the morning of May 3, defendant was upset (R. 183).

The record contains evidence that while defendant was awaiting trial he began preparations for an escape from the Salt Lake County jail in which he was confined (R. 345-358).

The above is a summary of the bulk of the state's evidence on which conviction was based. The record does, however, disclose certain other facts and circumstances which might have been considered by the jury. We rely upon the following cases and propositions of law to show that the jury was justified in finding that defendant coldly, premeditatedly, maliciously, and deliberately, murdered Levi P. Delk.

The defense has argued at some length on the difference between express and implied malice, and the degree of murder which must be found where one or the other is shown. And while we feel that our statute sufficiently defines the elements of each degree so that these common law distinctions are superseded, we would like to point out that express malice was shown in this case.

The difference between express malice and implied malice is of necessity a difference in the *degree* of malice shown, and not a difference in the type of evidence upon which the proof is based. In 1 Wharton's Criminal Law (11th Ed.), Sec. 145, we find the following statement:

"The older English text-books distinguish between 'malice express' and 'malice implied.' This, however, as

is elsewhere shown, cannot be sustained. Our *only way* of proving malice is by inferring it from circumstances. Even should a party, when examined on the stand, say, 'I did the act maliciously,' the question would still remain, how far the statement is to be believed. The mode of proof is not demonstration, but inference."

Our statute in effect adopts this view. Express malice is that malice in which there is manifested a deliberate intention unlawfully to take the life of a fellow creature. But, still under the statute, the *law* will imply malice where there is shown an unlawful killing and no considerable provocation appears; *or* where the circumstances surrounding the killing show an abandoned and malignant heart. There is nothing in the statute to indicate that express malice must be manifested by words or statements, or acts of preparation.

We feel that this should answer the technical nicety of distinction between types of malice. With this gone, the attack on the sufficiency of the evidence must be based upon the idea that there was simply not that *quantum* of evidence which is necessary to sustain the verdict. It is well settled that a conviction for first degree murder can be had on circumstantial evidence alone.

People v. Howard, 211 Cal. 322, 295 Pac. 333, 71 A. L. R. 1385, supports the contention of the defendant that where malice is "implied" it is second degree murder. But an examination of the cases cited in the Howard opinion shows that *express malice* may be *inferred*. One of the cases cited therein is People v. Bellon, 180 Cal. 706, 182 Pac. 420. It is used to support the statement that "if the act is preceded by, and be

the result of, a concurrence of will, deliberation and intent, the crime of first degree murder is proved."

In *People v. Bellon* the defendant had pleaded guilty to a charge of murder. California law required the court to determine the degree. It was shown that the defendant had committed a violent assault upon his wife; and when the deceased, his mother-in-law, attempted to interfere, defendant slashed her throat with a razor. The California Supreme Court, in answer to the contention that the elements of first degree murder were not shown, said:

"It is difficult to attribute any other design than that of killing to one who knowingly strikes at the throat of another with a sharp razor with such force and strength as to cause death."

Another California case concerned with the sufficiency of circumstantial evidence is *People v. Peete*, 54 Cal. App. 333, 202 Pac. 51 (hearing denied by Supreme Court November 25, 1921). There the body of deceased was discovered some four months after the killing. Defendant had been a tenant in a house owned by deceased, and in which the body was found. A physician testified that the deceased was probably killed by a bullet wound, though it was possible that death was caused by strangulation. Defendant was a small woman and deceased a 200-pound man. After discovery of the body it was learned that defendant had sold some jewelry of the deceased. After the defendant had sublet the house to another, a pistol was found in one of the closets. Defendant had made some inconsistent statements to police officers. There was no direct evidence of

malice, premeditation, or deliberation. Yet the California Court of Appeal (and the Supreme Court) upheld a conviction of murder in the first degree. Said the Court of Appeal:

"It is the general, if not universal, rule that where, as here, the evidence is entirely circumstantial, and no claim of any mitigating circumstances, justification, or excuse for the killing is advanced by the accused, the jury, from the nature of the wound inflicted, from the character of the weapon which the nature of the wound indicates was used, from the acts and conduct of the accused, and all the attendant and surrounding facts may infer that the deceased was unlawfully killed by the accused, with malice aforethought, as a result of a deliberate and premeditated purpose to kill, and so inferring, the jury under such circumstances, may be warranted in returning a verdict of murder in the first degree. If a different rule prevailed, then, as was said in *People v. Mahatch*, 148 Cal. 203, 82 Pac. 779, 'secret murders could rarely be punished by the infliction of the highest penalty.' * * *

See *State v. Dickson*, 78 Mo. 447. The question of the degree of the crime is exclusively for the jury, and their determination will not be disturbed when there is any evidence to support it. *People v. Machuca*, 158 Cal. 64, 109 Pac. 886. We think that the circumstances disclosed by the evidence are ample to support the inference that the killing was unlawful, was done with malice aforethought, and was willful, deliberate and premeditated. * * *

People v. Mahatch, 148 Cal. 203, 82 Pac. 779, cited in the opinion, *supra*, was another case of an unwitnessed killing. The killer and the killed had apparently been friends prior to the homicide. In upholding the first degree murder verdict, the California Supreme Court said:

"The jury, having found that the only extenuating circumstances which he interposed had no existence in fact, and no claim of any circumstances of mitigation, justification or excuse for the killing being advanced, had a right to infer from the character of the weapon used, the nature of the wound inflicted, and the acts and conduct of the accused, the existence of a deliberate purpose on his part to kill the deceased when the fatal blow was struck, and, so inferring, were warranted in returning a verdict therefrom for murder in the first degree. This is the general, it may be said the universal, rule. * * *

In *People v. Davis*, 8 Utah 412, 32 Pac. 670, the Utah Supreme Court held sufficient a pleading which omitted the allegation that there was an intent to kill. It was said there that the intent could be inferred from the facts pleaded, and that it was difficult to comprehend, from the instrument used, the fierceness of the assault, the manner and place of inflicting the wounds, and the instantly fatal result, that the defendant intended to commit any crime except first degree murder.

In *People v. Halliday*, 5 Utah 467, 17 Pac. 118, the court was called upon to consider the elements of murder in the first degree. The opinion adopted the language of the Pennsylvania case of *Keenan v. Commonwealth*, 44 Pa. St. 55, as follows:

"What the definition [of malice] requires, therefore, is a distinctly formed intent to kill, not in self defense, and without adequate provocation. It requires the malice prepense or aforethought of the common law definition of murder to be, not a general malice, but a special malice that aims at the life of a person. This distinctly formed intent to take life is easily distinguished, in the general from the instinctive and spon-

tanoeus reaction of mind and body against insult and injury, which is often the result of no distinctly formed intention; and also from those cases of previous and deliberate intention to kill, which may override even what without it would be adquate provocation given at the time of the killing.

Keeping this common understanding of the definition in mind, we shall also get clear of the influence of the cases in other states, where the terms deliberate and premeditated are applied to the malice or intent, and not to the act, and thus seem to require a purpose brooded over, and matured before the occasion at which it is carried into act. Under such a definition of the intention, all our jurisprudence by which malice and intent are implied from the character of the act, and from the deadly nature of the weapon used, would be set aside; for we could not from these imply such a previous and deliberate but only a distinctly formed intent, and this involves deliberation and premeditation, though they may be very brief. We should therefore blot out all our law relative to implied intent or malice, and require it to be always proved as express. And this would be a most disastrous result; for the most deliberate murderers are usually those who know how to conceal their intent until the occasion arises for the execution of it."

The Supreme Court of Oregon has held that circumstantial evidence is sufficient to establish all of the elements of murder in the first degree. In *State v. Butcheck*, 121 Or. 141, 254 Pac. 805, denying a rehearing of 121 Or. 141, 253 Pac. 367, that court said:

"The indictment in this case alleges a specific purpose to kill. However, in order to constitute murder in the first degree, there must be deliberation and premeditation. But like every other material fact arising on the

trial, the formed design to kill may be established by circumstantial evidence which satisfies the minds of the jurors, beyond a reasonable doubt, of the existence of a previous purpose to kill. Here the law wisely calls to its aid, in the administration of justice, presumptive evidence. The trial begins with the presumption of the defendant's innocence. But, upon the proof of the commission of an unlawful act, the presumption is that such act 'was done with an unlawful intent' and that the perpetrator intends the unlawful consequence of his voluntary act.' Or. L. Sec. 799, subds. 1, 2, 3, * * *

The existence of deliberate and premeditated malice in the killer's mind is the result of a mental condition and is not subject to direct proof. For this reason its existence may be inferred from tangible facts in evidence. 2 Bishops Criminal Law, p. 511; Underhill on Criminal Evidence (3rd Ed.) p. 709. As supporting this doctrine, see Wharton on Homicide, Sec. 150, 2 Bishop's Crim. Law, Sec. 673, Cyclopedia of Criminal Law, Brill, 1076, and 30 C. J. 142, 143, where it is held that deliberation and premeditation may be inferred, as a matter of fact, from the circumstances, act, conduct, language, the character of the weapon used, and the nature and number of wounds inflicted."

The doctrines announced in the above cases have received wide support. See *People v. Erno*, 195 Cal. 272, 232 Pac. 710; *State v. Hansen*, 25 Or. 391, 35 Pac. 976; *Hughes v. State*, 29 Tex. Cr. App. 565, 16 S. W. 548; 3 Warren on Homicide 401.

The evidence also tended to show (1) Delk was taken to a remote spot and there killed, or (2) Delk was killed in the vacant unit adjacent to defendant's apartment, and then the body was taken to a remote spot. Concealment of a body is a circumstance which may be considered in determining the guilt

or innocence of an accused. See *Hedger v. State* (1911), 144 Wis. 279, 128 N. W. 80, where the accused had been in and about the house in which his wife's body was later found. His failure to give an alarm, or disclose the fact of death, was held to be a circumstance justifying an inference of guilt. See, also, a note in 2 A. L. R. 1227. The jury might conclude that whoever killed Delk did it with malice aforethought and premeditation and then concealed the body, or that the killer thought out the act and premeditatedly took Delk to a remote spot and killed him there.

The evidence that defendant was in possession of deceased's truck and watch serves a purpose at least twofold in nature. It ties the defendant to the crime, and it gives some added information as to the probability of premeditation.

In 2 Wigmore on Evidence, Sec. 276, we find the following statement:

"Whenever goods have been taken as a part of the criminal act, the fact of subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime. Thus such possession is receivable to prove other acts than the simple crime of larceny. It is receivable to show the commission of a *burglary, a counterfeiting, a murder, a liquor selling,* or any other crime in which either a chief or a subordinate result might be the possession of a material article." (Author's emphasis).

In *Wilson v. United States*, 162 U. S. 613, 40 L. Ed. 1090, 16 S. Ct. 895, decided before there was any difference in degrees of murder, deceased was found in a decomposed condi-

tion about two weeks after he was last seen alive. Defendant was arrested on the same day the body was discovered. In his possession were five horses, a colt, wagon, gun, and bedclothing and other property which had belonged to the dead man. The defendant was convicted of murder. The United States Supreme Court said:

"Possession of the fruits of a crime recently after its commission justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by circumstances or accounted for in some way consistent with innocence. 1 Greenl. Ev. (15th Ed.) Sec. 34. * * * Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death is always admissible, and the fact, with its legitimate inference, is to be considered by the jury with the other facts in the case in arriving at their verdict."

And see 4 Warren on Homicide 173:

"Where money or other property of the deceased was found in the possession of the defendant it is evidence of premeditated and deliberate killing."

The Oregon case of *State v. Barnes*, 47 Or. 592, 85 Pac. 998, 7 L. R. A. (N. S.) 181, contains a good discussion of the significance of possession of stolen property. See opinion and cases cited at pp. 1001 and 1002 of the Pacific Reporter; *Little v. State*, 39 Tex. Cr. App. 654, 47 S. W. 984.

As was pointed out, supra, the evidence below also tended to prove that defendant, while in the county jail, prepared to make an escape. See 2 Wigmore on Evidence, Sec. 276:

"It is today universally recognized that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself."

And see the numerous cases cited and discussed in that section. The following authorities may also be found helpful: State v. Barnes, cited supra, 47 Or. 592, 85 Pac. 998, 7 L. R. A. (N.S.) 181; State v. Morgan, 22 Utah 162, 61 Pac. 527; People v. Flannelly, 128 Cal. 83, 60 Pac. 670.

From the record, and the authorities cited and quoted, we see that the jury was justified in concluding that defendant had murdered deceased in cold blood, with malice aforethought, premeditation and deliberation. The evidence was such that the jury could fairly find that defendant wanted property in the possession of Delk, that he thereupon decided to kill Delk, killed him in pursuance of his plan, and took his property.

We have confined the above discussion to first degree murder. If the authorities cited are correct, *a fortiori* second degree murder may be proved by circumstantial evidence. The only difference would be that the circumstances would not have to establish deliberation and premeditation.

POINT II

IN INSTRUCTING THE JURY CONCERNING THE DEGREES OF MURDER, AND REASONABLE DOUBT AS TO DEGREE, THE COURT WAS NOT REQUIRED TO USE THE EXACT LANGUAGE OF 105-32-5 UTAH CODE ANNOTATED 1943.

In instructing the jury as to what it should do in the event there was reasonable doubt as to the degree of murder of which defendant was guilty, the court said:

"You are further instructed that if you believe from all of the evidence beyond a reasonable doubt that the defendant committed either the offense specifically charged in the information or one of the included offenses, but if you have a reasonable doubt as to which of two or more offenses he did commit, then you can convict him only of the lowest degree as to those between or among which lies your doubt." (R. 36).

Defendant had requested this instruction:

"If you find from the evidence that the Defendant has committed a public offense and there is reasonable ground of doubt in which of two or more degrees he is guilty, under the law of this state you must find him guilty of the lowest of such degrees only." (R. 31).

It is defendant's contention that the court's use of the word "can" instead of the word "must" was prejudicial error against the rights of defendant. An instruction similar to the one in question now was given by the trial court in *State v. Cerar*, 60 Utah 208, 207 Pac. 507. Said the court:

"It is somewhat vigorously contended that the court erred in using the word 'can' instead of the term 'must', which latter term is used in the statute. A mere cursory reading of the instruction excepted to will disclose that, if the district court had used the term 'must' counsel in all probability would be here complaining that the court had in effect directed the jury to find the appellant guilty of some degree, and in such event there would

at least be some reason for the contention. By using the term 'must' in the instruction referred to a very awkward expression would have resulted which might have been construed to mean that the jury was required to find the appellant guilty of some lower degree. The instruction as it stands, in our judgment, clearly reflects the true intent and purpose of the statute, and any juror with sufficient intelligence to sit in any case would not have been misled by what the court said."

The instruction requested by the defendant here might have been construed by the jury as mandatory that they return a verdict of guilty of some degree of murder, for manslaughter is a public offense but is not, strictly, a degree of murder. We will concede, however, that the insertion of "must" in the instruction actually given by the court would not have been objectionable. But the essence of the statute is that the jury is required to find the lower degree, as between the higher and the lower, when there is reasonable doubt as to degree. The instruction as given modifies the word "can" with the word "only." The instruction as a whole leaves the jury no alternative but to choose the lower grade offense in case of doubt. When "can" is thus modified with "only" it *can only* be read as synonymous with "must."

POINT III

IT IS NOT PREJUDICIAL ERROR FOR A COURT TO INFORM THE JURY OF THE STEPS THE COURT MAY TAKE IN DECIDING WHETHER TO FOLLOW A MERCY RECOMMENDATION.

Another objection taken to the court's instructions is that the defendant was prejudiced when the jury was given an explanation of the effect of a recommendation of mercy. This supplemental instruction was given after the court had recalled the jury to learn of its progress. The foreman asked for additional information. This request, and the court's answer, will be found on page 392 of the record and page 27 of the appellant's brief.

The defendant contends that this statement by the court was of such a nature that the jury could have been influenced to bring in a verdict of first degree murder, with a recommendation of mercy, rather than a second degree verdict which they would likely have returned in the absence of the court's statement.

We have been unable to find any authority which is directly in point with the question raised. *State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117, 1 Ann. Cas. 268, 12 Am. Crim. Rep. 619, was concerned with an instruction wherein the judge intimated to the jury that he would follow a recommendation of mercy, and in that case there was prejudicial error.

The problem here is somewhat different. The court did not give the jury any indication of what it would do with a recommendation of mercy but did, in fact, go to great lengths to avoid answering the jury's question as to how the court would "look at it." All the jury learned was the procedure the court was allowed to follow under the law.

As provided by 105-33-3, a court may instruct the jury on a point of law after it has retired for deliberation, "if they desire to be informed on any point of law arising in the cause," so long as this instruction is given in the presence of the defendant or his counsel.

It is our belief that the court, in giving the challenged instruction, did nothing more than tell the jury, in the language of the layman, the legal effect of a recommendation of mercy, and the steps a court was allowed to take in determining the punishment. The law is contained in the statutes. 105-36-12 Utah Code Annotated 1943 provides:

"When discretion is conferred upon the court as to the extent of punishment, the court, at the time of pronouncing judgment, may take into consideration any circumstances, either in aggravation or mitigation of the punishment, which may then be presented to it by either party."

And 105-36-13:

"The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so ill or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, shall be offered to or received by the court or a judge thereof in aggravation or mitigation of the punishment, except as provided in this section."

These sections do not confine to "legal evidence" the testimony which may be received in mitigation or aggravation.

Our jurisprudence does not require that a jury be kept ignorant of the law and the possible consequences of a particular verdict. The main requirement in cases of this type is that the court do nothing which will mislead the jury to the prejudice of the defendant. Here neither has the jury been misled nor the defendant prejudiced. We cannot see how 12 jurors could have taken the above statement of the court and used it as a basis for returning a recommendation of mercy in lieu of a verdict of murder in the second degree. There was not a hint that the recommendation would be followed. When the court had finished explaining, the jury had no foundation on which to conclude that defendant would not be executed for first degree murder.

There is no use speculating on what the jury might have done without the explanation. The record indicates that the jurors were concerned with what effect the recommendation would have. It appears that they had reached a verdict if the recommendation of mercy meant what they thought it meant. After the explanation, the following conversation took place:

"MR. CHRISTENSEN: I believe that is what we had a question on. I believe we can bring back a verdict.

THE COURT: And would you rather do that now before you disband?

MR. CHRISTENSEN: Well, we can do it right here now."

Further questioning indicated that the jury was not quite

ready. They returned to the jury room at 10:31 p.m. and returned with a verdict of guilty with recommendation of mercy 11 minutes later (R. 392). A reading of the colloquy indicates to us that the jury could not decide whether or not defendant should die. Having found that they could let the court decide, they recommended mercy.

For the above reasons, we submit that the instruction complained of was proper and that, even if there was a technical error, there is no basis for assuming that the defendant was prejudiced thereby. The court is not justified in presuming that error has resulted in prejudice. 105-43-1 Utah Code Annotated 1943.

POINT IV

THERE IS NOTHING IN THE RECORD TO SHOW THAT THE COURT ABUSED ITS DISCRETION IN REFUSING TO FOLLOW THE MERCY RECOMMENDATION OF THE JURY.

It is now contended that the court abused its discretion in sentencing the defendant to death rather than to life imprisonment as recommended by the jury.

It is settled in this state, and conceded by the defendant, that an abuse of discretion must be shown before there can be a reversal on the court's refusal to follow the recommendation of the jury. *State v. Markham*, 100 Utah 226, 112 P. 2d 496.

The effect of recommendations of mercy varies in the various states. In some states the court is obligated to follow the jury's recommendation. In others, a recommendation is not authorized by law and is considered as merely advisory. A few statutory provisions contemplate that the jury will base its recommendation upon some evidence of mitigation or justification which appears at the trial. It is because of this variance that the statutory provisions should be studied when an abuse of discretion on the part of the court is being asserted on the grounds we have here.

Our provision is found in 103-28-4 Utah Code Annotated 1943, quoted in appellant's brief (p. 33). We note that the Utah statute has no conditions precedent to a recommendation of mercy. A jury may recommend mercy even if the defendant is convicted on overwhelming evidence and the crime is heinous. A recommendation may be made, so to speak, on the basis of the defendant's looks. And because such a recommendation need not be grounded in reason, there is nothing on which we can conclude that the recommendation was made because of "the skimpy case presented by the state." Such a conclusion would be a guess. We must assume that the jury considered the evidence, under the instructions, before deciding whether defendant was guilty.

Utah has adopted the view that the discretion of the jury in recommending life imprisonment is absolute and need not be based upon evidence or a showing at the trial. *State v. Thorne*, 39 Utah 208, 117 Pac. 58; *State v. Romeo*, 42 Utah 46, 128 Pac. 530.

In *State v. Markham*, cited *supra*, 100 Utah 226, 112 P. 2d 496, there was some positive evidence presented by the defense which might have tended to mitigate the seriousness of the crime, yet the court refused to find an abuse of discretion in the court's refusal to follow a recommendation of mercy. In the present case there is nothing to indicate to the court that the killing of Mr. Delk was anything but a cold-blooded murder. There would not be an abuse of discretion here even under the reasoning of the concurring opinion of Justice Wolfe in the *Markham* case, which opinion sought to restrict, to some extent at least, the exercise of discretion by the court where it might appear that the recommendation of the jury was based upon evidence—that is, something which would tend to lessen the seriousness of the homicide. In the present case there is no pretense, no contention, that there were any mitigating circumstances. No provocation, sufficient or insufficient, was shown. There was no evidence of anything bordering on justification or excuse. And our discussion of the sufficiency of circumstantial evidence, under Point 1, has indicated that the depravity of the crime does not depend upon the type of evidence used by the state to prove that crime. Defendant was given an opportunity to appeal to the court's leniency, but stood silent and offered to show nothing by any means or persons. See, generally, on recommendations of mercy and their effect, annotations in 12 A.L.R. 1153, and 87 A.L.R. 1370.

CONCLUSION

The evidence in the case was sufficient to justify the jury in determining that someone had cold-bloodedly, deliberately, premeditatedly, and with malice aforethought,

killed Levi P. Delk; that the murder was committed by the defendant; and that the idea of theft of an automobile and other property motivated the defendant to plan the murder. All the evidence indicates that the murder was committed in Salt Lake County. The instructions to the jury were fair and fully protected the rights of the defendant. And, finally, the court acted well within the bounds of its discretion in sentencing the defendant to death. The authorities have convinced us that substantial justice was done in the court below, and for that reason we believe that the judgment and sentence should be affirmed. But if the court does find some error which might have prejudiced the defendant, we respectfully urge the court, if possible, to exercise its powers under 105-43-3 Utah Code Annotated 1943, and modify the judgment to the extent that justice may be done.

Respectfully submitted,

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