

1986

# Utah v. DeMille : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

860532

STATE OF UTAH,

:

Plaintiff-Respondent, :

-v-

:

Case No. 860532

LELAND THOMAS DEMILLE,

:

Defendant-Appellant. :

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Plaintiff-Respondent, :  
-v- : Case No. 860532  
LELAND THOMAS DEMILLE, :  
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the State prove the elements of Second Degree murder?
2. Is a juror affidavit that describes the mental processes of the jurors during the deliberations admissible for purposes of verdict impeachment?

STATEMENT OF THE CASE

This is an appeal from a jury verdict and conviction of appellant Leland Thomas DeMille, of murder in the second degree in violation of Utah Code Ann. § 76-5-203(c) (depraved indifference homicide), a first degree felony.

COURSE OF THE PROCEEDINGS BELOW

This case was tried to a jury in Fifth Judicial District Court, Judge J. Harlan Burns, presiding on July 28 through July 31, 1986. Following the trial, the jury found Defendant guilty of second degree murder.

On August 26, 1986, Defendant submitted a motion for a new trial, which motion was denied on September 26, 1986.

Judge Burns sentenced Defendant on September 17, 1986, to serve 5 years to life, recommending that Defendant be incarcerated for ten years because the offense was "extremely heinous" particularly in light of the victim's particular vulnerability (Tr. of September 17, 1986, p. 10).

Defendant filed a notice of appeal to this Court on October 17, 1986.

#### SUMMARY OF ARGUMENTS

Defendant was properly convicted of second degree murder under Utah Code Ann. 76-5-203(c). The State proved that Ronnie's injuries were not inflicted accidentally, that the injuries were incurred when Ronnie was in Defendant's sole custody and control, and that the severity of the injuries foreclosed any claim that Defendant, in inflicting the grave risk of death that his actions wrought on Ronnie's life, failed to act with the requisite intent.

The State's case was further bolstered by the inadequacies and inconsistencies of Defendant's explanations for Ronnie's condition, which inadequacies provided further circumstantial evidence of Defendant's guilt.

Because the juror affidavit submitted by Defendant did not address outside influences on the jury, or extraneous prejudicial information that was interjected into the realm of

the jurors, but addressed the mental processes and deliberations of the jurors, it was incompetent evidence for impeachment of the verdict.

Had Defendant participated in the voir dire, instead of waiving his opportunity to object to the participation of the jurors, he could not have succeeded in raising a challenge for cause based on the circumstances described in the affidavit.

### FACTS

On May 5, 1985 at approximately 3:15 p.m. Ronald Wayne Davies ("Ronnie") a three year old male child, was brought into the emergency room of the Dixie Medical Center in St. George by his mother, Jan Davies, (now Jan DeMille), and Defendant Leland Thomas DeMille (Tr. 104). Ronnie was unconscious. He was having difficulty breathing. His right pupil was fixed and dilated, and he had multiple bruises on his body (Tr. 105). Medical personnel recognized that Ronnie had suffered a head injury and was in critical condition (Tr. 146, 186). Ronnie was diagnosed as having a skull fracture that nearly encompassed his entire skull. The fracture tore the dura mater (outer covering of the brain) (Tr. 328, 329). Ronnie was suffering from extreme brain edema (swelling) which caused his brain to expand against his skull until it began to deteriorate under the pressure (Tr. 332), an acute subdural hematoma (severe blood clot on the brain) (Tr. 336)., a hemorrhage in his sternocleidomastoid muscle (injury to

the neck) (Tr. 322), and multiple bruises (Tr. 105). Dr. VanNorman, the emergency room physician who attended Ronnie, concluded that the child's condition was the result of a severe blow to the head which occurred minutes to hours before Ronnie was brought to Dixie Medical Center (Tr. 199).

Medical technicians performed artificial respiration, put him on a heart monitor and an I.V., and x-rayed his head with a CT scan (Tr. 105-106). It was planned for Ronnie to be transported to Las Vegas for expert treatment, but immediately after the CT scan was completed, Ronnie's left eye became fixed and dilated, indicating that Ronnie's condition was deteriorating rapidly, and the doctors in St. George were forced to drill a burr hole in Ronnie's skull to evacuate part of the subdural hemotoma and relieve the mounting pressure from his swelling brain (Tr. 126, 150). The small hole was placed, the dura was incised, and blood and brain tissue rushed from the hole, evidencing the severe intracranial pressure caused by the injury to Ronnie's brain (Tr. 150).

After being taken to the Humana Sunrise Memorial Hospital in Las Vegas by helicopter, Ronnie underwent surgery consisting of the drilling of another burr hole, and a craniotomy (removal of a bone flap) to further relieve the pressure on his brain (Tr. 252). Although Ronnie was thereafter kept in the intensive care unit on a ventilator and a heart monitor, and

under medication, the efforts of his caretakers could not reverse the damage done to his brain, and he died on May 9, 1985.

In attempting to treat Ronnie, doctors in St. George and in Las Vegas elicited explanations from the DeMilles about Ronnie's activities before he presented at the Emergency Room. The explanations referred to events that had happened during the week before Ronnie presented with his injuries. None of the events described occurred on May 5th, the day that Ronnie was in Defendant's sole custody, and the day that Ronnie was brought into the Emergency Room. All of the medical practitioners who were familiar with Ronnie's injuries found those explanations to be inadequate in light of Ronnie's injuries (Tr. 113, 204, 206, 263, 535). Medical technicians in St. George contacted officials at social services (Tr. 114, 130), and the Las Vegas physicians also suspected child abuse, and contacted police (Tr. 416).

Because the explanations given to the doctors by the DeMilles did not coincide with the necessary time frame of the trauma and did not account for the massive trauma that was required to cause injuries as extensive as Ronnie's, his body was sent to the coroner for an autopsy (Tr. 269). Dr. James Y. Clarke, of the Clark County Coroner's Office, performed the autopsy and determined from the condition of Ronnie's body that his death was caused by a homicidal blow to the head (Tr. 336). He further opined that the injury was inflicted four to five days

prior to the autopsy on May 10, 1985, consistent with Dr. VanNorman's opinion that Ronnie was injured on May 5, 1985 (Tr. 406).

From January of 1985 through June of 1985, Defendant was living with Jan Davies (Tr. 684). They were married in June of 1985 (Tr. 621). Defendant was baby sitting Ronnie on Sunday, May 5, 1985, while Jan Davies worked a 7:00 a.m. to 3:00 p.m. shift as a dispatcher for the St. George Police Department (Tr. 754-812). Defendant testified that Ronnie seemed just fine during the day on Sunday. The child help him with yard work (Tr. 786) and played (Tr. 765). Defendant also established that Ronnie spoke to his mother by telephone at about 2:30 p.m. on Sunday (Tr. 786). Defendant alleged that at about 2:50 p.m. Ronnie went into the bathroom, that shortly thereafter he stood up from the toilet, let out a cry, and passed out (Tr. 794).

Dr. Marion L. Walker, a pediatric neurosurgeon from Primary Children's Hospital in Salt Lake City, Utah, reviewed all of the medical reports, autopsy reports, autopsy photographs, and transcripts of interviews for the purpose of rendering an expert opinion as to the cause of Ronnie's death (Tr. 527). Based upon that review, Dr. Walker concluded that within one hour of the time Ronnie presented for treatment at Dixie Medical Center (Tr. 591), Ronnie's head was either struck by a blunt object or was struck against a blunt surface (Tr. 538, 540) with great

velocity, equivalent to the velocity developed in an uninterrupted fall from a second or third story building onto a concrete surface (Tr. 531).

Dr. Walker also expressed the opinion that due to the nature of the injuries, Ronnie would necessarily have been unconscious from the moment the injury was inflicted and that he really had no chance of survival from that point on (Tr. 548). He was able to exclude all accidental causes of the injury, such as a fall in the bathroom or off a table (Tr. 532). Dr. Walker's opinion was that the defendant, who admittedly had exclusive control of Ronnie between 2:30 p.m. (the time of the phone call to Jan Davies) and 3:10 p.m. (when Ronnie was admitted to Dixie Medical Center), probably picked Ronnie up in some way and smashed his head against a blunt, hard surface with the velocity noted above (Tr. 539, 553).

Defendant was charged with second degree murder, and a unanimous jury convicted him (Tr. 852).

#### ARGUMENT

##### POINT I.

#### **THE STATE PROVED THE ELEMENTS OF SECOND DEGREE MURDER.**

Defendant's first contention on appeal is that the State failed to provide sufficient evidence of Defendant's intent to kill Ronnie. Defendant couches this argument in an extended comparison of second degree murder, manslaughter, and negligent

homicide, implying that he should have been convicted of a lesser included offense, if at all. Defendant made a tactical decision not to instruct the jury on lesser included offenses (Tr. 833) State v. Wood, 648, P.2d 71, 77 (Utah 1982) stands for the proposition that unless it is a capital case, this Court will not review a lower court's failure to instruct the jury on lesser included offenses when such instructions are not requested by the defendant.

Even if this Court chose to review the absence of the lesser included offenses instructions, the facts in this case did not require that such instructions be given. In State v. Baker, 671 P.2d 152 (Utah 1983), this Court explained that lesser included offenses instructions are necessary only when there is a "rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense". Id. at 159, quoting U.C.A. 76-1-402. As is explained in subpoints A through E of Point I of this brief, there is no rational basis for acquitting Defendant of second degree murder.

Defendant emphasizes the lack of direct evidence of his striking the fatal blow. As this Court stated in State v. Watts, 675 P.2d 566 (Utah 1983),

[W]e cannot ignore that the pernicious acts of the child abuser are always attended by secrecy, denied by protestations and innocence, and "peculiarly identified by the marked discrepancy between the clinical or physical findings and the historical data



provided by the [caretaker]." State v. Tanner, Utah, 675 P.2d 539 (1983). Nor are we unmindful of the propensity of knowledgeable intimates to stand mute for reasons known to them alone. But we have stated many times before that circumstantial evidence alone may be competent to establish the guilt of the accused, so long as it excludes every reasonable hypothesis other than defendant's guilt.

Id. at 569.

The State was bound to show beyond a reasonable doubt that Defendant acted with intent or knowledge that his actions would kill Ronnie, with intent to cause serious bodily injury while committing an act clearly dangerous to human life, or with depraved indifference to human life, knowing that his conduct created a grave risk of death to another. U.C.A. 76-5-203, State v. Fontana, 680 P.2d 1042, 1047 (Utah 1984).

The jury specifically found Defendant guilty under subsection (c) of 76-5-203(1) in a unanimous special verdict (R. 169), and this section is the proper one to focus on in this appeal. While the State presented no direct evidence of Defendant's intent, the depraved indifference category of second degree murder requires neither direct nor circumstantial showing of intent to kill or to cause serious bodily injury. In Fontana, supra, this Court explained that:

In contrast to the specific reference to "intent" in subsections (a) and (b), Section 76-5-203(1)(c), . . . , does not specify a particular mental state. Its reference to "depraved indifference" does not denote a subjective mental state. By their terms and their placement, the words "depraved

indifference" refer to the objective circumstances under which the conduct causing the death occurred.

Id. at 1045. Consistent with this explanation the jury instruction which defined depraved indifference in this case reads:

"Depraved indifference to human life": "to engage in conduct with a "depraved indifference to human life", a person must do more than act "recklessly" but need not have the conscious objective to cause the victim's death. Rather, the greatness of the risk of death which the actor's actions create and the lack of justification for the creation of the risk is the test to be applied in making such determination is an objective standard viewed by a reasonable man under such circumstances.

Instruction 14a, R. 157, 158.

Fontana lists the elements that the State must prove in order to convict under 76-5-203(1)(c):

- a. The defendant engaged in conduct that created a grave risk of death to another; and
2. At the time he so acted, the defendant knew that his conduct created a grave risk of death to another; and
3. The circumstances under which the defendant acted, objectively viewed by a reasonable man rather than subjectively by the actual state of defendant's mind, were such as to evidence a depraved indifference to human life; and
4. The defendant thereby unlawfully caused the death of another.

Id. at 1047. A review of the evidence demonstrates that the State met this burden, and that the jury's verdict was justified

by the evidence. In reviewing claims of insufficient evidence, this Court views "the evidence in the light most favorable to the verdict, and will interfere only when the evidence is so lacking and insubstantial that a reasonable person could possibly have reached a verdict beyond a reasonable doubt." State v. Tanner, 675 P.2d 539 (Utah 1983).

Defendant relies heavily on State v. Bolsinger, 699 P.2d 1214 (1985), a case which is readily distinguishable from the case at hand, through the comparative application of the Fontana depraved indifference test. In State v. Fontana, 680 P.2d 1042 (Utah 1984) this Court approved this jury instruction:

To engage in conduct with a "depraved indifference to human life," a person must do more than act "recklessly," but he need not have as his conscious objective or desire to cause the result. Rather, the greatness of the risk which the defendant's actions create and the lack of justification for the creation of the risk is the test to be applied in determining whether the defendant's conduct evidences a "depraved indifference to human life."

Fontana at 1047.

In Bolsinger, the defendant was charged with second degree murder when his partner in sexual intercourse was strangled by his pulling on the cord which she tied around her neck. This Court set aside the verdict and convicted the defendant of manslaughter after evaluating the utility of the act in question (seeking heightened stimulation for a consenting,

participating, and "sexually sophisticated" woman), and the defendant's lack of knowledge of the unusual risks of death present in the case (slight force caused the strangulation, the victim's inebriation and the defendant's weight on top of her increased her vulnerability to strangulation).

In the present case, there is absolutely no utility that civilized people would recognize in striking a child with or against a blunt object with such force as to render the child unconscious, and there was no consent or participation on the part of the victim. As will be shown in subpoints A through C, there is no way that an adult male could inflict such destructive force upon a defenseless child without understanding the grave risk of death involved.

In reviewing the evidence presented, it is helpful to follow the analysis provided in State v. Watts, 675 P.2d 566 (Utah 1983), in which the defendant was convicted of second degree murder in the death of his roommate's child. In Watts, the jury was asked three questions:

1) Was [the victim's] death a homicide or was it an accident? 2) If it was a homicide, who was responsible for the killing? 3) If the defendant was the person responsible for the criminal homicide, how high was the degree of his culpability?"

Id. at 570.

**A. THE SEVERITY OF RONNIE'S INJURIES  
NEGATES THE POSSIBILITY OF ACCIDENT.**

Witnesses attested to the fact that Ronnie was bruised when he entered the Emergency Room (Tr. 105, 124). Defense counsel sought to minimize this testimony by implying that Ronnie's bruises were normal for a three year old or inflicted by those who treated him after he left Defendant's custody. Dr. Clarke pointed out that Ronnie's bruises were located on unusual areas on his body, and that they were inconsistent with the activities of a normal three year old (Tr. 317), and consistent with child abuse (318, see also 593-594). Multiple witnesses that saw Ronnie when he first came to the Emergency Room and in later stages of his treatment testified that the bruises were in different stages of healing (Tr. 124). Thus, some of the bruises necessarily predated Ronnie's entrance into the hospital. Dr. Clarke testified that when he performed the autopsy, he noted several bruises on Ronnie's arms, legs, abdomen, back, neck, and head, which were too old to have been incurred while Ronnie was in the hospital (Tr. 314-317, 322, 407). The State presented testimony that medical practitioners do not normally bruise their patients, and that the people who treated Ronnie were careful with him (Tr. 179).

Dr. Clarke testified that Ronnie had a hemorrhage in his sternocleidomastoid muscle, which indicated that he had sustained a serious blow to his neck (Tr. 322). Dr. Clarke

explained that the edema (swelling) in Ronnie's brain was so severe that it flattened the normal curves in the brain, and forced the brain to herniate out of the hole from the craniotomy and into abnormal portions of the skull (Tr. 332). Dr. Walker testified that the force that caused the skull fracture tore the dura mater of the brain, and caused the subdural hemotoma and brain edema (Tr. 533, 534).

Ronnie's skull fracture nearly encompassed his entire head, and ran through the thickest part of his skull (Tr. 328-329). Dr. Walker testified that the force causing the skull fracture was equivalent to Ronnie's falling from a two to three story building onto the back of his head (Tr. 531).

Returning to the first question on Watts, "Was Ronnie's death a homicide or was it an accident?": Ronnie's death certificate, and the expert testimony of Drs. Clarke and Walker prove that his death was a homicide; and since no accidental cause would account for the severity of his injury, a human act was necessary to account for it.

**B. THE PROGRESSION OF RONNIE'S INJURIES INDICATES THAT THE FORCE THAT CAUSED THE INJURIES PRECEDED HIS LOSS OF CONSCIOUSNESS IMMEDIATELY, AND MUST HAVE OCCURRED WHEN RONNIE WAS IN DEFENDANT'S CUSTODY.**

Various medical technicians testified that Ronnie's head injury was acute (Tr. 153, 245, 301, 406), meaning severe, and recent. Dr. VanNorman testified that the fresh blood

depicted in the CAT scan that was shown to the jury indicates that Ronnie's injury was acute (Tr. 246). Dr. McCarthy also pointed out that in his opinion the bright red blood that exited the burr hole meant that the injury was acute (Tr. 301). Dr. Clarke testified that the early signs of necrosis (brain tissue death) where Ronnie's brain herniated out of his skull showed that the injury was acute (Tr. 370).

The acuteness of the injuries shows that the force causing the injuries must have immediately preceded Ronnie's presentation at the Emergency Room. Dr. VanNorman explained that Ronnie's right eye was dilated when he entered the hospital, and that when the left eye became dilated, it demonstrated the rapid progression of the injury (Tr. 198). He explained that the progression of injuries is often used by doctors to determine the cause and timing of injuries, and that the progression of Ronnie's injuries indicated that his injury occurred shortly before he was operated on (Tr. 232), and "minutes to hours" before he was brought to the Dixie Medical Center (Tr. 199). Dr. Walker also testified that the progression of dilation in Ronnie's eyes indicated that the injury was recent and rapidly progressing (Tr. 547).

Dr. Walker explained that the force causing Ronnie's injuries would have caused immediate unconsciousness (Tr. 534). Dr. Clarke testified that the condition of the hemotoma at the

time of the autopsy indicated that it immediately preceded Ronnie's unconsciousness, and was probably incurred on May 5 (Tr. 336), the date on which Ronnie was in Defendant's custody. Dr. Walker testified that Ronnie must have incurred his injuries after he got off the phone with his mother, because the injuries would have resulted in an immediate loss of consciousness and breathing difficulties (Tr. 552) and would have made it impossible for the child to have conversed normally with anyone.

Returning to the second Watts question; "If it was a homicide, who was responsible for the killing?"; the expert testimony of Drs. Walker, Clarke, VanNorman, and McCarthy proves that Ronnie's fatal injury was incurred during the time that Defendant, by his own admission (Tr. 754-812) had sole custody of him. As in Watts, the facts that defendant was the exclusive caretaker of the victim during the time when the injury must have occurred, that evidence supported the conclusion that he was less than happy with that role, that there was evidence of a prior loss of consciousness while Ronnie was in Defendant's care (Tr. 670), and that expert witnesses testified that the fatal injuries were inflicted by massive force within the range of Defendant's ability, show that Defendant was responsible for the homicide. Compare Watts at 570.



**C. NO ADULT COULD APPLY THE TREMENDOUS  
FORCE INVOLVED IN THIS CASE TO A THREE  
YEAR OLD CHILD WITHOUT KNOWING THAT SUCH  
CONDUCT INVOLVED A GRAVE RISK OF DEATH.**

The expert testimony noted above explained that the trauma causing Ronnie's injuries was extreme. Particularly in consideration of Defendant's prior experience with Ronnie (Tr. 670), and of Defendant's professed extensive experience with young children (Tr. 720), he must have understood the gravity of the risk involved in injuring Ronnie. In Watts, the Court deferred to the judgement of the jurors in their selection of the defendant's culpability (Watts question 3), stating:

It may well have been convinced that the defendant's conduct exhibited a depraved mind, inflamed to such a degree that it appeared to be indifferent to the life or safety of this child--making him guilty of murder in the second degree under the court's instruction . . .

Id. at 571.

**D. THE INCONSISTENCIES AND INADEQUACIES OF  
DEFENDANT'S EXPLANATIONS FOR RONNIE'S  
INJURIES ARE CIRCUMSTANTIAL PROOF OF  
DEFENDANT'S GUILT.**

Defense counsel presented five possible explanations for Ronnie's condition: his fall at the dam four days prior to his entering the hospital (687), his fall at play school two days prior to his entering the hospital (Tr. 641), his fall on cement one week before he entered the hospital (Tr. 709), his habit of

hitting his head on the floor intentionally (Tr. 635, 583), and the combination of the above occurrences.

Defendant gave numerous versions of Ronnie's fall at the dam. When Defendant talked to the Washington police officer Chandler, he claimed that Ronnie incurred a slight abrasion on his forehead (Tr. 440). When he talked to Washington police officer Allsop, he claimed that he had not noticed any head injury from the fall at the dam (Tr. 460). Defendant's employer, Garland Turner, testified that Defendant told him on the way to Ronnie's funeral that when Ronnie fell at the dam, he lit on his head, and the sound of the impact prompted Defendant to take Ronnie to a doctor, who warned Defendant to watch for signs of concussion (Tr. 611). In Defendant's testimony, he reported that he did not see Ronnie hit his head at the dam, but there was a scrape on the side of his head (Tr. 689).

Dr. VanNorman testified that the acuteness of the injury ruled out the possibility that Ronnie could have sustained it four days before entering the hospital, particularly in light of Ronnie's normal behavior between the fall at the dam and his entrance into the hospital (Tr. 206). In his interview with a Washington police office, Dr. VanNorman explained that a person could not maintain consciousness with the degree of brain swelling present in Ronnie's head, and that it was unlikely that the swelling developed as a result of the alleged injury four

days earlier (Tr. 251-252). Dr. McCarthy rejected the fall at the dam explanation (Tr. 283).

Attendants at the nursery school testified that Ronnie did not fall while he was in their care (Tr. 489, 503, 512), and that nothing unusual was recorded about Ronnie's visit in the school records kept to monitor such events, because nothing unusual happened to Ronnie while he was at the school (Tr. 491). Dr. McCarthy testified that even if the fall off of the swing had actually occurred, it would not explain Ronnie's severe injuries (Tr. 283). Miake Nichols established that any alleged fall must have preceded the taking of photographs, since Ronnie played outside only before the photos were taken. States Exhibit No. 1.

Like the explanations of the falls at the dam and at the play school, Defendant's explanation about Ronnie's falling on the cement one week prior to his admission in the hospital was not corroborated by independent evidence (Tr. 709). While this explanation did not surface until Defendant's cross-examination during Defendant's case in chief, medical testimony explaining that Ronnie's injuries would have caused immediate unconsciousness (Tr. 552) rebuts this explanation.

Dr. Walker indicated that in his experience with over one thousand patients falling from heights such as those provided in Defendant's explanations, none of them had injuries as extensive as Ronnie's (Tr. 578), and that people in his

profession agreed that this type of injury does not occur without violent force (Tr. 579).

The explanation that Ronnie habitually hit his head on the ground was provided by Mrs. DeMille (Tr. 635, 583). Defendant failed to mention this phenomena to the police (Tr. 770), and discussed it only when he was asked to during the cross-examination (Tr. 770). Dr. Walker testified that Ronnie could not have inflicted his injuries upon himself (Tr. 535).

Dr. VanNorman testified that, while it was possible for the fracture and the edema (brain swelling) to have come from separate blows, each of the two injuries was caused by one blow (Tr. 237). Likewise, Dr. Walker testified that Ronnie's injuries were not caused by multiple blows (Tr. 535, 591).

Ronnie's activities during the week before his entrance to the emergency room on Sunday indicate that the events described in Defendant's explanations did not cause the fatal injury. On Friday night, after the three alleged falls, and after the habitual head banging, Ronnie was laughing, dancing for Defendant's friends and jumping on their laps (Tr. 642). On Sunday, May 5th, Ronnie ate breakfast and lunch (Tr. 763, 774), helped Defendant mow the lawn (Tr. 766), played with his toys (Tr. 765), and called his mother at 2:15 or 2:30 p.m. (Tr. 785), at which time he sounded normal to her (Tr. 645). Defendant's testimony indicated that immediately before the phone call to his

mother, Ronnie's eyes, speech, movement and mood were normal (Tr. 781-782). Ronnie was admitted at 3:15 p.m. to Dixie Medical Center in the unconscious condition which ultimately led to his death (Tr. 104).

All of these activities are consistent with the medical evidence that Ronnie was not fatally injured earlier in the week. Had Ronnie sustained the fatal injury earlier, he would not have appeared as he did (healthy and happy) in the photograph, taken at the play school on Friday (Tr. 549) (State's Exhibit No. 1), and could not even have spoken to his mother on the phone (Tr. 552).

The inconsistencies and inadequacies of Defendant's explanations are circumstantial evidence of his guilt. The descriptions of Ronnie's activities that are provided in the explanations combine with the expert medical testimony to prove that Ronnie sustained his fatal injury in the time frame between Ronnie's telephone call to his mother, inquiring when she would return home, and Defendant's call to Ronnie's mother, informing her that "something" was wrong with Ronnie (Tr. 646).

In that time frame, Defendant had complete and sole custody of Ronnie. While Defendant argues that the State's lack of direct evidence of the fatal blow necessitates that the State disprove every hypothesis of innocence (i.e. that Defendant accidentally threw Ronnie in the air, that Defendant was

temporarily insane), none of these hypotheses were presented in Defendant's testimony, and the State has no duty to rebut them.

**E. THE STATE PRESENTED ADDITIONAL  
CIRCUMSTANTIAL EVIDENCE OF DEFENDANT'S  
GUILT.**

Drs. McCarthy and Walker testified that an adult could have caused Ronnie's injuries (Tr. 270, 538). In October of 1984, when Ronnie lost consciousness when he was in Defendant's custody, his mother suspected that Defendant had hurt him (Tr. 678). At the time of Ronnie's fatal injury, Defendant was under stress: Ronnie had chicken pox (Tr. 724), and allegedly had been vomiting and sick intermittently during the days before Ronnie's death (Tr. 695). The night before Ronnie's death, Defendant didn't sleep much (Tr. 757), and on the day of Ronnie's death, the lawnmower broke (Tr. 763). Defendant's back was injured (Tr. 726), his time off of work resulted in a loss of income (Tr. 727), and being home babysitting Ronnie for two weeks (Tr. 726). He and Ronnie's mother were having financial difficulties (Tr. 744) - her job was more regular than Defendant's, and she was paying most of the bills (Tr. 748). Ronnie's mother's schedule was difficult, and often left Defendant and Ronnie together on weekends, without her (Tr. 741).

Defendant and Ronnie's mother were considering Defendant's moving out of the house (Tr. 744). Ronnie's mother wrote letters to Defendant, one on April 30, stating "Please

just remember I love you. I don't know what I'll do about Ronnie. The only thing I can think of is to send him away. I'm one hell of a mother aren't I," and one on May 1, stating "I know a lot of the problem has been Ronnie in the pain you've been feeling. Ronnie loves you even though he whines and cries. He loves you. He just tries so hard to win your approval and affection." (Tr. 675-677) Defendant admitted that prior to Ronnie's death, Defendant had wondered about what life would be like without Ronnie (Tr. 740), and that he knew that to "take" Ronnie's mother, he'd have to "take" Ronnie too. (Tr. 751)

According to Defendant's own testimony, when Ronnie passed out, Defendant did not rush to seek medical assistance. He took Ronnie's clothes off, put him in the tub and sprinkled him with water (Tr. 699), then dried him off and put fresh clothes on him before he even called the child's mother (Tr. 699). While Defendant called Ronnie's mother at work where she was a police dispatcher, he did not tell her to send an ambulance (Tr. 807), but asked instead, "When do you get off?" (Tr. 646).

Ronnie's death was not accidental. It was a homicide. The force that caused Ronnie's fatal injuries was applied when Defendant had sole custody of Ronnie. The extreme force which caused Ronnie's extensive injuries involved a grave risk, if not a certainty, of death, which risk any adult would have to understood when applying such force. Defendant's explanations

for Ronnie's injuries are inconsistent with the physical findings of the medical experts. While Defendant presented multiple witnesses to attest to the fact that his relationship with Ronnie appeared to be a loving one, the State presented evidence that Defendant was under a great deal of stress and unhappy about living with Ronnie when the accident occurred.

Viewing this evidence in the light most favorable to the jury's guilty verdict, this Court should uphold Defendant's conviction of second degree murder.

#### **POINT II**

**THE GARNER AFFIDAVIT IS NOT COMPETENT EVIDENCE, AND EVEN IF IT WERE, THE CONTENTS OF THE AFFIDAVIT DO NOT MERIT A NEW TRIAL.**

**A. DEFENDANT DID NOT SUBMIT QUESTIONS DURING VOIR DIRE, AND WAIVED HIS OPPORTUNITY TO CHALLENGE THE JURORS.**

In Point II of Defendant's Brief, he argues that his trial in the district court did not meet constitutional standards because of unrevealed juror biases and juror misconduct during deliberations. In Maltby v. Cox Const. Co., Inc., 598 P.2d 336, 341 (Utah) cert. denied, 444 U.S. 945 (1979), this Court held that:

"[m]atters of possible bias and prejudice on the part of the jury are within the sound discretion of the trial court, and its rulings on whether to question veniremen with respect thereto will not be disturbed on appeal unless it is demonstrated that the Court abused its discretion,:



U.C.A. 78-35-18, Rule 18 of the Utah Rules of Criminal Procedure, provides in subsection (b) that:

[t]he court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant.

Defendant was given the opportunity to discover the alleged biases of the jurors during voir dire. After Judge Burns questioned the prospective jurors, counsel for Defendant was asked if he would like to pose questions to the jurors, and he declined (Tr. 70).

Defendant should have inquired further of the jurors or objected to their participation before he passed them for cause (Tr. 75). Rule 12 of the Utah Rules of Criminal Procedure, U.C.A. 77-35-12, provides in subsection (d) that:

Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

This Court relied on this statute in State v. Miller, 674 P.2d 130 (Utah 1983), when the defense objected to the inadequacy of the voir dire in the proceedings below:

The next claim is that the judge erred in failing to inquire to the jurors if they

would be prejudice in their minds because the case involved motorcycle clubs such as the "Sundowners." The defense conceded the fact that the court may have forgotten to inquire. Counsel neither objected, reminded the judge of the oversight, made a new request, nor asked permission personally to voir dire the jury under U.C.A., 1953, Section 77-35-18(b). Such failure effectively waived the error under U.C.A., 1953, Section 77-35-12(d).

**B. THE GARNER AFFIDAVIT IS INCOMPETENT EVIDENCE.**

Defendant sought to substantiate his claims of juror bias and misconduct by submitting an affidavit of one of the jurors. The trial court properly excluded the affidavit, citing U.R.E. 606(b), and denied Defendant's motion for a new trial, which was based wholly on the affidavit. Utah Rules of Evidence 606(b), adopted Federal Rule of Evidence 606(b) verbatim. It states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The Eleventh Circuit Court of Appeals had occasion to explain the application of F.R.E. 606(b) in Gulf Life Ins. Co. v. Folsom, 806 F.2d 225 (11th Cir. 1986). In Gulf Life, a juror submitted an affidavit claiming that she had failed to understand the jury instructions and had been unduly influenced by the other jurors in reaching her decision to convict the defendant of assault. In rejecting the defendant's attempt at impeaching the verdict, the court emphasized that:

[I]t is settled law that juror testimony is inadmissible to impeach a verdict, except where the proffered testimony relates to "whether extraneous prejudicial information" or any "outside influence was improperly brought to bear upon any juror."

Id. at 225, n. 2 (citations omitted, emphasis original). See also United States v. Jelsma, 630 F.2d 778 (10th Cir. 1980) (several juror affidavits offered to show that the jurors were confused during deliberations and that the verdict did not reflect their understanding of the law were not admitted); United States v. Brooks, 677 F.2d 907 (D.C. Cir. 1982) (defendant, convicted of first degree murder by overwhelming evidence, was not allowed to overturn the verdict because one of the jurors did not realize until after the trial had begun that he had regularly made casual observations of defendant in a laundromat before the trial).

Courts that have interpreted F.R.E. 606(b) have not differentiated between the phrases "outside influence" and

"extraneous prejudicial information", but use either or both in circumstances where the verdict may be prejudiced by the jurors' contact with non-jurors and prejudicial information about the case that was not presented in the court room. For example, in U.S. v. Greer, 620 F.2d 1383 (10th Cir. 1983), the court did not specify which phrase justified the admission of a juror affidavit testifying that a marshal (non-juror) approached him and offered an opinion about the potential sentence for the defendant. In U.S. v. Brooks, 677 P.2d 907 (1982), the court explained the policy behind 606(b) and the "improper influence" exceptions:

The purpose . . . is to preserve the integrity of jury deliberations by confining claims of error to events or conditions that are "improperly brought to the jury's attention" and involve a calculated, intentional attempt to affect their outcome.

Id. at 914 (emphasis original, citations omitted).

These cases do not admit evidence of the personal knowledge held by jurors when the trials began, but admit only evidence of extrajudicial information that came to the jurors during the course of the trial. See also Wiser v. People, 732 P.2d 1139 (Colo. 1987) (affidavit testifying of juror consultation of dictionary and legal secretary was permitted as the exposition of "extraneous information or influence" under U.R.E. 606(b), which is identical to F.R.E. 606(b)); State v. Blackwell, 664 S.W. 2d 686 (Tenn. 1984) (affidavit testifying that a witness' mother told the juror that the defendant was

guilty was competent evidence of "outside improper influence" and "extraneous prejudicial information", while testimony that jurors discussed defendant's race during the deliberations was incompetent under the Tennessee equivalent of F.R.E. 606(b)); Gulf Life Ins., Co. v. Folsom, 806 F.2d 225 (11th Cir. 1986) (affidavit of juror's second thoughts after being influenced by the other jurors in the deliberations did not deal with "'external' interference with the deliberative process", and was barred by F.R.E. 606(b)).

The Utah Supreme first addressed the issue of verdict impeachment through juror affidavits in People v. Flynn, 26 P. 1114 (Utah 1891), in which it was stated:

It is well settled that affidavits of jurors will not be received to impeach or question their verdict, nor to show the grounds upon which it was rendered, nor to show their misunderstanding of fact or law, nor that they misunderstood the charge of the court, or the effect of their verdict, nor their opinions, surmises, and processes of reasoning in arriving at a verdict.

Id. at 1116. McDonald v. Pless, 238 U.S. 264 (1914) explained the policy reason for barring juror affidavits from impeaching verdicts, by predicting the state of affairs that would result if affidavits were allowed to impeach the verdicts:

Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public

investigation--to the restriction of all frankness and freedom of discussion and conference.

Id. at 267.

In Wheat v. Denver, 250 P.2d 932 (Utah 1952), cert denied, 346 U.S. 896 (1953) the Court was working under U.R.C.P. 59, which limited the admission of juror affidavits to cases involving bribery and chance. The Court explained the reasons for respecting the sanctity of jury deliberations:

To permit litigants to get jurors to sign affidavits or testify to matters discussed in connection with their functions as jurors would open the door to inquiry into all matter of things which a losing litigant might consider improper; misconceptions of evidence or law, offers of settlement, personal experiences, prejudice against litigants or their causes or the classes to which they belong. It would be an interminable and totally impracticable process. Such post mortems would be productive of no end of mischief and render service as a juror unbearable. If jurors were so circumscribed in their deliberations, it is likely that judge and counsel would have to be present in the jury room attempting to monitor and regulate their thought and discussions into approved channels.

Id. at 937. Flynn and Wheat were both cited with approval and quoted in State v. Couch, 635 P.2d 89 (Utah 1981). See also Rosenlof v. Sullivan, 676 P.2d 372 (Utah 1983) (defendant barred from submitting a juror affidavit of mathematical error that occurred when the damages were decided by the jury); Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983) (six juror affidavits were

not admitted to show that the jurors did not understand that insurance would compensate the victim); Smith v. Barnett, 408 P.2d 709 (Utah 1965) (three juror affidavits of an unauthorized test by a juror, which test was the basis for the decision, were not admitted); Stringham v. Broderick, 529 P.2d 425 (Utah 1974) (five juror affidavits not admitted to show that the jury did not understand the jury instructions); Johnson v. Simons, 551 P.2d 515 (Utah 1976) (Juror affidavits not admitted to show that the jury misunderstood the jury instructions and disregarded the law in reaching their decision).

The affidavit offered by Defendant alleges juror bias (juror previously married to, but not "a fortiori a victim of" (Appellant's Brief 28) a child and spouse abuser, juror with experience working with abused children, juror knowledge of the location of Defendant's residence and knowledge of "what was going on"), juror impropriety (juror resorting to prayer, discussion of juror religious affiliation), and improper consideration during deliberations (juror consideration of autism, juror concern for health of jurors).

None of the allegations made in the affidavit describe a verdict that was reached by bribery or by chance, or constitute proof of extraneous prejudicial information or outside influence. They describe the mental processes and deliberations of the jury, and are not competent to impeach the verdict, as is shown by

State v. Gee, 498 P.2d 662 (Utah 1972). In Gee, juror affidavits showing that jurors concurred in the verdict because of their discussion of the defendant's failure to take the stand were not admitted because:

the testimony did not relate to extrinsic misconduct, that is, to physical facts, conditions or activities which might have a bearing upon or which might influence the jury in its determination of guilt or innocence. (Rule 44, U.R.E.) The testimony related solely to the discussions and reasoning process by means of which the jury arrived at its verdict. This evidence was inadmissible for the purpose of impugning the verdict, and should have been excluded at the hearing of defendant's motion for a new trial.

C. **EVEN IF THE AFFIDAVIT WERE ADMISSIBLE, IT DOES NOT DESCRIBE CIRCUMSTANCES THAT WOULD SUPPORT CHALLENGING THE JURORS FOR CAUSE IMPEACHING THEIR VERDICT.**

Even if the affidavit were accepted as competent evidence, and if the allegations posed therein were true, none of the allegations included in it constitute grounds for challenging the jurors for cause or for impeaching their verdict.

Valid challenges for cause are listed in subsection (3) of Rule 18 of the Utah Rules of Criminal Procedure, 78-35-18:

(e) The challenge for cause is an objection to a particular juror and may be taken on one or more of the following rounds:

(1) Want of any of the qualifications prescribed by law;

(2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror;



(3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;

(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted to or employed by the state or a political subdivision thereof;

(5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by him in a criminal prosecution;

(6) Having served on the grand jury which found the indictment;

(7) Having served on a trial jury which has tried an other person for the particular offense charged;

(8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;

(9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(10) If the offense charged is punishable with death, the entertaining of such conscientious opinions about the death penalty as would preclude the juror from voting to impose the death penalty following conviction regardless of the facts;

(11) Because he is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense;

(12) Because he has been a witness, either for or against the defendant on the

preliminary examination or before the grand jury;

(13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged; or

(14) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

#### **1. "Juror Bias".**

Defendant's allegations of juror bias demonstrating that one of the jurors had been married to a spouse and child abuser and that one of the jurors had worked with abused children, even if true, do not show that the jurors had formed unqualified opinions about Defendant's guilt, or held states of mind which prevented their impartial consideration of the case.

Although the challenges for cause were listed in a different statutory format in State v. Baran, 474 P.2d 729 (Utah 1970), this Court demonstrated that allegations that prospective jury members have had similar experiences to those being litigated and allegations that prospective jury members are acquainted with the facts of the case do not constitute bias that

alone justifies dismissing jurors for cause. Baran was a robbery case, and the facts that:

"eight members [of the jury] had been victims of a robbery, two had previously read about defendant in the newspaper, one had served on a jury in 1954 on a robbery case, and one lived in the same neighborhood as defendant's estranged wife"

did not justify challenging the jurors for cause, because the jurors indicated that they held no bias or prejudice against the defendant. Id. at 730.

In State v. Hewitt, 689 P.2d 22 (Utah 1984), defendants were convicted of distribution of a controlled substance. On appeal, they contended that when the judge in the lower court denied their challenge for cause of two of the jurors, the judge denied them a fair trial. One of the jurors had training in the army in drug abuse, and participated in investigations of drug distribution, and was also acquainted with one of the detectives in the case, but because the juror stated that he could try the case impartially, the challenge for cause against him was rightly denied.

If the jurors in the present case were indeed told that one of the jury members knew where the defendant lived and "knew exactly what was going on", such information was certainly not an independent basis for convicting defendant, in light of the overwhelming evidence of his guilt presented at trial. There is no way for the reviewing Court to interpret the ambiguity of the

above-mentioned statement, or to know if the juror was convinced of defendant's guilt by the evidence presented at trial, or by her acquaintance with the location of his residence. The statement serves to demonstrate one more reason for excluding evidence of jury deliberations - the reviewing court has no demeanor evidence or contextual basis for interpreting the comments that allegedly were uttered by the jurors.

In Hathaway v. Marx, 439 P.2d 850, (Utah 1968), an appeal from a civil trial finding no negligence on the part of the defendant, this Court refused to give credence to the plaintiff's contention that the jury foreman stated during deliberations of the jury that he was present at the scene of the accident after it happened, and saw one of the defense witnesses there. This Court refused her contention for two reasons:

First, there [was] no competent proof that the alleged misconduct happened at all. Second, with very limited exceptions, the conduct and deliberations in the jury room cannot be impeached.

Id. at 851 (footnote omitted).

In C.R. Ownes Trucking Corporation v. Stewart, 509 P.2d 821 (Utah 1973), a negligence case, this Court explained that acquaintance with the defendant is not cause for dismissing a prospective juror. The court below "was careful to exclude from the panel veniremen who indicated bias or prejudice in favor of the defendant or who indicated a desire to be excused from

sitting on the case", and this action was held to be an adequate safeguard of the plaintiff's rights. Id. at 822.

Even in cases where there is information interjected into the realm of the jury by non-jurors during the trial, such information does not justify impeachment of the jury verdict when the jurors commit to rendering an impartial verdict and when the extraneous information is not different from the evidence presented at trial. In State v. Velasquez, 672 P.2d 1254 (Utah 1983) this Court upheld the verdict of a jury, when two jurors disobeyed court orders to avoid media coverage of the case, and stated:

In the instant case, both jurors who disobeyed the court's order stated to the court that their exposure to the newspaper articles would not influence their ability to render an impartial verdict and that the articles did not present any information that they had not already learned from the presentation of the evidence.

Id. at 1263. See also Gee v. Smith, 541 P.2d 6 (Utah 1975) (the fact that a juror was present when non-jurors were viewing a photograph of the deceased victim was not prejudicial because there had been several photographs of the deceased presented at trial); United States v. Weiner, 578 F.2d 757 (9th Cir. 1978), cert denied, 439 U.S. 981 (1978) (the facts that two jurors were present on an elevator and heard a discussion between prosecuting attorney and witness which contained no prejudicial information, and that one juror was told by the bailiff that the judge would

like a verdict did not justify overturning the verdict convicting the defendants of securities fraud); Wiser v. People, 732 P.2d 1139 (Colo. 1987) (juror consultation of dictionary and juror inquiry to legal secretary about the source of jury instructions did not merit overturning the guilty verdict of burglary and felony menacing).

Judge Burns repeatedly asked the jurors during voir dire if they could render an impartial verdict, (Tr. 26, 31, 36, 39, 41, 47, 48, 50, 52, 57, 58, 60, 61, 62, 63), and reminded them of their duty to do so at numerous points during the trial (Tr. 134, 253, 433, 468, 598, 710, 826) and in the jury instructions at the close of the case. (R. 141, 142, 145, 149, 151, 155, 163).

The jury was properly instructed to presume defendant innocent, and to appreciate the state's burden of proof.

Instruction No. 10 (R. 151) reads:

A defendant in a criminal action is presumed to be innocent until the contrary is proved and if there is a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal. The effect of this presumption is to place upon the State the burden of proving him guilty beyond a reasonable doubt. However, the presumption of innocence follows him throughout the trial until the State has met its burden.

To warrant your conviction of the defendant, the evidence must, to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if, after a complete consideration and comparison of all the

testimony in the case, you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him.

Likewise, Instruction No. 12 (R. 153) indicates that:

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the defendant, while the other points to his innocence, it is your duty under the law to adopt that interpretation which will admit to the defendant's innocence and reject that which points to his guilt.

## **2. "Juror Impropriety".**

Defendant's objections to one juror's resorting to prayer, and to eleven of the twelve jurors sharing the same religion imply three things: that the praying juror's "revelation", and not the evidence, convinced her of Defendant's guilt, that her "revelation" doctrinally mandated that the other ten L.D.S. jurors convict Defendant, and that the eleven L.D.S. jurors intimidated the twelfth juror into accepting the guilty verdict. There is no competent proof to support any of these implications, and search for such proof would violate Article I, Section 4 of the Utah Constitution, which states in part, that:

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof.

In conformity with the Constitution, U.C.A. 78-46-3 provides that "[a] citizen shall not be excluded or exempt from jury service on account of race, color, religion, sex, national origin, or economic status."

This Court has had the opportunity to discuss allegations against jurors similar to those raised by Defendant on two prior occasions. In State v. Piepenberg, 602 P.2d 702 (Utah 1979), the defendant was charged with violation of pornography laws, and on appeal, claimed that his trial was unfair, by virtue of the fact that several of the jurors admitted on voir dire that they were L.D.S. and that their church had taken a position against pornography. Because the jurors were not challenged by the defendant during the jury selection process, the judge had no opportunity to rule on the bias, and this Court held that the opportunity to rule on the bias, and this Court held that the defendant had waived his right to object to the service of the jurors. The facts of the present case parallel those in Piepenberg because Defendant here, while aware of the religious affiliations of many of the prospective jurors (Tr. 32, 39, 58, 66), failed to object to their service, and passed the jurors for cause (Tr. 75).

In State v. Darrow, 475 P.2d 541 (Utah 1970), a case in which the defendant was convicted of gaining money from the L.D.S. church through forgery, the defendant appealed the guilty



verdict because six of the eight jurors were L.D.S. This Court noted that the jurors had indicated that church membership would not bias their verdict, and this Court rejected the defendant's "ipse dixit that impute[d] to every Mormon, or for that matter, every Catholic, every Protestant, and every Jew, ad infinitum, a congenital, ingrained or adopted dishonesty where his church's property and his own property are involved." Id. at 542. While the present case does not involve a crime against the L.D.S. church, defendant's contention is like that in Darrow, because it imputes non sequitur characteristics to those of a particular religious faith (e.g. members of the L.D.S. church "notoriously rely on 'revelation'" (Appellant's Brief 24), and thus impliedly disregard the evidence presented at trial,) and attempts to disqualify them from jury service on religious grounds, in contravention of the Utah Constitution.

In explaining the reasons for rejecting such contentions, this Court emphasized in Darrow that the verdict was unanimous, and pointed out that the verdict forced the defendant's argument to one of three logical conclusions:

that the two non-Mormon jurors were 1) biased, as were the six Mormons, or were 2) fair, upright, honest and dandy, so that the six Mormons likewise must have been fair, upright, honest and dandy, or that 3) the six Mormons converted the two non-Mormons to Mormonism while they were in the jury room, thus infecting them with the same presumed cholera of bias and prejudice with its malodorous atmosphere of incredulity.

Id. at 542. As in Darrow, the verdict in this case was unanimous, and the evidence against the Defendant was substantial. This Court should once again reject "the objection to the jury . . . a tenuous point born of futility in finding a more substantial point, -- or technicality, if you please, to justify an appeal." Darrow at 542.

### 3. "Improper Considerations During Deliberations"

Defendant argues that the Garner affidavit should be allowed to show that the jurors hypothesized facts not in evidence (that Ronnie was autistic). Several cases discussed supra demonstrate that this is incompetent evidence. See State v. Gee, 498 P.2d 662 (Utah 1972) (juror speculation of defendant's failure to take the stand was not admitted); Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983) (juror speculation that insurance would compensate the plaintiff was not admitted); Smith v. Barnett, 408 P.2d 709 (Utah 1965) (Juror consideration of unauthorized test not admitted). Even if this were competent evidence, it does not meet the criteria necessary for overturning the verdict:

(1) evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on the misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence, the verdict.

State v. Cullen, 357 N.W. 2d 24 (Iowa 1984).

The Defendant relied on the Garner affidavit for proof of objectively noticeable prejudice during the jury deliberations. There would be no need for Defendant to imply that the jurors' discussion on autism demonstrates that the jurors were manufacturing evidence with which to convict defendant. As is demonstrated by cases discussed supra, in which juror affidavits were not admissible to constrain deliberations through impeachment of verdicts, juries are given wide discretion in their deliberations. See State v. Gee, 498 P.2d 662 (Utah 1972); Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983); Smith v. Barnett, 408 P.2d 709 (Utah 1965). As to whether or not the autism discussion was calculated to and probably did influence the verdict, because mental processes of the actual jurors are not subject to proof, URE 606(b), standards of reason must substitute for records of the deliberations. No reasonable person would be more likely to convict a defendant of second degree murder because the defendant's victim was autistic.

Defendant's affiant contends that she and other jurors were compelled to agree to the verdict because of their concern for the age and apparent fatigue of two jurors. During jury selection, Judge Burns inquired if he jurors had any physical ailments or conditions that would make sitting through the trial difficult, and got no positive indications of such conditions.

(Tr. 75) Before the jury deliberations began, Judge Burns asked the jurors if they were free from fatigue and otherwise physically able to commence deliberations, and the jurors all agreed to begin deliberations. (Tr. 842) During the deliberations, the jurors were interrupted and given the option to recess for the evening, but they chose to eat their evening meal and continue (Tr. 846). After the meal, when Judge Burns asked the jurors if they wished to continue with their deliberations, they "vigorously and affirmatively raised their hands" in assent. (Tr. 849)

In People v. Black, 725 P.2d 8 (Colo. Appl. 1986), defendant challenged a verdict by offering the testimony of two jurors who claimed that they were "mentally exhausted" and "unable to argue" with the majority of the jurors, and thus agreed to the unanimous verdict of guilty. The appellate court upheld the lower court's refusal of a new trial, pointing out that the statutory codification of the common law barred the "inquiry into the mental processes of jurors in arriving at a verdict or into any matter or statement occurring during the jury's deliberations . . . except under narrowly circumscribed circumstances." Id. at 9 (citations omitted). See also People v. Collins, 730 P.2d 293 (Colo. 1986) (allegations of juror failure to follow jury instructions and mental coercion of jurors were not allowed to be shown through the submission of juror affidavits).

One of the cases cited by the Black court to justify an exception to the general rule against invading the deliberations of the jury is Wharton v. People, 90 P.2d 615 (Colo. 1939), in which a juror reported that during the deliberations, the other jurors repeatedly swore at the juror, accused him of lying on voir dire when he disclaimed prejudice against the imposition of the death penalty in appropriate cases, threatened him physically, and followed him around the jury room, hounding him without reprieve. Although the juror reportedly broke down physically and cried, the jurors continued to brow beat him until he agreed to assent to the verdict. Even if the proffered facts of jury deliberations in the present case could be proved through competent evidence, like those in Black, they do not justify abandoning the general proscription against the invading jury deliberations.

Instruction No. 3 (R. 144) reads:

The State of Utah and the defendant both are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of the defendant. When you have reached a conclusion in that respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he

unhesitatingly should abandon that original opinion and render his verdict according to his final decision.

#### CONCLUSION

Defendant did not submit questions during voir dire, and waived his opportunity to object to the inadequacy of the voir dire when he passed the jurors for cause.

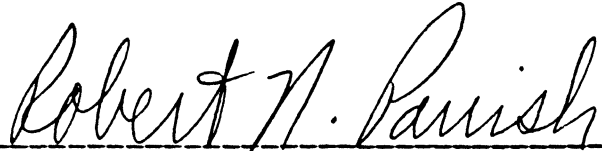
The Garner affidavit discusses the deliberations of the jury and the mental processes of individual jurors. It does not fall under any exception (bribery, chance, extraneous prejudicial information, outside influence) to rules proscribing the admission of juror affidavits for impeachment of verdicts.

Even if the affidavit were admissible evidence, the charges of bias, impropriety, and improper considerations do not describe circumstances that would have mandated disqualifying the jurors on a challenge for cause, had the information in the affidavit come out in voir dire.

The jurors took an oath to and were repeatedly admonished to deliver a verdict based not on personal prejudices, but on the evidence presented to them during the trial. Defendant has not shown, and is barred by the rules of evidence from attempting to show, that the jurors convicted him in contravention of their oath and the court's admonitions. As was explained in Point I of this brief, the State provided ample evidence of Defendant's guilt. The jury's unanimous verdict

convicting Defendant of second degree murder should not be disturbed.

DATED this 1st day of June, 1987.



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CERTIFICATE OF MAILING

I hereby certify that true and correct copies were mailed this 1st day of June, 1987, postage prepaid to J. MacArthur Wright, Attorney for Appellant, 60 North 300 East, P.O. Box 339, St. George, Utah 84770.

