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Utah v. Leland Thomas DeMille : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

860532

STATE OF UTAH,)

Plaintiff-Respondent,)

vs.)

Case No. 860532

LELAND THOMAS DEMILLE,)

#2

Defendant-Appellant.)

BRIEF OF DEFENDANT-APPELLANT, LELAND THOMAS DEMILLE

APPEAL FROM A JURY VERDICT AND DENIAL OF A MOTION FOR A
NEW TRIAL IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. HARLAN
BURNS, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)	
Plaintiff-Respondant,)	
-v-)	Case No. 860532
LELAND THOMAS DEMILLE,)	
Defendant-Appellant.)	

STATEMENT OF ISSUES

1. The prosecution failed to prove, beyond a reasonable doubt, the elements of Murder in the Second Degree.
2. The defendant failed to receive a fair and unbiased trial because certain jurors held unveiled biases and prejudices and because of juror misconduct during deliberations.

STATEMENT OF THE CASE

Appellant, Leland Thomas DeMille was arrested and charged with Second Degree Murder a felony of the First Degree.

A Jury Trial was held, commencing, July 28, 1986, in the Fifth Judicial District Court in and for Washington County, the Honorable J. Harlan Burns, presiding.

At the end of the trial, the defendant was convicted by the jury of said charge.

Defendant filed his motion for a new trial, August 26, 1986, (R-173) and it was denied by the Honorable J. Harlan Burns, on the 26th day of September, 1986. (R-197)

On the 17th day of October, defendant filed his Notice of Appeal to the Supreme Court of Utah.

Defendant, Leland Thomas DeMille, at the time of the trial was married to Jan DeMille, formerly Jan Davies, the mother of the deceased child, Ronald Davies. (Tr. P 680-681) They had been married June 7, 1985 (Tr. P 680; L 10-15) and had had a child born of that issue, Thomas James DeMille born May, 1986. (Tr. P 680; L 21-25)

The defendant, hereinafter, sometimes, "DeMille", had met Jan Davies through his father who worked with Mrs. Davies' husband. (Tr. P 681; L 14-20) After Jan Davies and her husband separated, and he left her to go to Las Vegas, DeMille developed a friendship with Mrs. Davies that ultimately developed into a relationship. (Tr P 682; L 6-19) Initially, DeMille served as a babysitter for her son, Ronald, when he was not working, on occasions while she worked. (Tr. P 683; L 2-25)

Ultimately in January, 1985, that relationship became a joint living arrangement while they awaited Jan Davies' divorce from her husband so DeMille and Jan could be married to each other. (Tr. P 684; L 9-13 & Tr. P 680; L 10-15)

Ronald Davies lived with his mother and DeMille from January 1985 until his death on May 9, 1985. (Tr. P 684, L 9-16)

On Sunday, May 5, 1985, DeMille was at home doing yard work, among other things, (Tr. P 697, L 2-6) and caring for Ronnie Davies while Jan Davies DeMille worked at her job as police dispatcher.

At approximately 2:15 to 2:30 p.m. DeMille called Jan DeMille to allow Ronald Davies to talk with his mother on the telephone. (Tr. P 785 & P 785; L 2-12)

Slightly before 3:00 p.m., at 2:57 (Tr. P 646; L 14-15), when Jan DeMille was due to get off work, she received a call from DeMille informing her, "something's wrong with Ronnie." (Tr. P 646, L 14-19).

Jan DeMille hurried home and upon arriving home, together with DeMille, they placed the child in her automobile and drove him to Dixie Medical Center to the emergency room. (Tr. P 647; L 1-3)

The child was comatose when Mrs. DeMille arrived home (Tr. P 646; L 22-25) and when they delivered the child to the emergency room at Dixie Medical Center (Tr. P 647; L 22) at approximately 3:15 p.m. (Tr. P 104; L 11)

Later in the day at approximately 5:55 p.m. Ronald Davies was transported to Las Vegas by a Life-Flight team for further treatment. (Tr. P 110; L 21-25)

He was treated by Dr. Lonnie Hammergren and Dr. Vincent McCarthy in Las Vegas until May 9, 1985 when he died. (Tr. P 268; L 13-19)

Dr. McCarthy assigned the cause of death to be head trauma. (Tr. P 269; L 6-7)

The autopsy report, D-15, listed the Immediate Cause of Death: "Increased intra cranial pressure" due to: "Acute and subacute subdural hematoma - post craniotomy," due to: "Homicidal traumatic injuries - blunt force from trauma to head."

After the jury trial was concluded and the verdict of guilty rendered, juror, Judith Ann Garner executed an affidavit,

which was filed with the Motion for a New Trial, alleging numerous acts of misconduct or bias on the part of certain jurors.

SUMMARY OF ARGUMENTS

1. Defendant was charged by information with second degree murder, a first degree felony. While there may have been circumstantial evidence that enabled the jury to find that defendant did in fact cause the death of Ronald Davies, there is no evidence, or insufficient evidence to prove, beyond a reasonable doubt, that the crime fits the elements or requirements for second degree murder as opposed to the lesser included crimes of manslaughter or negligent homicide.

While there were no instructions given, and none requested by defendant, which would have permitted the jury to find either manslaughter or negligent homicide, that does not relieve the prosecution of the burden of proving the elements of second degree murder beyond a reasonable doubt when the elements of the crime, actually proved, might as easily have constituted manslaughter or negligent homicide, which defendant submits is grounds for reversal or, at the very least, reduction of the conviction to the lowest level possible, i.e. of manslaughter or negligent homicide.

2. Defendant, with his motion for a new trial, submitted to the court an affidavit, executed under oath by a juror, alleging various incidents of unrevealed bias or misconduct on the part of jurors which defendant submits made a fair trial impossible.

The District Court refused to hold a hearing or to consider said allegations to determine if they were true or not, all of which defendant submits is grounds for a new trial.

ARGUMENT

POINT I

I. THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF MURDER IN THE SECOND DEGREE.

The defendant, Leland Thomas DeMille, was charged in an Information with certain elements of Section 76-5-203 of Utah Code Annotated, referred to as the 2nd Degree Murder Statute. The elements charged are essentially those outlined in subparagraphs a, b and c, to wit:

"... did intentionally or knowingly cause the death of Ronald Wayne Davies....,"

which is subparagraph (a). The Information inserts next an "or" that is not in the statute and then proceeds

"... intending to cause serious bodily injury to Ronald Wayne Davies, did commit an act clearly dangerous to human life that caused the death of Ronald Wayne Davies..."

which is subparagraph (b) and again inserting an "or" that does not appear in the statute, proceeds

"... acting under circumstances evidencing a depraved indifference to human life, the Defendant, Leland Thomas DeMille, engaged in conduct which created a grave risk of death to another and thereby caused the death of Ronald Wayne Davies, "

which is subparagraph (c) of Section 76-5-203. (See Information, R-32-33)

The prosecution attempted to prove the death of Ronald Wayne Davies was caused by a massive blow to the head during a

time when only the defendant was with him, ergo defendant caused his death.

There was no testimony of any one describing the infliction of the injury and no direct evidence whatever of how the blow was inflicted or even that it was, indeed, inflicted by the defendant.

Hence, the evidence against defendant was entirely circumstantial, that is, the blow or trauma to the head, according to the prosecution's expert witnesses, had to have occurred within a certain limited time period and because defendant was with him, and the only person with him, during that time period, defendant must have caused the blow to his head that ultimately killed him. (See testimony of Dr. Walker, McCarthy & Clark)

The prosecution submitted evidence, though disputed or questioned, that could and apparently did enable the jury to believe that the injury was caused by a relatively heavy blow. (See Tr. P 553; L 5-11) The evidence was of an extensive skull fracture and of a rather large subdural hematoma. But, does evidence of a serious or severe injury suffice to satisfy all the necessary requirements of the Second Degree Murder Statute?

In determining the answer to that question, one must look at the Manslaughter Statute, 76-5-205, and the Negligent Homicide Statute, 76-5-206, and a comparison of them must be made to the 2nd Degree Murder Statute, 76-5-203.

The crucial portion of 76-5-205, the Manslaughter statute reads:

- (1) Criminal homicide constitutes manslaughter if the actor:
 - (a) recklessly causes the death of another; or
 - (b) causes the death of another under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse; or
 - (c) causes the death of another under circumstances where the actor reasonably believes the circumstances provided a legal justification or excuse for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.
- . . .

and the crucial portion of 76-5-206, the Negligent Homicide Statute reads:

- (1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.
- . . .

The distinction between 76-5-203, the crime of Murder in the 2nd Degree, and 76-5-205 Manslaughter, is essentially the element of intent.

Second Degree Murder requires that the accused (a) intentionally or knowingly causes the death of another while Manslaughter requires only that the accused (a) recklessly causes the death of another and negligent homicide requires only that the accused ... act with criminal negligence in causing the death of another.

Because the State has the burden of proving all of the elements of the crime charged beyond a reasonable doubt, the accused has no obligation to prove that one of the lesser included offenses is really the crime of which he is guilty and not the one charged, i.e. Murder in the Second Degree.

Therefore, the State must prove beyond a reasonable doubt that it was the intent of the accused to cause the death of another and not that it was simply caused by his reckless conduct or his negligent conduct.

The recent case of State vs. Bolsinger 699 P.2d 1214 (Utah 1985) decided by this Court is important in analyzing this case.

As that case pointed out very succinctly:

Section 76-1-501(1) presumes a defendant to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt; the requisite actus reus and mens rea set out in section 76-1-501(2) constitute the elements of the offense as follows:

- (a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;
- (b) The culpable mental state required.

In the present case there is no evidence whatever of the circumstances surrounding the death of the child other than the circumstantial evidence that the child must have been subjected to a severe or heavy blow to the head.

The State no doubt would argue that that circumstance is sufficient to justify a conviction under subparagraph (b) or (c) of Section 76-5-203. However, the Bolsinger case would dispose of that assumption as well.

After citing and quoting Sections 76-2-103(2), on page 1219 states:

A person engages in conduct:

- (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person

acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

The court then stated:

Correlating the conduct, circumstances, and result required under the depraved indifference statute and the mens rea of knowledge as promulgated in State v. Fontana, supra, we conclude that the following elements had to be present to properly convict the defendant under the State's third theory:

1. The defendant engaged in conduct which created a grave risk of death to another and that conduct resulted in the death of another--the actus reus.

2. The defendant knew that his conduct or the circumstances surrounding his conduct created a grave risk of death to another--the mens rea.

3. Defendant acted under circumstances evidencing a depraved indifference to human life--a qualitative judgment to be made by the jury in determining the extent of the defendant's conduct. It is not a description of the mens rea involved in the commission of the crime, but an evaluation of the actus reus. (Emphasis added)

The court in that case, realizing that the accused in that case actually entwined an electric cord around the neck of the deceased and pulled it tight - at least, tight enough to cause her death, and admitted that he had done so, still on page 1219 stated:

There is no question that defendant engaged in conduct creating a grave risk of death and actually resulting in death. It is the degree of culpability as well as the evaluation of the conduct that we question here. As enunciated under State v. Fontana, knowledge of one's conduct or the circumstances surrounding the conduct is the cognizance that the conduct or the circumstances surrounding it create a life-endangering risk to another.

In the instant case, there was no admission by the defendant that he had in any way caused the injury that caused

the death. The jury apparently believed those witnesses that testified the injury had to have occurred while the child was in his exclusive custody, and then drew the conclusion that he must have inflicted the injury. But, that is not evidence of his mens rea, only, as the Bolsinger case points out, of the actus reus.

In Bolsinger, the court noted that the defendant denied having intended any harm (page 1218). That was the only direct evidence of his intent. The State had no evidence otherwise, just as in this case, the state was not able and did not, present any evidence of what the defendant's state of mind was when, and if, he caused the blow that resulted in the injury to the child.

There is no evidence that it was neither the result of a reckless act nor a criminally negligent act as opposed to an intentional act.

Because the defendant does not himself provide the evidence of what the facts were, what his mens rea was, does not relieve the State of its burden to prove beyond a reasonable doubt that it was an intentional act as opposed to a reckless act or a negligent act. The jury, no matter how severe the injury, cannot simply presume the necessary mens rea to find him guilty of the highest possible degree of crime, to wit, in this case, 2nd Degree murder, rather than the less severe crimes that he might have been guilty of committing.

This court, in Bolsinger, after noting there was no evidence of the necessary mens rea, in that case, to commit 2nd Degree Murder, on page 1219 stated:

Given those facts reasonable minds must perforce entertain reasonable doubt that there was that degree of awareness with respect to the defendant's conduct and surrounding circumstances to impute to him the knowledge that his conduct created a grave risk of killing Kaysie and that he possessed the medical knowledge that compounding factors existed which would hasten her death.

In the instant case, even assuming that the defendant did something (the actus reus) which resulted in the death of the child, there is no evidence that the defendant understood and intended that that act could or would cause the child's death. There is no evidence that he did not temporarily black out. There is no evidence that he did not suffer temporary insanity, and that he even know what he was doing as he did it. There is no evidence that he did not, in a playful mood toss the child in the air, intending to catch him as he came down,-- as many loving fathers do-- but slipped himself and missed him, allowing him to hit his head on a hard object in the bathroom or elsewhere. There is no evidence that the defendant did not, because of the terrible emotional trauma the child's injury caused, simply himself black-out all knowledge or recollection of what did happen during that terrible few moments. There is no evidence that a hundred other things, short of an intentional taking of the child's life, might not have happened. But because there is no evidence that any one of these possible things might not have happened does not mean the prosecution is relieved of its burden to prove the intent necessary to constitute 2nd degree murder, and that the jury can, without any evidence whatsoever of what

did happen, simply assume that there was the requisite mens rea to find him guilty of the higher, most serious of all the possibilities available to them.

The State may argue that the defendant should have asked for an instruction, which he did not, which would have suggested to the jury they could find, as an alternative, either recklessness or negligence. But it is not the defendant's obligation to prove his innocence or that the State has not proved what it has charged him with. It is the State's obligation to prove, beyond a reasonable doubt precisely what it has accused him of doing.

In *Bolsinger*, on page 1218, the Court dealt with subparagraph (c) of 76-5-203, which requires, to find murder in the Second Degree, that the accused was,

acting under circumstances evidencing a depraved indifference to human life, he engages in conduct which creates a grave risk of death to another and thereby causes the death of another.

It stated on page 1219 regarding that case:

There is, however, sufficient evidence that the defendant was aware of, but consciously disregarded, a substantial and unjustifiable risk that placing and/or pulling a cord around the victim's neck would result in her death.

And the court again on page 1219 continued:

That risk was of such a nature and degree that its disregard constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from defendant's standpoint. Such conduct is "reckless" under section 76-2-103(3).

In the instant case, the jury did not even know what the conduct of the defendant was, for there was no evidence whatsoever of what his actual conduct was.

In *Bolsinger*, on page 1220 the Court goes on to point out what the jury must know to find the requisite element of guilt:

In evaluating the defendant's conduct, reasonable minds must be free from reasonable doubt that the defendant was guilty of depraved indifference to the grave risk of death created by his conduct. To constitute depraved indifference, the act must be one "which has been rather well understood at common law to involve something more serious than mere recklessness alone which has had an incidental tragic result."

Again it is the State's obligation to present evidence that the act met that standard.

The Court continued on page 1220:

There must be a knowing doing of an uncalled for act in callous disregard of its likely harmful effect on a victim, which is so heinous as to be equivalent to a "specific intent" to kill.
(Emphasis added)

The court on page 1220 went on to describe what must be shown (beyond a reasonable doubt)--not just surmised--to meet the requirement of depraved indifference.

Depraved indifference to human life is characterized by unmitigated wickedness, extreme inhumanity or acts exhibiting a high degree of wantonness. *People v. Northrup*, 83 A.D.2d 737, 442 N.Y.S.2d 658 (1981).

Again there was no evidence of such behavior whatever. The only evidence as to the continuing on-going relationship between the defendant and the deceased child was the testimony of

several witnesses who had observed their relationship. Garland J. Turner on page 603 of the Trial Transcript said after being asked if he could describe the relationship:

A. Well, I'd say what described it most was loving, kind. Tom (the defendant) was always helping. Ronnie was a smart boy, I mean, for three, he knew his ABC's and could count to 30 and it was - several times I seen them kissing. Ronnie would call him "Dad"--"Daddy"; you know, and he was happy. It was love.

and again on page 605, he added:

Q: Now at any time when he was in the home, did you ever see Mr. DeMille discipline him in any way?

A: No, In fact it was just like I said, love, kissing. It would surprise you. It did me. that...

Q: Why did it surprise you?

A: I knew Ronnie wasn't his real son. It kinda shocked you.

Q: You mean what shocked you?

A. To see the relationship they had. You know, like I say, it was love.

Leland Vaughn DeMille, defendant's father was asked what kind of relationship did he observe between the defendant and the child, page 617.

A: Very good

Q. Can you describe what you mean by "very good?"

A. Oh, a great deal of love there.

Q. Did you ever see Tom Davies cruel or in any way strike--not Tom Davies, Tom DeMille strike Ron Davies?

A: No sir, I never did.

Q: Did you ever see him in any way attempt to correct anything he did?

A: Just by talking to him.

Q: Okay, and what was the relationship--well, not the relationship, but how did Ronald Davies act towards Tom?

A: Real nice. I mean, you know, he was on his lap more than he was off his lap. There was a great deal of love there.

Q: Did he ever appear to be afraid of Mr. DeMille?

A: No. No. he never did.

Jan DeMille, the defendant's wife and the mother of Ronald Davies testified page 626:

A: He (Ronald Davies) took to Tom (defendant) right away. He wanted to go everywhere with him. He loved him dearly. He started calling him "Daddy" and his own father he called "Harley."

Again on page 628

Q: Now, during that period of time, did you observe the relationship that developed between Ronnie and Tom DeMille?

A: Yes, I did.

Q. Can you describe, the best way you can, what that relationship was?

A: Ronnie adored Tom. He walked up to Tom one day and asked if Tom would marry both of us and if he -- he would go up to Tom for a kiss and Tom would tease him and say, "No, I'm not going to give you a kiss," and he would get so upset. He just hung on. He wanted to be with him everywhere. He would get upset if he couldn't go for a ride with him, or if some reason Tom couldn't do it. When he would go to the dump, for instance, and he had things that he was dumping that he didn't want to take Ronnie, Ronnie would get really upset, and he would wait by the door until his daddy got home. And he called him "Daddy."

Also on page 656, Jan DeMille testified:

Q: Now, Mrs. DeMille, I think you earlier described the relationship that your husband, Mr. DeMille, had with Ronnie Davis.

Q: Did you ever have any reason to suspect that there was any kind of abuse being inflicted upon your son by Mr. Davies - or Mr. DeMille?

A: If I had thought that Tom had abused my son, I would have thrown him out of there. He never did. All he did was love him. (Emphasis added)

Of course, the defendant himself described his relationship with Ronnie, the child as one of mutual love.

The most the State could do to dispell that relationship was introduce evidence of a previous accident and leave the jury to assume that defendant must have somehow been responsible and to introduce testimony of nurses, doctors and the pathologist of bruises, after the injury which apparently caused his death, to suggest there was some kind of abuse of the child.

However, in that respect, it is interesting to note the testimony of Dr. VanNorman, the emergency room doctor who examined him when he was first brought to the hospital emergency room to determine the type and nature of his affliction. See page 211 et seq. of the Trial Transcript.

Q: What else did you examine?

A: I did a general exam, listened to his lungs, pressed on his abdomen, looked at his extremities.

Q: And do you look for other type of injuries? You realize there might be head injuries. Do you look for other injuries concurrent with that head injury?

A: Certainly.

Q: And what do you do in that regard? What do you look for and where do you look?

A: Okay. You examine the skin, looking the kid over, basically seeing what else might be going on, whether there's evidence of trauma or illness.

Q: Okay, do you look for fractured bones, that sort of thing--

A: Sure.

Q: --that might come along too?

A: Sure.

Q: And did you find anything of that nature?

A: In looking over the rest of the child, he had a few little marks consistent with his healing of chickenpox, and he had a few scattered bruises over his extremities and a few on his trunk. But other than the one on his forehead, nothing that seemed to be of much clinical relevance at that point.

Q: Where did you observe bruises on his body, besides-- you said something about his forehead? Let's leave that one for a minute and go to the rest of the body. Where did you find bruises elsewhere?

A: On the front of his shins, thighs, a few on his chest and abdomen.

Q: How severe were they on his chest and abdomen?

A: To me they did not appear particularly severe.

Q: As a matter of fact, when you testified previously, you didn't even indicate that there were any on his chest and abdomen, did you?

A: What I had seen and written is that, as I indicated, there were a few on his trunk, but they did not impress me.

Q: They were not serious enough to even be concerned about, were they?

A: That's correct.

Q: As a matter of fact, most of the bruises that you saw on him were bruises that are consistent with a three-year-old child that maybe bumps into chairs, or that sort of thing, is that correct?

A: Yes.

Q: Most of them were on his shins?

A: Yes.

Q: And did you see any elsewhere on his body, other than on the shins and the trunk or--

A: I did not examine his back or his buttocks. But, no, on the surfaces I examined, I didn't see any others other than what I've described.

Q: Okay, None on the arms?

A: I don't believe so.

Q: And can you describe the ones that you saw on his chest and on his stomach?

A: Small centimeter size.

Q: And circular--when you say "centimeter in size," that's very small, isn't it?

A: Yeah.

Q. Less than an inch?

THE COURT: You have to answer out loud.

THE WITNESS: Yes. Half inch or so.

Q: (By Mr. Wright) And there were none that appeared to be extensive or elongated, or anything of that nature, were there, on his body?

A: No, I did not see any.

Q: Okay. And none on his arms?

A: I don't recall any on his arms.

Q: Well, when you gave statements earlier and at that time you hadn't observed any either, had you?

A: I don't believe so.

Q: Now, you indicated there was--appeared to be a bruise on his forehead, is that right?

A: That's correct.

Q: And what type of bruise did that appear to be? Can you describe it?

A: Yes. This was, oh, one to two centimeter, probably, two centimeter area with a series of tiny bruises that might almost be called

petechiae, p-e-t-e-c-h-i-a-e. That's a very fine millimeter, or so, skin discoloration. And these were sitting in a cluster. They had not become confluent, had not merge together yet.

Q: Was there any bruise--I mean, excuse me, any swelling, or anything, consistent with that?

A: I frankly don't recall.

Q: Was there any other bruises on the forehead?

A: No.

In spite of doctors and nurses, most of whom saw him later after treatment including, forced intubation, the drilling of at least two bur holes in the skull, (See P 569 of Transcript,) one of which was done with a cloward drill which was not designed for that purpose (see Transcript P 570; L 10 to P 571; L 15) a craniotomy--the removal of a large portion of the skull (Tr P 509, L 6-19)--all of which could easily have caused the bruises reported by the doctors and others who saw the child later, some not even until after his death.

See for example the testimony of Dr. Clark the pathologist that taping the intubation tubes by the doctor and nurses had caused lacerations and bruises on the child's face during treatment. (Tr. P 372; L 5-19). This would indicate that many of the bruises reported by the pathologist, but not reported by the emergency room doctor could have been caused by the treatment.

All of this discussion is in preface to citations in the Bolsinger case to the type of conduct that might qualify to prove "depraved indifference to human life." The court, after quoting from People vs. Northrup, 83 A.D. 2d. 737, 442 N.Y.2d 658 (1981) on page 1220 among other cases:

Depraved indifference to human life is characterized by unmitigated wickedness,

extreme inhumanity or acts exhibiting a high degree of wantonness.

cited representative cases, page 1220:

In sharp contrast to defendant's conduct here, conduct in the following cases was properly held to constitute depraved indifference: Neitzel, supra (defendant fired several shots directly at girl friend while she sat on the ground. Some struck the ground within an inch of the victim before the fatal shot entered her head); People v. Lilly, 71 A.D.2d 393, 422 N.Y.S.2d 976 (1979) (defendant inflicted vicious and brutal injuries on 6 1/2-pound baby girl over period of one month and sought no medical attention to ease substantial pain); People v. LeGrand, 61 A.D.2d 815, 402 N.Y.S.2d 209 (1978), cert. denied, LeGrand v. New York, 439 U.S. 835, 99 S. Ct. 117, 58 L. Ed. 2d 130 (1978) (defendant beat former wife to death, dragged her body down two flights of stairs, chopped her up and stuffed her into plastic bags for easier disposal); State v. Nicholson, Utah 585 P.2d 60 (1978) (defendant neglected and mistreated small son for a period in excess of five months. Victim was found dead of malnutrition and dehydration in garbage, spoiled food and human feces reaching a depth of three feet in some places).

Admittedly these are simply examples, but no evidence presented by the State proved beyond a reasonable doubt that Leland Thomas DeMille's conduct came even close to comparing to these kinds of examples nor met the standard required by the Bolsinger Court. As the court pointed out on page 1220:

The evidence here simply does not support a finding of depravity in the conduct of the defendant that caused the death of Kaysie.

And it does not in the instant case. Again it is the State's burden to prove every element of the crime it charges. It simply cannot say, as it did in this case, the child died by a very severe blow to the head, the defendant was the only person

present when that blow must have happened, Ergo, he is guilty of a "depraved indifference to human life.

This Court in the Bolsinger case on page 1221 pointed out:

The jury may well have been swayed by the reprehensible conduct of the defendant subsequent to her death. But that conduct is not before us for review.

Defendant submits that in this case the jury "may well have been swayed..." by an irrelevant or improper consideration by the jury as well, as will be discussed in the next section, but regardless, that does not release the State from proving every element of its case beyond a reasonable doubt.

Defendant submits the State has not proven, even if it proved defendant caused the death of Ronald Davies, that it was with the requisite intent to make it Second Degree Murder as opposed to Manslaughter or Criminal Negligence.

POINT II

II. THE DEFENDANT-APPELLANT FAILED TO RECEIVE A FAIR AND UNBIASED TRIAL BECAUSE CERTAIN JURORS HELD UNREVEALED BIASES AND PREJUDICES AND BECAUSE OF JUROR MISCONDUCT DURING DELIBERATIONS.

One of the trial jurors, Judith Ann Garner came to appellant's attorney in a distraught state of mind and reported what she has memorialized in an affidavit which was included with defendant's motion for a new trial. (See R-176-179)

In that affidavit the Juror alleged several facts which appellant submits constituted improper bias and prejudice and

conduct on the part of several jurors, all of which served to deprive the defendant of a fair trial, were a violation of his due process rights, and made a mockery of the verdict reached in his case.

The relevant portions of said affidavit are as follows:

4. During said deliberations co-juror, Kathleen J. Ence, announced, to affiant and other jurors assembled in said jury room, that she had been previously married to a "child abuser" and to a "spouse abuser."
5. Said juror, Kathleen J. Ence, further stated to the affiant and the other jurors in said jury room during said deliberations, that while the defendant's attorney was giving his closing argument, she, Kathleen Ence, prayed, ". . .that if said attorney made eye contact with her she would know he was telling the truth, but if he did not she would know he was not telling the truth about defendant; that he did not make eye contact with her, so she knew said attorney was not telling the truth," concerning the defendant.
6. That an inquiry was made of the religious affiliation of the jurors and all but one of which claimed to be members of the Church of Jesus Christ of Latter Day Saints.
7. Said juror, Kathleen Ence, was one of the leaders, during the deliberations by the jury, of the faction seeking a speedy and early determination of guilt of the defendant.
8. That juror, Teresa Bean stated to the other jurors that ". . .she had gone by the home of the defendant (not necessarily during the trial, but previously) and knew exactly what was going on."
9. That jurors, during deliberations discussed the possibility that the deceased child was autistic and that could have led the defendant to committing the crime, even though there was no evidence presented by either the prosecution or the defense that the child was autistic or had a similar condition.
10. One juror, the name of whom, affiant does not know, stated to the other jurors that she had worked with abused children in a professional capacity and understood matters of this kind.

11. That the jurors who favored conviction seemed to manufacture circumstances not in evidence, such as the possible autism of the child victim, their own experience with abused children, etc., to justify a finding of guilt of the defendant in the above case.
12. Affiant, during said deliberations observed and noted, together with the other jurors, that two of the older jurors appeared ill and emotionally distressed during said deliberations, that there was concern by all of the remaining jurors for the health and welfare of said two older jurors during said deliberations and they felt the need to conclude the deliberations quickly because of that concern for the well being and health of the two older jurors.
13. Affiant felt intimidated and overly pressured by her's, and some of the other more outspoken jurors', concern for the physical and emotional well-being of the said two older jurors and by the late hour the case was turned over to the jury for deliberations and the insistence by said outspoken jurors, who were seeking conviction, for a quick, speedy decision based upon their concern, among other things, for the health and welfare of the said two older jurors.
14. That the affiant, herself was concerned for the emotional condition of said two older jurors and felt "pressured" by such considerations, unrelated to the merits of the case, and that she changed her position based upon that pressure and concern rather than because she was persuaded that the State had proved the case pursuant to the requisite standard imposed by the instruction made to the jury by the Court.

The errors or improprieties, if true, as recounted in said affidavit are numerous but can be summarized as follows:

1. Juror bias:
 - (a) Ence stated during deliberations she had previously been married to a child and a spouse abuser.

(b) Unnamed juror stated she had previously worked with abused children

(c) Bean stated she had gone by the appellant's home "... and knew exactly what was going on."

2. Juror Impropriety:

(a) Ence stated she had prayed during the closing argument that if appellant's attorney made eye contact with her she would know he was telling the truth, but if he did not that he was not telling the truth, and that he had not.

(b) Religious affiliation of jurors was discussed during deliberations.

3. Improper consideration during deliberations:

(a) Assumption, without any evidence to support it that child was probably autistic.

(b) Concern for the health and welfare of elderly jurors insisting in desire to reach a hasty conclusion to deliberations.

The trial court in ruling against defendant's motion for a new trial without comment or explanation would seem to have accepted the State's contention that such an affidavit is inadmissible and therefore denied defendant a new trial because

no evidentiary hearing was ordered or allowed to determine the truth of the allegations in the Juror Garner's affidavit.

Passing over, for the moment, the issue of the admissibility of the affidavit, it would appear clear and beyond question that if the allegations were proved true, the defendant did not receive a fair and impartial finding by the jury of his guilt or innocence.

Asking God to give a sign to a juror to determine guilt or innocence may have some religious efficacy but hardly meets the requirements that jurors consider only the evidence presented during the trial.

Inquiring as to the religious affiliation of jurors, i.e. determining that all but one of the jurors to be members of the Church of Jesus Christ of Latter-day Saints, which notoriously teaches the efficacy of "divine revelation" then announcing to the remaining jurors, what one juror considered to be a revelation, i.e. that defendant's attorney had not made eye contact at a precise moment during his closing argument, hardly seems to be an appropriate and fair means of reaching a verdict.

Adding to that is the fact that the juror who announced her "revelation" also reported during deliberations, but not during jury selection, that she had previously been married to a child and spouse abuser, contributing immensely to the unfairness of the deliberative process. Unfortunately, the same juror was discussed in the affidavit as one of the leaders during the deliberations.

In addition, are the further considerations that were discussed by the jurors, i.e. that the child may have been autistic and that that could account for the defendant's "striking the child", when the only evidence in the trial was to the contrary. Several described him as bright and alert and normal. Witness, Turner described him as a smart boy, knowing, at age 3, his ABC's and able to count to 30. No testimony disputed that.

Another juror revealed during the trial deliberations, but not during jury selection she had worked with abused children, suggesting a sympathy for "abused children" and an antagonism to anyone even remotely accused of abusing children.

Another juror reported improper contact with the home of the defendant and a vague suggestion to the other jurors that she had special knowledge about the facts of the case which was not known by the remaining jurors, all of which cumulatively tended to deprive the defendant a fair, and unprejudice and unbiased jury.

The issue by the State seems to be that which it made in its memorandum in opposition to the Motion for a New Trial, that is, that the affidavit of a juror may not even be received or considered.

The State cited cases dealing with civil jury verdicts, Wheat vs. Denver & RGWR Co, 122 Utah 418, and others, then submitted that State v. Couch, Utah 635 P.2d 89 (1981) supported that determination. Rule 606 (b) of the Utah Rules of Evidence is also cited.

The defendant submits however, that neither the rule nor the case is determinative in this case.

The Rule, 606(b) has not been specifically interpreted by the Utah Appellate Courts, as yet.

The Couch case discussed Rule 41 of the Rules of Evidence, which preceded Rule 606(b), which is somewhat changed from the old Rule 41.

The over all thrust of this case and Rule 606(b) seems to be to restrict those activities which appear to be an attempt to second-guess the jurors during their deliberations. Jurors should, and defendant agrees, feel free to carry on a dialogue during deliberations without fear of having, later, to justify every proposition or position expressed during the give and take of a jury determination. The Couch case states "We cannot referee the deliberative process." The Couch case and Rule 606(b) seem to try to memorialize that principal and provide situations where that principal, if unrestricted, would go too far, i.e. where "... extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

The State would no doubt like to restrict the interpretation of that exception to the rule to the narrow confines of bribery or to a verdict by chance.

Appellant submits that the Couch case only used those two situations as examples of exceptions to the rule and did not mean to specifically limit exceptions to the very narrow corridors exemplified by those two situations.

When dealing with the criminal justice system, justice equity, fairness and truth are powerful considerations. They are, in fact, the very foundation of our democratic system and if we arbitrarily impose rules or regulations that suppress or destroy those foundational blocks we are not only destroying an individual we are smothering those essential elements of a democratic, free society.

The fairness of a trial which may take away one's liberty or even his life, is too basic an american constitutional due process right to be carelessly or lightly dealt away.

In the instant case, defendant believes that the allegations made in the juror, Garner's, affidavit do in fact fit even under the most restrictive interpretation one may try to apply to both the Couch case and Rule 606(b), but that that case and Rule 606(b) were not meant to be as restrictive as the State would suggest.

This is not simply a case of a juror allegedly misunderstanding an instruction given by the court. The Couch case in excluding the affidavit, commented that "... the affidavit under consideration here contains no suggestion that the verdict was arrived at by a means other than the 'fair expression of opinion on the part of all the jurors.'" That, alone, suggests the Court might well have been willing to consider something that was arrived at by means other than the fair expression of opinions on the part of all jurors!

In this case, the allegations of Garner's affidavit would, to all fair-minded observers clearly suggest the verdict

was arrived at by means other than by the fair expression of jurors' opinion.

One juror announced she had prayed for a sign and did not receive the specific sign she prayed for. To an assembled group who acknowledged membership in a religious organization that teaches revelation from God in all the affairs of life to be a true principle of life, would certainly appear to fit into the definition of an "outside influence."

That same juror, for the first time revealed that she believed herself to have been married to, and a fortiori, a victim of, a spouse and a child abuser, a factor that certainly would constitute an outside and even devastating influence on her. When she emerges as the leader of the faction for conviction, the mischief she represents to the principal of a fair trial becomes even more overwhelming.

If that were all, it would appear to be sufficient, but add to that unstable beginning the fact that another juror is alleged to have, for the first time, announced she had previously worked with abused children. The presumption that that experience has created in her a sympathy for abused children in general and perhaps even an antagonism toward anyone who even might be accused of being a child abuser, is too apparent to overlook. That outside influence - apart from the evidence actually introduced at trial - simply must come outside the limitation imposed by the Couch case and Rule 606(b).

But that again, is not all. One juror is reported to have obliquely announced that she had gone by the home of the

defendant "and knew exactly what was going on," suggesting she had information about the case not garnered from the testimony and evidence presented at the trial.

In fact, all the testimony introduced during the trial, was to the effect that nothing nefarious, evil or illegal did go on, by numerous witnesses, but her suggestion certainly was an "extraneous prejudicial information" as referred to in Rule 606(b) .

And as an overlay to all of that, is the suggestion in the affidavit that two elderly jurors were in ill health physically and emotionally to the extent that they were of concern to the remaining jurors and that that concern was of primary importance, not the reaching of a true and just verdict!

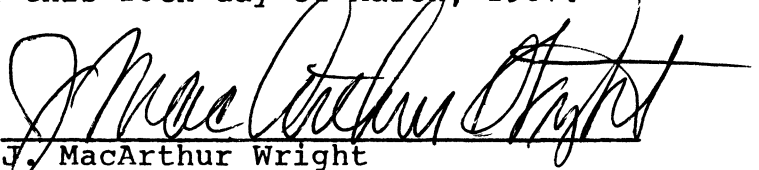
Finally discussion of the child being autistic, which presumably was suggested as a rationalization by the jurors that the defendant became angry and did what he was accused of doing, in spite of no evidence whatever that the child was autistic - even evidence to the contrary so that they could, in good conscience find him guilty - would strongly suggest to the court that the defendant did not - could not - have received a fair trial.

CONCLUSION

WHEREFORE, the defendant submits (1) that the State has not proved beyond a reasonable doubt that defendant committed

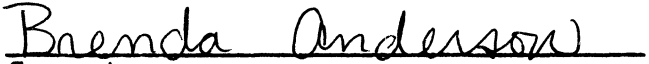
the crime of 2nd Degree Murder, or (2) at the very least,
defendant should be granted a new trial.

RESPECTFULLY submitted this 18th day of March, 1987.


J. MacArthur Wright
Attorney for Defendant/Appellant
Leland Thomas DeMille

MAILING CERTIFICATE

I do hereby certify that I mailed 2 true and correct
copies of the above and foregoing document to: David L.
Wilkinson, Attorney General and to Sandra L. Sjogren at 236 State
Capitol, Salt Lake City, Utah 84114 on this 18th day of March,
1987.


Secretary