

1982

# State of Utah v. Sandra J. Talbot : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff-Respondent, :  
-v- : Case No. 18340  
SANDRA J. TALBOT, :  
Defendant-Appellant. :

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BRIEF OF RESPONDENT  
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Appeal from a verdict of guilty of manslaughter in  
the Fourth Judicial District Court in and for Utah County, the  
Honorable Allen B. Sorenson, Judge, presiding.

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**FILED**

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Clerk, Supreme Court, Utah

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Defendant-Appellant.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with manslaughter, a second-degree felony, in violation of Utah Code Ann., § 76-5-205 (1953), as amended, for the homicide of Brandon Glen Talbot on July 11, 1981.

DISPOSITION IN THE LOWER COURT

Appellant was convicted November 19, 1981 of manslaughter in a jury trial before the Honorable Allen B. Sorensen, Judge, presiding in the Fourth Judicial District Court in and for Utah County, State of Utah. On February 26, 1982, appellant was sentenced to an indeterminate term of not less than one year nor more than fifteen years in prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of appellant's conviction and sentence.

### STATEMENT OF THE FACTS

Appellant was tried on November 18-19, 1981 for the homicide of Brandon Glen Talbot, appellant's 18-month-old son.

When Brandon was four months old, he was hospitalized at Utah Valley Hospital on March 15, 1980 and was treated by Dr. Brent Griffin, a pediatrician, for "failure to thrive," a term which refers to an inadequate weight gain or below normal growth in a young child (State's Exhibit 9; T. 27). Dr. Griffin suspected that appellant was not providing adequate care for Brandon and he requested the assistance of the Utah Division of Family Services, which investigated the case (State's Exhibit 9; T. 36). Brandon gained weight during his three-week hospital stay and was then released to appellant's custody (State's Exhibit 9). The Division of Family Services, with the assistance of police officers, removed Brandon from appellant's custody because of neglect and placed him in a foster home (State's Exhibit 9; T. 100). Brandon remained in the foster home from April 18, 1980 until April 30, 1981, when he was returned to appellant's custody (T. 97, 100; State's Exhibit 9).

On July 11, 1981, appellant was at her Provo, Utah home when Brandon awoke at 10:30 a.m. (T. 92; State's Exhibit 9). Appellant had problems with Brandon because he was playing in the toilet and throwing temper tantrums, so she placed Brandon back in bed (T. 92; State's Exhibit 9).



Appellant's husband, Rodney Talbot, left the apartment for his job around 10 a.m., leaving appellant with sole custody of Brandon (T. 112; State's Exhibit 9).

When Brandon woke up about 1 p.m., appellant placed him in a kitchen chair and gave him a piece of toast (T. 91, 112; State's Exhibit 9). Because Brandon was having another temper tantrum, appellant slapped him (T. 93, 112; State's Exhibit 9). Brandon's "head hit pretty hard on the table" (T. 93, 112; State's Exhibit 9). Appellant was alarmed at how hard she slapped him, she hugged him and said she would not do it again (T. 93, 112; State's Exhibit 9). While appellant was adjusting the television, she heard Brandon choking and saw him fall out of the chair (T. 93, 112; State's Exhibit 9). Appellant picked Brandon up and ran to a neighbor's home to get transportation to Utah Valley Hospital, where they arrived at about 1:30 p.m. (T. 108, 113; State's Exhibit 9).

On arrival at the hospital, Brandon had breathing difficulties and had a rapid heart rate (T. 17, 27). Dr. Robert Gray, an emergency room physician, suctioned multiple pieces of food and vomit from Brandon's throat and placed an endotracheal tube into the trachea to artificially resuscitate the child (T. 17, 28). Phenobarbital was administered to help control the seizures Brandon was having (T. 28). Dr. Gray became concerned about the head injuries because Brandon did not begin normal breathing after his throat was cleared (T. 18). The normal level of acid in Brandon's blood indicated

that suffocation on food was not the cause of Brandon's breathing problems (T. 18). Dr. Gray had not ruled out child abuse as the cause of the breathing problems (T. 21). The history from appellant that the child was sitting in a chair, was eating, fell from the chair, vomited and quit breathing was inconsistent with the physical examination of Brandon, who had new, acute head bruises and several older bruises (T. 24). Dr. Gray could not say whether it was likely that the head injuries could be caused by a fall from a chair (T. 25). Because Brandon had multiple head bruises, which could cause vomiting, Dr. Gray requested the assistance of Dr. Brent Griffin, a pediatrician, and Dr. John Andrews, a neurologist (T. 19-20).

Dr. Brent Griffin had treated Brandon on March 5, 1980 for "failure to thrive"; the child was not gaining weight or growing normally (T. 27; State's Exhibit 9). Dr. Griffin was surprised by the blood gas tests because the acid content was at a normal level, indicating that choking on food was not the cause of Brandon's breathing problems (T. 34-35). Dr. Griffin saw several bruises on Brandon's forehead and back, which were of different colors, indicating that they were of various ages (T. 35). He was also concerned with child abuse because it is uncommon for a child to have multiple bruises, especially an 18-month-old child with multiple bruises on the back (T. 36-37). It is very unlikely that a child could sustain a severe brain injury from a fall off a chair (T. 38).

Griffin could not explain the severe brain injury from the history that appellant had given and he would be surprised if the injury had been caused by a fall from a chair to a tile floor (T. 39-40).

Brandon had highly elevated pressure inside his head the night after his hospital admission and on July 13, 1981 at about 7 a.m., Dr. Griffin pronounced Brandon dead (T. 39-40). Dr. Griffin believed he died from severe intercranial swelling and pressure on the brain from an injury caused by a blow or blows to Brandon's head (T. 40). Dr. Griffin considered a number of possible causes of the brain injury, including accident, but a blow or something striking his head caused Brandon's death (T. 43-44).

Dr. John Andrews made a neurological examination of Brandon from 4:30 to 5:30 p.m. (T. 48). Brandon was in a semicomatose state, not fully alert with abnormal posturing and with involuntary movements (T. 48). Also present were abnormal eye movements and decorticate and decerebrate (different degrees) levels of severe and considerable brain damage, "even down into the region of the vital centers of the brain in the brain stem region, down low in the medulla pons and midbrain area" (T. 48-49).

Dr. Andrews believed the injuries were caused by a blow to the head because of intercranial pressure, swelling where the optic nerve joins the back of the eye, hemorrhages in the eyes, and bruises of various colors (T. 50). Dr.

Andrews rejected choking or suffocation on food as an explanation for the severe injuries because the acid content in Brandon's blood was normal and because the severity of the brain injury was inconsistent with suffocation (T. 52). The history given by appellant did not explain the severity of the brain damage and the subsequent course of Brandon's health (T. 53). He stated that a fall from a chair may account for one of the bruises, but not for multiple bruises and that a fall from a chair would be unlikely to cause Brandon's injury (T. 57).

Dr. Andrews did not rule out "battered child syndrome"<sup>1</sup> (T. 59-60) because of the bruises on the head, especially the left temple bruise (T. 56), bruises on the child's back (T. 56), "a scab or a bruise or cut, abrasion" on the child's penis (T. 56), several scattered bruises and diaper rash on the buttocks (T. 56-57), and because of the discrepancies between the medical examination of Brandon and the history given by appellant (T. 59-60). He could not rule out with medical certainty that accident was the cause of the brain injury (T. 62-63).

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<sup>1</sup>"Battered Child Syndrome" is a term by which children are injured other than by accident. State v. Loss, 204 N.W.2d 404 (Minn. 1973); United States v. Bowers, 660 F.2d 527 (5th Cir. 1981). As explained in State v. Periman, 230 S.E.2d 802 (N.C. Ct. App. 1977), it indicates that "the group of signs or symptoms they observed precludes the notion that the injuries were self-inflicted or inflicted by other than the intentional violence of another."

Dr. John Wallace Graham, a medical examiner for the State of Utah, performed an autopsy on Brandon on July 13, 1981 (T. 72). Dr. Graham's external and internal examination of Brandon revealed that the primary cause of death was a very large bruise over the left top of the head which caused a bilateral subdural hematoma and severe brain swelling (T. 74-75, 78). The child's injuries were not consistent with Brandon's falling from one of the chairs because the fatal internal injury was too severe (T. 76). Brandon would have had to fall from a considerably greater height than a chair to sustain a severe head injury (T. 76).

His conclusion was that a solid object struck Brandon's head or that the head had been banged against a solid object (T. 76). Dr. Graham ruled out accident entirely as a cause of Brandon's injuries (T. 81). He agreed that an accident may have caused some of the bruises, but there were too many injuries of differing ages to consider an accident as the cause of the fatal injury, which was extremely severe (T. 80-81). He stated that Brandon's injuries were consistent with "Battered Child Syndrome" because there were bruises on various parts of Brandon's body, there were injuries of various ages, and the injuries were not explained adequately and consistently with those caused by accidents (T. 83).

On July 14, 1981, George Pierpont, a Provo City police officer, met appellant and her husband at their apartment (T. 65-66, 84; State's Exhibit 9). He transported



them to the Provo Police Department where he conducted an investigation of the case (T. 66, 84; State's Exhibit 9). Prior to questioning, Pierpont advised appellant of her Miranda rights, which she said she understood (T. 84-85; State's Exhibit 18). Appellant signed a form waiving her Miranda rights (State's Exhibit 18).

In the conversation with Pierpont, appellant explained that she and her husband had been having marriage problems because appellant's husband was not Brandon's biological father, which was not discovered by her husband until after their marriage (T. 92, 111; State's Exhibit 9). Appellant also said that her family had been having financial problems, that she had few friends in the area, and that she was constantly with her children (T. 92, 114-115; State's Exhibit 9). During the last three weeks, appellant was hitting Brandon and often hit him "harder than I really expected to" (T. 93, 117; State's Exhibit 9). After noticing bruises on Brandon's back, Rodney Talbot told appellant not to discipline the child (T. 115-116; State's Exhibit 9).

While the officer taped the conversation, appellant had the opportunity to agree that the officer was correctly interpreting her comments (T. 94). After the conversation was typed, appellant reviewed the statement to make any deletions or corrections (T. 94). Each page of the statement given to Officer Pierpont was signed and dated by appellant (T. 94; State's Exhibit 9). The statement was admitted into evidence (T. 95).

At trial, appellant said her husband beat Brandon (T. 112). On July 11, 1981, Brandon did not want to eat a piece of toast "and I slapped him. And after I slapped him his head his pretty hard on the table" (T. 112). Under cross-examination, appellant said her husband warned her about hitting Brandon (T. 115-116), that she was alarmed with the force she had used (T. 118), that the left temple bruise was caused after she slapped Brandon, he lost his balance and hit his head on the side of the table (T. 119). She slapped him because she lost her temper (T. 120).

In a jury trial on November 18-19, 1981, appellant was found guilty of manslaughter. After a 90-day evaluation by the Utah Division of Corrections, Judge Allen B. Sorensen sentenced appellant on February 26, 1982 to one year nor more than fifteen years in the Utah State Prison (R. 46, 53-54, 67).

#### ARGUMENT

##### POINT I

THE PROSECUTION ESTABLISHED THE CORPUS DELICTI OF MANSLAUGHTER, WHICH REQUIRES (1) EVIDENCE OF A DEATH OF A HUMAN BEING, AND (2) EVIDENCE THAT THE DEATH RESULTED FROM CRIMINAL CONDUCT.

The appellant was convicted of manslaughter, a second-degree felony, in violation of Utah Code Ann., § 76-5-205(1)(a) (1953), as amended, in that appellant, on or

about July 11, 1981 did recklessly cause the death of Brandon Glen Talbot. Utah Code Ann., §§ 76-5-201 and 76-5-205(1)(a) when read together define one theory of manslaughter as where an actor unlawfully and recklessly causes the death of another. Utah Code Ann., § 76-2-103(3) (1953), as amended, defines recklessly as follows:

A person engages in conduct:

(3) Recklessly . . . with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Under this theory of manslaughter, the State was required to prove: (1) that appellant acted unlawfully, (2) that appellant acted recklessly, i.e., was aware of but consciously disregarded the substantial and unjustifiable risk that her conduct would result in the death of Brandon Talbot, and (3) that appellant caused the death of Brandon Talbot. The jury found that the State's evidence was sufficient to establish these elements beyond a reasonable doubt.

Appellant contends that the trial court erred in allowing the police officer to testify about statements appellant made several days after Brandon was initially



treated in the emergency room at Utah Valley Hospital. Appellant alleges that the error occurred when the trial court admitted these statements before the corpus delicti of manslaughter had been established beyond a reasonable doubt. Appellant's argument also assumes that there was insufficient evidence to support the conviction. These claims are refuted by the evidence admitted at trial.

Corpus delicti means the body or substance of the offense, the existence of a criminal fact without the existence of which there is nothing to investigate. State v. Johnson, 95 Utah 572, 83 P.2d 1010 (1938). The requirement of corpus delicti has two elements: (1) that the State present evidence that the injury specified in the crime occurred, and (2) that the State present evidence that such injury was caused by someone's criminal conduct. State v. Knoefler, Utah, 563 P.2d 175 (1977); State v. Kimbel, Utah, 620 P.2d 515 (1980); State v. Cazier, Utah, 521 P.2d 554 (1974). Thus, the term corpus delicti in a homicide case involves the fact of the death and the fact that death was brought about or induced by a criminal agency. State v. Johnson, 95 Utah 572, 83 P.2d 1010 (1938).

In the homicide context, the "injury" in the first part of the corpus delicti definition is the death of a human being. State v. Petree, Utah, \_\_\_\_ P.2d \_\_\_\_ (Case No. 18015, filed February 4, 1983); State v. Pyle, 532 P.2d 1309 (Kan.

1975); State v. Smith, 531 P.2d 843 (Wash. Ct. App. 1975); People v. Brechon, 390 N.E.2d 626 (Ill. 1979).

For the second requirement, the State need only present evidence that the death resulted from criminal conduct, rather than by accident or from natural causes. State v. Petree, *supra*; Riley v. State, 349 N.E.2d 704 (Ind. 1976); Tanner v. State, 327 So.2d 749 (Ala. Crim App. 1976). It is not necessary to show cause of death or to provide evidence on the specific degree of homicide. State v. Petree, *supra*. Additionally, contrary to appellant's claims, the second element does not require that the crime perpetrator's identity be proven. State v. Cazier, Utah, 521 P.2d 554 (1974); State v. Johnson, 95 Utah 572, 83 P.2d 1010 (1938); Jenkins v. State, 401 A.2d 83 (Del. 1979). This Court in State v. Knoefler, *supra*, explained the State's burden of proof in establishing the corpus delicti:

. . . the requirement of independent proof of the corpus delicti requires only that the State present evidence that the injury specified in the crime occurred, and that such injury was caused by someone's criminal conduct. An admission or confession is admissible to connect an accused with the crime committed, but the connection of the accused with the crime need not be proven to establish the corpus delicti.

563 P.2d at 176 (emphasis added).

Other authorities also support the view that the corpus delicti does not require that the State prove appellant

was the guilty party. Professor McCormick explained the rule as follows:

To establish guilt, it is generally necessary for the prosecution to show that (a) the injury of harm specified in the crime occurred, (b) this injury or harm was caused by someone's criminal activity, and (c) the defendant was the guilty party. To sustain a conviction, the requirement of independent proof of the corpus delicti demands only that the prosecution have introduced independent evidence tending to show (a) and (b). It is not necessary that the independent proof tend to connect the defendant with the crime.

McCormick's Handbook of the Law of Evidence, E. Cleary, § 158 at p. 347 (2nd Ed. 1972).

Not all of the elements of the crime need to be proven because "otherwise, corpus delicti would be synonymous with whole of charge." Jenkins v. State, 401 A.2d 83, at 86 (Del. 1979). Corpus delicti does not include all the elements of the crime; independent proof of the corpus delicti is a separate question from that of whether appellant committed the crime. State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941); State v. Cazier, Utah, 521 P.2d 554 (1974). In State v. Chesnut, Utah, 621 P.2d 1228 (1980), this Court stated:

This Court rejected the contention that the corpus delicti of a crime includes the total proof of all elements necessary to convict defendant of the crime charged in State v. Cazier. This

Court explained the traditional and practically universal concept of the term "corpus delicti," which means literally the body of the crime, in regard to proof of crime, refers only to evidence that the crime has been committed.

This Court has continually held that the corpus delicti of a crime does not include proving the appellant's connection with the crime.

Appellant states that the corpus delicti must be established "beyond a reasonable doubt." She does not cite any supporting case law. In fact, the standard for proving the elements of the corpus delicti is the lesser standard of "proof of clear and convincing evidence." This standard of proof was established by State v. Ferry, 2 Utah 2d 371, 275 P.2d 173 (1954) which stated:

An accused cannot be convicted on his confession alone. We believe and hold that in addition there must be independent, clear and convincing evidence of the corpus delicti, although we and the authorities generally do not require it to be convincing beyond a reasonable doubt.

This Court has expressly rejected the "beyond a reasonable doubt" standard for proving corpus delicti. It is generally agreed that the evidence of the corpus delicti need not be "beyond a reasonable doubt," "conclusive" or "sufficient to warrant a conviction." State v. Weldon, 6 Utah 2d 372, 314 P.2d 353 (1957).

Furthermore, there is no requirement that the corpus delicti be proved by eyewitnesses. State v. Johnson, 95 Utah 572, 83 P.2d 1010 (1938). The two elements of corpus delicti can be proven by circumstantial evidence. State v. Petree, Utah, \_\_\_\_ P.2d \_\_\_\_ (Case No. 18015, filed February 4, 1983); State v. Long, 369 P.2d 247 (Kan. 1962). The elements can also be proved by the reasonable inferences to be drawn from the direct or circumstantial evidence. State v. Petree, supra; People v. Ramierez, 91 Cal. App. 3d 132, 153 Cal. Rptr. 789 (Cal. Ct. App. 1979); People v. Wetzel, 17 Cal. Rptr. 879 (Cal. Dist. Ct. App. 1962). In the present case, it is not fatal to the State's case that there were no eyewitnesses to the homicide of Brandon. The trial judge could review all the evidence, including the testimony of four physicians, and draw reasonable inferences to support the conclusion that the corpus delicti of manslaughter had been established.

These rules of corpus delicti reflect two competing interests: (1) to prevent convictions based solely on the defendant's statements, and (2) the recognition of the probativeness and evidentiary value of a defendant's statements after a crime has been committed.

The purpose of the rule was to safeguard against convicting the innocent on the strength of false confessions. . . . As a precaution against convicting the innocent in the few instances when persons mentally disturbed or impelled by strange motivations might confess to crimes they did not commit.

State v. Weldon, 6 Utah 2d 372, 314 P.2d 353 (1957). At the same time, because false confessions occur in extremely rare situations, courts recognize the evidentiary value and validity of statements, admissions or confessions made by criminal defendants because of the "natural compunction people have against confessing to or implicating themselves in crimes." State v. Weldon, supra.

The rule (that appellant's statement, by itself, cannot be used to establish the corpus delicti of the crime and justify a conviction) should be applied with caution and not permitted to be used as a technical obstruction to the administration of justice. State v. Weldon, supra. The rule best suited to the proper administration of justice is that reasonable minds could believe that the manslaughter of Brandon Talbot is a real crime which was in fact committed, and not a crime which was fanciful or imaginary. Id.

A. THE CORPUS DELICTI OF MANSLAUGHTER WAS SUFFICIENTLY ESTABLISHED BY THE PROSECUTION BEFORE THE APPELLANT'S STATEMENTS WERE ADMITTED INTO EVIDENCE.

Appellant argues that the prosecution introduced appellant's statements before the corpus delicti of the crime was established. This is contrary to what happened at trial. The first element of corpus delicti in a homicide case (the death of Brandon Talbot) was established by the evidence at



the trial. Dr. Brent Griffin pronounced Brandon dead on July 13, 1981 at 7 a.m. (T. 40). Dr. Robert Nelson Gray was told the child died (T. 21). Dr. John Andrews said severe brain damage caused Brandon's death (T. 62). Police Officer George Pierpont investigated Brandon's death (T. 65, 84). Dr. John Wallace Graham performed an autopsy on the body of Brandon Talbot (T. 72). All of this evidence was presented at trial before George Pierpont testified to the statements made by appellant (which is at T. 91-93).

There was also clear and convincing evidence of the second element of corpus delicti, that the death resulted from criminal conduct, rather than by accident or from natural causes. Dr. Robert Gray, the emergency room physician at Utah Valley Hospital, initially suspected that Brandon had choked on food, but he rejected an accident as the cause of Brandon's breathing problems because Brandon did not resume normal breathing when the pieces of food were suctioned from his throat (T. 19) because there were multiple head injuries (T. 19), because the acid content in Brandon's blood had remained normal (T. 18), because Dr. Gray suspected child abuse (T. 21), and because the doctor's physical examination of Brandon revealed problems which were not consistent with the background information provided by appellant (T. 24).

Dr. Brent Griffin also suspected criminal conduct rather than an accident as the cause of Brandon's death because the blood gas tests showed that accidental choking was

not the cause of Brandon's breathing difficulty (T. 34-35). It is not common to see children with multiple bruises (T. 36-37) and Brandon was suspected to be a victim of child abuse (T. 36). He said it would be very unlikely that a child could receive a severe brain injury from a fall although a bruise is possible (T. 38). He could not explain Brandon's severe brain injury consistently with the history that had been obtained from appellant (T. 39) and he would be surprised if the severe injury was caused by a fall from a chair to a tile floor (T. 40). His opinion was that Brandon's death was caused by a blow or blows to the head (T. 40, 44).

Dr. John Andrews' testimony also rejected the initial explanation of accidental choking. He suspected criminal conduct because of the multiple bruises (T. 49), and because a severe blow to the head would more likely cause the swelling where the optic nerve enters the back of the eye and would more likely cause the hemorrhages in Brandon's eyes (T. 49-50). He said the brain injury was incompatible with accidental suffocation (T. 52) and the history given by appellant was inconsistent with the severity of the brain damage (T. 53). Because of the discrepancies between Brandon's injuries and appellant's explanation of the injuries, Dr. Andrews was concerned about "child abuse syndrome" (T. 59).

Additional evidence of the second element of corpus delicti was provided by Dr. John Wallace Graham, who performed



the autopsy. He suspected criminal conduct because there were six bruises on Brandon's head (T. 75). The severity of Brandon's injuries was not consistent with Brandon's falling from a chair onto a floor (T. 76), and there were too many injuries to Brandon's head to believe that they were caused accidentally (T. 80). Brandon's injuries were consistent with "Battered Child Syndrome" because different body segments had bruises, the injuries were of different ages, and the injuries were not explained adequately through accidental cause (T. 83). Graham concluded that death was caused by a solid object striking Brandon's head or Brandon's head being banged against a solid object (T. 76).

Again, all of this testimony on the second element of corpus delicti was received before Officer Pierpont testified about the statements which appellant made to him during the investigation. This testimony, and all reasonable inferences to be drawn therefrom, provides clear and convincing evidence of the two elements of corpus delicti.

B. EVIDENCE THAT ACCIDENT COULD NOT BE RULED OUT AS THE CAUSE OF THE INJURIES DOES NOT DESTROY THE CORPUS DELICTI IN THIS CASE, WHERE AN ACCIDENT WAS EXTREMELY UNLIKELY TO CAUSE THE INJURIES.

Appellant claims throughout her brief that the evidence showed that Brandon's injuries could have been caused accidentally, and thus, there was no evidence of any criminal

agency. Appellant misinterprets what the physicians actually said at trial. Admittedly, some of the testimony was that accident could not be ruled out with medical certainty as the cause of Brandon's injuries. However, this does not destroy what all of the doctors basically agreed to: it would be extremely unlikely that the injuries could have been caused by an accident.

Because of appellant's contentions that an accident was not conclusively ruled out by the physicians as the cause of Brandon's injuries and, therefore, no criminal conduct was proven, a thorough review of the evidence on the accident theory contention is necessary.

Dr. Robert Gray had not ruled out child abuse as a cause of Brandon's injuries (T. 21). Brandon did not resume normal breathing when the food and vomit were suctioned from his throat and Dr. Gray rejected an accident as the cause of Brandon's problems (T. 19). The doctor's physical examination of Brandon revealed inconsistencies with the background information provided by appellant (T. 24). He could not determine what caused the death because he had treated Brandon only in the short time of the emergency situation (T. 22). Dr. Gray said one of the bruises would be consistent with a fall from a chair, but a fall would not explain all of the bruises (T. 24). Dr. Gray testified that he could not answer the question whether the injuries could have been caused by a fall from a chair (T. 25).

Dr. Brent Griffin, who first treated Brandon in 1980 for "failure to thrive" shortly before Brandon was taken from the custody of appellant and placed in a foster home, stated that the bruises on Brandon's head could have been caused by any type of blow or fall, and that his concern was that Brandon was a victim of child abuse (T. 36). His belief was based in part on the multiple bruises Brandon had, which were not normal for an 18-month-old child (T. 37). Griffin drew a distinction between the bruise on the exterior of Brandon's head and the severe internal brain injury. He said it was possible that the degree of bruising which appeared on the outside of Brandon's head was consistent with a fall from a chair to the floor (T. 38). However, Dr. Griffin qualified this general point with reference to the more severe internal injury: it would be very unlikely that a child could sustain a severe brain injury from a fall from a chair to the floor (T. 38).

Because of the neurological signs, increased intracranial pressure, and unresponsiveness to treatment, Dr. Griffin said that Brandon sustained extremely severe injuries, much more severe than the accidental falls onto the floor which young children typically encounter (T. 39). The severe brain injury was inconsistent with the history provided by appellant that the injuries were accidentally received from a fall to the floor and he would be "very surprised" if the injuries had happened by falling from a chair onto a tile

floor (T. 39-40). His conclusion was that death resulted from a blow or blows delivered to Brandon's head. He did say that he could not with medical certainty rule out accident as the cause of the injury (T. 43), but his opinion still remained that the death was caused by something striking Brandon's head (T. 44).

Dr. John Andrews said Brandon had suffered extreme brain damage, "even down into the region of the vital centers of the brain in the brain stem region" (T. 48). There were scattered body and head bruises, and abnormal eye movements, which indicated that the bruise on Brandon's head was not only a superficial injury but a deep brain injury (T. 49). The injury to Brandon's left temple region was only a few hours old when he made his examination at 4:30 p.m. on July 11 (T. 61).

He suspected a blow to Brandon's head caused the brain injury because eye examinations revealed intercranial pressure and hemorrhages inside the eyes because of multiple body bruises and because of the severe brain injury (T. 50-51). The history given by appellant did not explain the severity of the brain damage and the history was also inconsistent with the death of Brandon (T. 53). Dr. Andrews said it was unlikely that a fall from a chair to the floor would cause the severe injuries (T. 57). He could not say that it was impossible for a fall to the floor to cause the injuries, but a fall would not account for all of Brandon's

bruises (T. 57). He could not with medical certainty rule out accident as the cause of injury (T. 62). However, Dr. Andrews' main concern was that Brandon may have been abused because of the discrepancies between the history given by appellant and the neurological examination, which indicated purposeful abuse rather than accident (T. 59-60).

Dr. John Wallace Graham, a state medical examiner, said the cause of death was a head injury which resulted in external bruising, a bilateral subdural hematoma and severe brain swelling (T. 75). The most serious and fatal injury was the one on the left side of Brandon's head, which was mainly an internal injury (T. 75). The other bruises may have contributed to the internal damage (T. 76). He said the injuries to Brandon's head were too severe to be consistent with a fall from one of the chairs (T. 77). His conclusion was that a solid object struck Brandon's head or his head was banged against a solid object (T. 76, 80).

Appellant claims, but does not cite to the transcript to support her claims, that Dr. Graham said the injuries could have been caused by an accidental fall. However, Dr. Graham conclusively ruled out accident as the cause of death (T. 80). Based on his experience with homicides of children, he said there were several reasons for his conclusion, including: (1) the severity of the injury (T. 80); (2) the many bruises (T. 80); (3) bruises of different ages (T. 81); and (4) the injuries were consistent with

"Battered Child Syndrome" because there were injuries involving different body segments, injuries were of different ages, and the injuries were not adequately explained through accidental causes (T. 82-83).

A review of the evidence refutes appellant's claims that the State only proved:

that the life of Brandon Talbot had ended due to injuries received to the head which injuries could have been the result of the child falling accidentally against a hard object or a hard object accidentally hitting the child's head.

(appellant's brief, 7). It bears repeating that the only physician, Dr. Graham, who had the opportunity to view both the external head injuries and the severe internal brain injury (therefore in the best position to analyze the injuries' cause) conclusively stated that an accident could not have caused Brandon's head injuries or the resulting death.

The three other physicians (Gray, Griffin and Andrews) also provided probative evidence on appellant's contention that Brandon's injuries were sustained accidentally. Each of their medical examinations of Brando was limited, in general, to a review of only the external injuries, which did not clearly show the severity of the brain injuries. Yet, each of the three doctors agreed that an accident was unlikely. The three doctors thus discounted



accident while the state medical examiner conclusively ruled out an accident as the cause of Brandon's injuries.

The doctors' statements that they could not with medical certainty rule out accident as the cause of Brandon's death does not destroy the elements of corpus delicti, proven by clear and convincing evidence by the State before appellant's statements were admitted into evidence. Not being able to rule out accident with medical certainty goes to the credibility of the doctors as witnesses and what weight should be given to their testimony by the jury. It does not make the evidence insufficient to prove corpus delicti in this case where accident was very unlikely but could not with medical certainty be ruled out by some doctors as the cause of Brandon's injuries. Even without the statements by appellant to Officer Pierpont, the corpus delicti of manslaughter was shown by clear and convincing evidence. Appellant's claims, unsupported by the evidence, that the injuries were caused accidentally does not destroy the corpus delicti.

Appellant attempts to confuse the proof required to sustain a conviction with proof required for corpus delicti before appellant's statements may be admitted into evidence. Appellant cites Bennett v. State, 377 P.2d 634 (Wyo. 1963), State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945), and State v. Bassett, 27 Utah 2d 272, 495 P.2d 318 (1972) for the proposition that:

the State must prove the fact of the child's death and secondly the State must prove beyond a reasonable doubt that the child's death was caused by means of criminal agency inflicted by the accused.

As discussed supra, the standard for proving corpus delicti in Utah is proof by clear and convincing evidence. Also as discussed supra, the State does not need to show that the appellant is connected with the criminal conduct as part of the corpus delicti. In addition, appellant's cited cases do not stand for the proposition that the State must show that the appellant is connected with the criminal conduct as part of the corpus delicti. Instead, appellant's cases require the State to show appellant is connected with the criminal conduct to sustain a conviction.

The Wyoming Supreme Court in Bennett, supra, stated in the homicide of a newborn child that the elements of corpus delicti, which must be established beyond a reasonable doubt, are: (1) that the infant was born alive and (2) that death was caused by the criminal agency of the accused. The case does not control the present situation because Bennett did not involve statements made by the defendant. In addition, Bennett dealt with sufficiency of the evidence to support a conviction, and not the required proof of corpus delicti before the statement of a defendant can be admitted into evidence. The Bennett case held that before there can be a conviction, all elements (including that defendant caused



the criminal act) must be proven beyond a reasonable doubt. The Bennett case followed the general rule that to sustain a conviction, there must be proof beyond a reasonable doubt of all elements of the crime: (1) the death of the child; (2) criminal agency [(1) and (2) are the elements of the corpus delicti required before admitting a defendant's statements]; and then (3) the fact that the defendant caused the death. This is consistent with the case law in Utah of proof required to sustain a homicide conviction.

The Wyoming case is correct in requiring that the corpus delicti be proved beyond a reasonable doubt, along with the defendant's connection to the crime, before a defendant can be convicted. Respondent's reading of Bennett is supported by the several cases cited by the Wyoming Supreme Court in Bennett. Each case deals with the proof required to find corpus delicti to sustain a homicide conviction. People v. Ryan, 138 N.E.2d 516 (Ill. 1956), and State v. Osmus, 276 P.2d 469 (Wyo. 1954) do not discuss corpus delicti required before a defendant's statements can be admitted into evidence. Rather, in both cases, the contention was that there was insufficient evidence to convict, i.e., there was insufficient proof of corpus delicti for the conviction.

Respondent can find no Wyoming cases which support appellant's contention and apparently the Wyoming Supreme Court has not confronted the issue of the elements of corpus delicti required before an appellant's statements can be admitted into evidence. Even if there were Wyoming cases

on this point, they would not control this Court because of the numerous Utah cases, supra, dealing with this contention, all of which state that appellant need not be connected with the criminal agency before appellant's statements can be admitted into evidence.

Appellant cites State v. Bassett, 27 Utah 2d 272, 495 P.2d 318 (1972), claiming that the State cannot convict appellant for gross negligence or lack of care of Brandon. In that case, this Court said a conviction for involuntary manslaughter could not be upheld where there was no evidence to show any criminal act by the defendants, the parents of the child who had died. In Bassett, there was no evidence of the second element of corpus delicti: death caused by someone's criminal conduct. There was no evidence of whether the child's head injuries were caused accidentally or if they were inflicted otherwise. An unfortunate death from injuries by a source not shown in the evidence was simply insufficient to support the conviction. For the same reasons, People v. Strohm, 523 P.2d 973 (Colo. 1974) is distinguishable from the present case.

The Bassett and Strohm cases are not on point. In the case at bar, there was extensive evidence of the second requirement of corpus delicti, as discussed supra. Four physicians testified about the unsuccessful treatment of Brandon's injuries and the criminal nature of the injuries.

There was testimony that Brandon was suspected to be a victim of child abuse. Brandon was taken from appellant's custody and placed in a foster home, where he developed normally. There was evidence that Brandon's injuries were not caused accidentally. While there was no evidence of criminal agency in Bassett, there was clear and convincing evidence of criminal agency in the present case before appellant's statements were admitted into evidence.

State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945) is also not on point. Thatcher dealt with an involuntary manslaughter case in which the defendant was attempting to flee from highway patrol officers when defendant's car drove into a group of pedestrians, killing two people. Thatcher adds nothing to an understanding of the issues in the case at bar.

Appellant cites State v. Gallegos, 16 Utah 2d 102, 396 P.2d 414 (1964) for the proposition that the State must prove an intent to kill or do great bodily harm, or do an act knowing the natural and probable consequence thereof will be death or great bodily harm. This case is of questionable validity because the conviction was based on Utah Code Ann., § 76-30-5 (1953), a statute now repealed, which provided for differing definitions (voluntary and involuntary manslaughter) of that form of homicide. The present manslaughter statute establishes one form of manslaughter, with three separate theories which will support a conviction. Utah Code Ann.,

§ 76-5-205 (1953), as amended. Under the present statute, the State is not required to prove that appellant knew the natural or probable consequences of her act would be death.

Respondent submits that independent proof of the corpus delicti of the manslaughter of Brandon Talbot was shown by clear and convincing evidence before appellant's statements were admitted into evidence. Evidence that accident could not be ruled out as the cause of the injuries does not destroy the elements of corpus delicti.

C. THE EVIDENCE WAS SUFFICIENT TO SUPPORT  
THE JURY'S DETERMINATION THAT  
APPELLANT WAS GUILTY OF MANSLAUGHTER.

Appellant's arguments on the insufficiency of the evidence to prove corpus delicti necessarily include the contention that there is insufficient evidence to convict appellant of manslaughter. Specifically, the claim of accidental injury to Brandon is an argument that the State did not provide sufficient evidence to establish the guilt of appellant beyond a reasonable doubt.

In reviewing a claim of insufficient evidence, it is well established that it must appear that reasonable minds necessarily entertain a reasonable doubt that appellant committed the crime. State v. Wilson, Utah, 565 P.2d 66 (1977). Unless evidence compels a conclusion that as a matter of law evidence was inconclusive or so unsatisfactory that

reasonable minds acting fairly must have entertained reasonable doubt that appellant did not commit the crime, the verdict must be sustained. State v. Kerekes, Utah, 622 P.2d 1161 (1980); State v. Lamm, Utah, 606 P.2d 229 (1980); State v. Gorlick, Utah, 605 P.2d 761 (1979); State v. Daniels, Utah, 584 P.2d 880 (1978); State v. Romero, Utah, 554 P.2d 216 (1976).

The evidence need not refute contrary allegations made by appellant if the verdict is supported by substantial evidence. State v. Lamm, Utah, 606 P.2d 229 (1980). The evidence, and all inferences that may reasonably be drawn therefrom, is to be viewed in the light most favorable to the fact finder's verdict. State v. Gorlick, Utah, 605 P.2d 761 (1979). A trial court's judgment has a presumption of validity in an appellate court. Burton v. Zions Cooperative Mercantile Institution, 122 Utah 360, 259 P.2d 514 (1952). It is the exclusive function of the trier of fact and not within the prerogative of a reviewing court to substitute its judgment for that of fact finder to determine guilt or innocence or to substitute its judgment on the weight to give conflicting evidence or the credibility of witnesses. State v. Romero, Utah, 554 P.2d 216 (1976).

The appellate court may not review the sufficiency of the evidence in cases, like this one, where the fabric of evidence against the appellant covers the gap between the presumption of innocence and the proof of guilt. In the

present case, the evidence, stretched to its utmost limits, is sufficient to prove the defendant guilty beyond a reasonable doubt. State in Re J.S.H., Utah, 642 P.2d 386 (1982); State v. Kourbelas, Utah, 621 P.2d 1238 (1980).

The standard of review was recently stated in State v. McCardell, Utah, \_\_\_\_ P.2d \_\_\_\_ (Case No. 17718, filed August 27, 1982):

This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man would not possibly have reached a verdict beyond a reasonable doubt. We also view in a light most favorable to the jury's verdict those facts which can be reasonably inferred from the evidence presented to it. "Thus, intent to commit [a crime] . . . may be found from proof of facts from which it reasonably could be believed that such was defendant's intent." [Citations omitted.]

Accordingly, when the evidence in this case is viewed in the light most favorable to the verdict, there is sufficient evidence to support the guilty verdict.

Evidence presented by the State established that Brandon Talbot was taken by appellant to the Utah Valley Hospital at about 1:00 or 1:30 p.m. on July 11, 1981 (T. 13, 27, 47, 91, 112). Brandon had previously been placed in a foster home (T. 97, 100; State's Exhibit 9), but on July 11, 1981, Brandon was in appellant's sole custody during the time



the injuries were sustained (T. 16, 52, 91, 107, 112; State's Exhibit 9). Brandon was initially treated for suffocation and breathing difficulties (T. 17, 27). Efforts to restore Brandon's breathing were ineffective (T. 19, 28, 52). Because of normal acidic content in Brandon's blood (T. 18, 28, 34), because of multiple head injuries (T. 19, 35, 39, 48, 51, 53), and because the explanation given by appellant was inconsistent with the severity of Brandon's injuries (T. 24, 39, 53), criminal conduct by the appellant was suspected. There was also evidence of "Battered Child Syndrome" (T. 59, 83).

A state medical examiner performed an autopsy and concluded that the injuries were caused by a solid object striking Brandon's head or by Brandon's head being banged against a solid object (T. 76). The medical examiner conclusively ruled out accident as an explanation of the injuries (T. 81) because there were multiple injuries, because of the different ages of the injuries (T. 81, 83), and because the most severe injury, which deceptively appeared only as a superficial bruise on the exterior of Brandon's head (T. 75), was actually a large swelling of the brain which, in combination with a bilateral subdural hematoma (T. 75, 78), resulted in Brandon's death (T. 21, 40, 62, 75).

There was also evidence of "Battered Child Syndrome," which is evidence that the injuries were not sustained accidentally. State v. Loss, 204 N.W.2d 404 (Minn.

1973); State v. Periman, 230 S.E.2d 802 (N.C. Ct. App. 1977); United States v. Bowers, 660 F.2d 527 (5th Cir. 1981). It has become an accepted medical and legally qualified diagnosis. People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (Cal. Ct. App. 1971).

Dr. Andrews suspected "Battered Child Syndrome" (T. 59-60) because of the bruises on the head (T. 56), bruises on the child's back (T. 56), several scattered bruises on the buttocks and penis (T. 56-57), and because of the discrepancies between the medical examination of Brandon and the explanation of the injuries by appellant (T. 59-60). Dr. Graham said Brandon's injuries were consistent with "Battered Child Syndrome" because there were bruises on various parts of Brandon's body, there were injuries of various ages, and the injuries were not explained adequately and consistently with those caused by accidents (T. 83).

In addition, there was evidence from a police officer who talked to appellant the day after Brandon died (T. 84). He read the Miranda rights to appellant and she signed a waiver form (T. 84-85). After the officer had an account of the conversation typed, appellant signed this statement after she had the opportunity to make changes (T. 85, 94). This evidence corroborates the testimony of the four doctors. During the conversation, appellant said she was having marriage problems, financial problems and was constantly with her two children without having a chance to get out of the



house (T. 92; State's Exhibit 9). She said she needed to talk to someone but had had a difficult time in finding friends (T. 92; State's Exhibit 9). Because of her frustration and anxiety toward Brandon, she had been hitting Brandon during the three weeks prior to the day Brandon received the fatal injuries (T. 92). Appellant said no one had hit the child other than herself (T. 95, 121, 122).

On July 11, 1981, appellant had given Brandon a piece of toast around 1:30 p.m., but he had a temper tantrum (T. 92). Appellant slapped Brandon twice on the head and the second hit resulted in Brandon's head hitting the edge of the table (T. 92). After she went to adjust the television, she heard Brandon choking as he fell out of the chair (T. 92).

This testimony is also corroborated by appellant's testimony at trial. She said she was having marriage problems (T. 112), financial problems (T. 114), and having problems with Brandon (T. 115). She argued with her husband over the amount of force she used in disciplining Brandon (T. 115). She said that her husband had beaten Brandon on occasion (T. 112), but she added that her husband told her to limit her discipline and not to hit Brandon so hard (T. 116).

Appellant slapped Brandon on July 11, 1981 and "his head hit pretty hard on the table" (T. 112). Brandon then fell out of the chair while she went to the television (T. 112). She told Officer Pierpont that she hit Brandon harder than she intended to hit him (T. 118). She was alarmed that

Brandon's head hit the table so hard (T. 118). She said the bruise over Brandon's left temple area was caused "after I slapped him he lost his balance and hit his head on this side of the table" (T. 119). She said she slapped Brandon because she was mad (T. 120).

From all of the evidence presented, the jury fairly and reasonably could conclude that appellant recklessly caused the death of Brandon Talbot. This Court should not disturb that finding.

#### POINT II

APPELLANT'S STATEMENTS WERE PROPERLY ADMITTED INTO EVIDENCE BECAUSE APPELLANT WAIVED HER MIRANDA RIGHTS AND BECAUSE SHE HAD AN OPPORTUNITY TO MAKE CHANGES IN THE WRITTEN STATEMENT BEFORE SIGNING IT.

Appellant complains that her statements were improperly admitted into evidence because the State had not independently established the corpus delicti of manslaughter. Appellant contends that no corpus delicti had been proven because the injuries could have been caused accidentally and contends that the appellant's statements were improperly admitted to prove corpus delicti. Appellant also argues that even with the statements, there is not sufficient evidence to prove criminal agency (appellant's brief, 12-13).

Appellant's Point II is similar to her first contention. Appellant claims that the State proved corpus

delicti of manslaughter only because appellant's statements were admitted into evidence. However, as discussed in Point I, supra, the evidence of corpus delicti even without appellant's confession and admissions was sufficient.

George Pierpont, a Provo City police officer, talked to physicians at Utah Valley Hospital about Brandon's death (T. 65, 83). He then went to appellant's residence and later interviewed appellant and her husband at the Provo City Police Department (T. 84). He advised appellant of her Miranda rights (T. 84-85); appellant said she understood the rights (T. 85); appellant read the document, State's Exhibit 18 (T. 85); and she signed the waiver form in the officer's presence (T. 85). Appellant and Pierpont cooperated in making a tape-recorded account of the conversation (T. 94). As Pierpont recorded the conversation, appellant had the opportunity to review the account as it was recorded to make any corrections (T. 94). After the statement was typed, appellant again had the opportunity to make changes (T. 94). Appellant then signed each of the three pages of the statement (T. 94; State's Exhibit 9).

Under these circumstances, appellant does not challenge the voluntariness of her statements to Officer Pierpont or claim that the statements were the product of coercion by the police officer. Appellant's confession<sup>2</sup>

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<sup>2</sup>A confession admits the commission of a crime; that is, admits all the elements of the crime including guilty participation. An admission, on the other hand, admits only

could not be argued to be either. Respondent submits that appellant's confessions can be admitted into evidence when the confession is independently corroborated at some point in the trial.

In Utah, an admission or a confession, without some independent corroborative evidence of the corpus delicti, cannot alone support a guilty verdict. State v. Knoefler, Utah, 563 P.2d 175 (1977); State v. Cazier, Utah, 521 P.2d 554 (1974); State v. Jessup, 98 Utah 482, 100 P.2d 969 (1970).

On the other hand, when the corpus delicti has been established by independent evidence at trial, the confession of appellant can be used to connect appellant to the crime. State v. Cazier, Utah, 521 P.2d 554 (1974); State v. Erwin, 101 Utah 365, 120 P.2d 285 (1942); State v. Jessup, 98 Utah 482, 100 P.2d 969 (1970); State v. Weldon, 6 Utah 2d 372,

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some part or elements of the crime, but not the guilt, and leaves the rest, including participation, to be proved by other evidence. State v. Johnson, 95 Utah 572, 83 P.2d 1010 (1938). Appellant said to the police officer:

"I remember hitting him on the head on at least two occasions and on the second occasion he then struck his head on the edge of the kitchen table and started to cry. I was alarmed at that time because he struck his head so hard on the kitchen table."

(State's Exhibit 9; T. 93). This is a confession and is corroborated by appellant's direct testimony (T. 112) and testimony on cross-examination (T. 118). These statements confess to the manslaughter, recklessly causing the death of Brandon Talbot.

314 P.2d 353 (1957). In State v. Knoefler, Utah, 563 P.2d 175 (1977), the defendant was convicted of driving under the influence of intoxicants and inflicting bodily injury on another. The evidence showed that defendant and two other persons were injured when the car in which they were riding overturned. Beer was found near the wreckage and defendant was staggering, was slurring his speech and smelled of alcohol. At the scene, defendant admitted he was the driver of the car. The Court said:

An admission or confession is admissible to connect an accused with the crime committed, but the connection of the accused with the crime need not be proven to establish the corpus delicti. The defendant's conviction is not subject to reversal since his admission was corroborated by independent evidence that a crime had occurred. The effect of the defendant's admission was to connect him to the crime, and his admission was not needed to establish that a crime had been committed.

563 P.2d at 176.

In the present case, appellant's confession was not needed to establish corpus delicti. The testimony of corpus delicti was admitted before appellant's confession and thus the confession was properly admitted into evidence. When the confession was properly admitted, it connected appellant to the crime and supported the conviction.

### POINT III

THE TRIAL JUDGE ACTED PROPERLY BY DENYING APPELLANT'S MOTION FOR A MISTRIAL.

Appellant alleges prejudicial error in the prosecutor's presentation of opening arguments to the jury. She claims that the words "death blow" were highly inflammatory, and unduly and unfairly prejudiced the jury.

During the prosecutor's opening statement to the jury, he said:

The tragedy of the case lies, not only in the fact that the child was so young, but that the death blow was delivered by the child's mother, the defendant in this particular case.

(T. 7). Defense counsel objected and an off-the-record discussion was held by the trial judge with the prosecutor and the defense counsel. The prosecutor then continued with his opening statement:

Now the evidence will be as follows: That the defendant struck her little child in the head; that the death blow was struck on July 11, 1981, the second Saturday of July.

(T. 7). Defense counsel did not object to the use of the words "death blow" at this point. Later, defense counsel made a motion for a mistrial based upon the opening argument of the prosecutor (T. 9-10). The trial judge denied the motion (T. 11).



Appellant also claims that the prosecution used the words "death blow" and "words of that kind" during the course of the trial. Appellant does not refer to any part of the record other than the sections relating to the prosecutor's opening statement to support this claim. Defense counsel renewed the motion for a mistrial after the State had rested (T. 102) and also made a motion to dismiss the information because:

The evidence adduced at trial is evidence of intentional acts of the defendant and that tends to prove another crime, Your Honor, which is the crime of murder in the second degree. . . . There is no evidence of manslaughter. There is no evidence of recklessly causing the death of the child.

(T. 103). The motions were denied (T. 104).

Appellant's contentions are without merit because:

(1) the opening arguments by the prosecutor were accurate comments upon the evidence later presented at trial; (2) the opening arguments were not prejudicial and inflammatory but accurate descriptions of what happened to Brandon Talbot; and (3) the jury was instructed that statements by counsel are not evidence and must be given no significance where the statements have no basis in the evidence (R. 35).

A review of the prosecutor's opening arguments reveals that he was simply commenting upon the evidence he would present at trial. Respondent agrees with appellant

that the prosecution cannot use improper methods of securing a conviction and that the prosecutor cannot predicate his opening arguments on his knowledge, as was held in People v. Purvis, 384 P.2d 424 (Cal. 1963), cited in appellant's brief. People v. Lyons, 303 P.2d 329 (Cal. 1956) is also not applicable to the present facts because there the district attorney improperly referred to a prior conviction of defendant on cross-examination before the defendant had testified in his own behalf.

An opening statement in a criminal case is an outline of facts which the prosecution in good faith expects to prove. People v. Roberts, 426 N.E.2d 1104 (Ill. App. Ct. 1981). An opening statement merely provides an opportunity for counsel to advise the jury of the facts and questions before them. State v. Simpson, 641 P.2d 320 (Hawaii 1982); People v. Ramos, 639 P.2d 908 (Cal. 1982). Where an opening argument closely follows the evidence introduced later, there can be no error. State v. Wilson, 626 P.2d 998 (Wash. Ct. App. 1981).

The purpose of an opening argument is to advise the jury of the facts relied upon and of the questions and issues, and to give the jury a general picture of the facts so that they will be able to understand the evidence. State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941). Generally, counsel should be allowed considerable latitude and make a fair statement of

the evidence. In Erwin, the Court said:

. . . and the extent to which he may go is largely in the discretion of the trial court. He should not make a statement of any facts which he cannot legally prove upon the trial; nor should he argue the merits of his case, or relate the testimony at length.

Erwin, 120 P.2d at 313. The prosecutor in his opening arguments must refrain from stating facts (such as defendant's criminal record) which he will not be permitted to prove during the presentation of the State's case in chief. Garner v. State, 374 P.2d 525 (Nev. 1962).

In State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973), the Court examined the closing arguments of the prosecutor to the jury and held that there was no error where the final argument was within the range of reasonable inferences which could be drawn from the evidence. The Valdez Court's explanation of closing arguments seems appropriate for opening arguments as well:

The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks. The determination of whether the improper remarks have influenced a verdict is within the sound discretion of the trial court on motion for a new trial. If there

be no abuse of this discretion and substantial justice appears to have been done, the appellate court will not reverse the judgment.

Valdez, 513 P.2d at 426.

Under the Valdez test, the prosecutor did not call to the attention of the jurors in the instant case matters which they would not be justified in considering to determine the appellant's guilt. Three elements of manslaughter in this case were: (1) the death of Brandon Talbot, (2) caused by blows to his head, (3) which were delivered by appellant. The prosecutor in his opening argument made a common sense observation of the facts which he later did in fact enter into evidence. It was a common sense observation that the jurors could consider: blows to Brandon's head delivered by appellant caused his death. The prosecutor outlined these elements for the jury and told the jury that he would present evidence on these elements at the trial (T. 7).

The prosecutor did not say or insinuate that the opening argument was based on his personal knowledge or on anything other than the testimony which was presented shortly after, during the trial. The prosecutor did not indicate his personal opinion of appellant's guilt. In his outline of the case, it is difficult to imagine how the prosecutor could explain his evidence without talking about (1) death (2) blows to Brandon's head or (3) appellant as the criminal actor. In

homicide cases, the prosecution has always been allowed in opening arguments to talk about death, how it was caused and that the defendant allegedly did the act. There was nothing improper with the opening arguments of the prosecutor, and all of his arguments were based on legally admissible evidence, which was in fact presented to the jury.

Moreover, the determination whether improper remarks, if any, of the prosecutor during opening arguments to the jury have influenced a verdict lies within the discretion of the trial court. State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973). Also, note 6, State v. Vigil, Utah, \_\_\_\_ P.2d \_\_\_\_ (Case No. 18118, filed March 18, 1983). If there is no abuse of discretion and substantial justice appears to have been done, the appellate court will not reverse the judgment. State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973).

Appellant has not shown that she was prejudiced by the prosecutor's words "death blow," which accurately describe the injuries to Brandon Talbot. A simple finding of guilt without appellant showing prejudice in the jury's reaching its verdict is not, by itself, grounds for reversal. Appellant has not shown that the words have improperly influenced the jurors' minds as to the guilt of appellant. There is no showing that the words "death blow" were the sole basis for the guilty verdict or that the jury would have decided otherwise if the words had not been used. The prosecutor should be allowed to use words in his opening argument which the jurors will use later in their deliberations.

There was no prejudice to appellant which would support grounds for reversal. The opening arguments were supported by the evidence. The evidence was clear and decisive, and the trial court's judgment should be upheld, notwithstanding any alleged misconduct by the prosecutor (two references to "death blow") or the trial judge (denying a motion to dismiss). Respondent submits that there was no error by the prosecutor or the trial judge, but if there was an error, this Court should find that it was harmless in the context of the evidence, which was sufficient to sustain a finding of guilt beyond a reasonable doubt. State v. Patterson, Utah, \_\_\_\_ P.2d \_\_\_\_ (Case No. 17610, filed November 5, 1982).

Furthermore, the trial judge instructed the jurors that statements by the prosecutor or the defense counsel were not evidence. Instruction Number 3 said, in part:

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. You should disregard any such utterance that has no basis in the evidence.

(R. 35). The jurors were expressly told to reject arguments of counsel, unless the arguments were supported by the evidence. The trial judge instructed the jurors that they should not consider the opening argument as evidence. Additionally, the trial judge instructed them to disregard the arguments which were incompetent, i.e., not supported by the evidence.



Respondent urges that any alleged prejudicial error did not result from the prosecutor's opening argument where the jury was given a cautionary instruction and the evidence supported, directly and by inference, the appellant's conviction for the manslaughter of Brandon Talbot, who (1) died (2) from blows to the head (3) which were delivered by appellant. All elements outlined in the prosecutor's opening argument were properly placed in evidence.

#### CONCLUSION

The prosecution presented sufficient evidence on the two requirements of corpus delicti: (1) death of a human being and (2) that the death resulted from criminal conduct. When the corpus delicti was established by independent proof, the confession of appellant was properly admitted into evidence to connect appellant with the crime. There was also sufficient evidence to sustain the manslaughter conviction and to sustain the court's finding that appellant was guilty beyond a reasonable doubt.

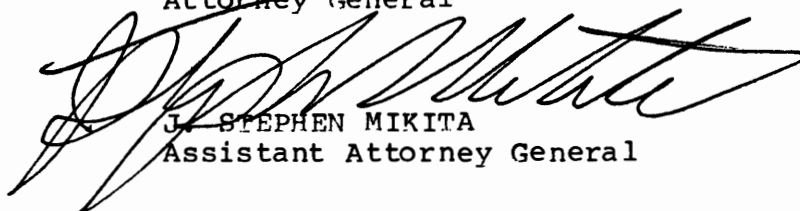
Appellant's confession was properly admitted into evidence because she waived her Miranda rights and because she had an opportunity to make changes in the written statement before signing it.

The prosecutor's use of the words "death blow" in his opening argument was not prejudicial, but was an accurate description of the properly admitted evidence.

Based upon the foregoing, respondent urges that the conviction and sentence of appellant be affirmed.

Respectfully submitted this 5<sup>th</sup> day of April, 1983.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Gary H. Weight, Attorney for Appellant, Aldrich, Nelson, Weight & Esplin, 43 East 200 North, Provo, Utah, 84603, this 5 day of April, 1983.

Susan Patton