

1958

State of Utah v. James W. Rodgers : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

JUN 26 1958

THE STATE OF UTAH,

Plaintiff and Respondent,

Clerk, Supreme Court, Utah

vs.

Case No.
8868

JAMES W. RODGERS,

Defendant and Appellant.

BRIEF OF RESPONDENT

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ARROW PRESS, SALT LAKE

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In the Supreme Court of the State of Utah

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

JAMES W. RODGERS,
Defendant and Appellant.

Case No.
8868

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The statement of facts contained in defendant's brief is substantially correct and fairly represents the facts in this case.

STATEMENT OF POINTS

POINT I.

DEFENDANT'S CONVICTION FOR FIRST DEGREE MURDER BASED UPON AN INFORMATION FILED BY THE DISTRICT ATTORNEY

CHARGING THE DEFENDANT WITH THE COMMISSION OF THE CRIME OF "MURDER IN THE FIRST DEGREE" FOLLOWING THE FILING OF A COMPLAINT CHARGING DEFENDANT WITH "MURDER" UPON WHICH A PRELIMINARY HEARING WAS HAD BY DEFENDANT THAT RESULTED IN HIS BEING BOUND OVER TO THE DISTRICT COURT TO STAND TRIAL FOR "MURDER" DID NOT VIOLATE THE LAWS OF THE STATE OF UTAH, THE CONSTITUTION OF THE STATE OF UTAH NOR THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND THE LOWER COURT DID NOT ERR IN SO FINDING.

POINT II.

THE LOWER COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO QUASH THE INFORMATION MADE AT THE TIME OF ARRAIGNMENT AND BEFORE PLEA ON THE GROUNDS THAT THE DEFENDANT DID NOT HAVE A PRELIMINARY HEARING ON THE CHARGE OF FIRST DEGREE MURDER AND THAT THE COURT THEREFORE WAS WITHOUT JURISDICTION TO HEAR THE CASE.

POINT III.

THE LOWER COURT DID NOT ERR IN OVER-
RULING THE DEFENDANT'S MOTION TO

QUASH THE INFORMATION OR IN LIEU THEREOF TO AMEND SAME TO CONFORM TO THE CHARGE THAT WAS MADE IN THE ORIGINAL COMPLAINT AND THE CHARGE FOR WHICH THE DEFENDANT WAS BOUND OVER BY THE COMMITTING MAGISTRATE TO STAND TRIAL.

POINT IV.

THE LOWER COURT DID NOT ERR IN OVER-RULING THE DEFENDANT'S OBJECTION TO THE INTRODUCTION OF ANY TESTIMONY WITH RESPECT TO FIRST DEGREE MURDER.

POINT V.

THE LOWER COURT DID NOT ERR IN OVER-RULING DEFENDANT'S MOTION IN ARREST OF JUDGMENT BASED ON THE FOLLOWING GROUNDS:

(A) THAT THE DEFENDANT IS INSANE, AND,

(B) THAT THE TRIAL COURT WAS WITHOUT JURISDICTION TO TRY THE DEFENDANT FOR THE CRIME OF MURDER IN THE FIRST DEGREE BECAUSE THE DEFENDANT WAS CHARGED IN THE COMPLAINT WITH WHAT CONSTITUTES THE CRIME OF MURDER IN THE SECOND DEGREE; THAT

THE PRELIMINARY HEARING WAS BASED UPON SAID COMPLAINT AND THAT THE DEFENDANT WAS BOUND OVER BY THE COMMITTING MAGISTRATE TO STAND TRIAL FOR THE OFFENSE STATED IN THE COMPLAINT TO WIT: MURDER IN THE SECOND DEGREE.

POINT VI.

THE LOWER COURT DID NOT ERR IN OVER-RULING THE DEFENDANT'S MOTION FOR A NEW TRIAL IN THAT THE VERDICT RENDERED IN THIS CASE IS SUPPORTED BY THE EVIDENCE AND FURTHER THAT THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO CONCLUDE THAT THE DEFENDANT WAS NOT INSANE AND INCAPABLE OF CONTROLLING HIS ACTIONS BY REASON OF AN ORGANIC MENTAL DISORDER.

ARGUMENT

POINT I.

DEFENDANT'S CONVICTION FOR FIRST DEGREE MURDER BASED UPON AN INFORMATION FILED BY THE DISTRICT ATTORNEY CHARGING THE DEFENDANT WITH THE COMMISSION OF THE CRIME OF "MURDER IN THE FIRST DEGREE" FOLLOWING THE FILING OF A COMPLAINT CHARGING DE-

FENDANT WITH "MURDER" UPON WHICH A PRELIMINARY HEARING WAS HAD BY DEFENDANT THAT RESULTED IN HIS BEING BOUND OVER TO THE DISTRICT COURT TO STAND TRIAL FOR "MURDER" DID NOT VIOLATE THE LAWS OF THE STATE OF UTAH, THE CONSTITUTION OF THE STATE OF UTAH NOR THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND THE LOWER COURT DID NOT ERR IN SO FINDING.

Section 77-11-1, U. C. A. 1953, provides that a complaint upon which a criminal prosecution is initiated shall include the following:

"77-11-1. CONTENTS.—The complaint must state:

"* * *

"(3) The general name of the crime or public offense.

"(4) The acts or omissions complained of as constituting the crime or public offense named.
* * *"

This Court, in construing Section 8680, Comp. Laws Utah 1917, which was identical insofar as the above quoted portions of 77-11-1 are concerned, held as follows:

"The purposes of a complaint are two-fold: To advise the defendant of the charge made against him and to enable the committing magistrate to determine whether or not the defendant should be bound over to the district court to stand trial for the offense charged in the complaint. *While a complaint*

*need not charge a crime with the fullness and particularity required in an information or indictment, it must be in substantial compliance with the provisions of Comp. Laws Utah 1917, § 8680; * * *.*"

State v. Hale, 71 U. 134, 263 P. 86.

In an earlier case, *State v. Anderson*, 35 U. 496, 101 P. 385, this Court, in interpreting identical statutory provisions as those above quoted, opined thus:

"* * * We do not understand the law to be that a complaint, which is made the basis of a preliminary hearing before a magistrate only, must be drawn with the same precision and technical accuracy that is required in the drawing of an indictment or information upon which a party charged with a felony is finally brought to trial, * * *."

The defendant cites the case of *State v. Pay*, 45 U. 411, 146 P. 300, in support of his position, when in fact the case is directly in point with the above cases. In this case the Court states as follows with respect to the sufficiency of a complaint:

"[5, 6] Of course, the offense need not be stated in technical language *nor in such specific terms as is required in an information or an indictment*. It is sufficient that the jurisdictional facts appear and that the crime is stated in ordinary language. * * *" (Emphasis added.)

It is thus evident that this Court has given effect to the clear statutory language contained in Section 77-11-1, U. C. A. 1953. The "*general name of the crime or public offense*" is sufficient thereunder. That the term "*murder*"

as charged in a complaint is a "general" term embracing all statutory degrees thereof can hardly be doubted. Section 76-30-1, U. C. A. 1953, provides as follows:

"76-30-1. "MURDER" DEFINED.—Murder is the unlawful killing of a human being with malice aforethought."

This is simply a codification of the common law definition of murder. *State v. Russell*, 106 U. 116, 145 P. 2d 1003. As such it includes all present degrees of murder and an indictment for murder at common law does charge murder in the first degree. *Davis v. Utah Territory*, 151 U. S. 262, 38 L. Ed. 153, 14 S. Ct. 328; *Green v. Commonwealth*, (Supreme Judicial Court of Mass.), 12 Allen, 155, 170; *People v. Murray*, 10 California 309, 310; *People v. Conroy*, 97 N. Y. 62, 70; *State v. Lessing*, 16 Minn. 64, 66, 67; *State v. Verrill*, 54 Maine 408, 415; *Gehrke v. State*, 13 Texas 568, 573, 574; *McAdams v. State*, 25 Ark. 405, 416. In the *Davis* case the Supreme Court of the United States, in construing territorial statutes identical with those of the State of Utah today, resolved the question thus, at pages 266 and 267 of 151 U. S. Reports:

"Other assignments of error present the objection that the indictment is so framed that it will not support a verdict of guilty of murder in the first degree. This objection is based, in part, upon the theory that murder in the first degree and murder in the second degree are made distinct, separate offenses. But this is an erroneous interpretation of the statute. *The crime defined is that of murder.* The statute divides that crime into two classes in order that the punishment may be adjusted with reference to the presence or absence of circumstances of ag-

gravation. And, therefore, whenever a crime is distinguished into degrees, it is left to the jury, if they convict the defendant, 'to find the degree of the crime of which he is guilty.' 2 Comp. Laws of Utah, 715, § 5076. * * * An indictment which clearly and distinctly alleges facts showing a murder by the unlawful killing of a human being with malice aforethought is good as an indictment for murder under the Utah statutes, although it may not indicate, upon its face, in terms, the degree of that crime, and thereby the nature of the punishment that may be inflicted. * * * *As the acts which, under the Utah statute, constitute murder, whether of the highest or lowest degree, constituted murder at common law, it is clear that an indictment good at common law as an indictment for murder, in whatever mode or under whatever circumstances of atrocity the crime may have been committed, is sufficient for any degree of the crime of murder under a statute relating to murder as defined at common law, and establishing degrees of that crime in order that the punishment may be adapted to the special circumstances of each case.*" (Emphasis added.)

We quote further from the *Davis* case at page 269, wherein Justice Harlan quotes from the Massachusetts case of *Green v. Commonwealth*, supra :

"The reason on which these decisions were founded was this: that the statute establishing degrees of murder did not create any new offense or change the definition of murder as it was understood at common law; that the forms of indictment previously in use descriptive of murder embodied every shade or degree of the crime, from that which was most aggravated, malicious, and premeditated down to that which had only the element of implied malice in its most mitigated form; and that as the offense

was not changed, but only its punishment mitigated in certain cases, the indictment was sufficient to embrace every species of murder, whether it fell within one or the other of the degrees of homicide as defined by the statute. The logical and necessary conclusion from these discussions is, that an indictment for murder at common law does charge murder in the first degree.' ”

We feel that the above authorities are controlling upon the question of whether the Legislature has created separate crimes of first and second degree murder as contended by defendant, and that a complaint charging “murder” upon which a defendant is afforded a preliminary hearing and subsequently is bound over to the District Court to stand trial is sufficient to charge the defendant with murder in the first degree upon an information filed by the District Attorney.

It is interesting to note that the defendant makes no attempt to challenge the sufficiency of the information in charging first degree murder upon which his conviction was based. And yet every case cited by defendant to support his position resolves itself into a determination of the sufficiency of an indictment or information.

Defendant quotes at length from the case of *State v. Spencer*, 101 U. 274, 117 P. 2d 455, rehearing denied 101 U. 287, 121 P. 2d 912, wherein the Court held that perjury in the first degree and perjury in the second degree are distinct and separate crimes and that an information charging “perjury” does not charge a crime or public offense. The Court was divided 3-2 in its opinion in this case. How-

ever, the defendant fails to point out that this decision has been specifically overruled by a unanimous court in the case of *State v. Hutchinson*, 4 U. 2d 404, 295 P. 2d 345. In this latter case, the Court, speaking through Justice Henriod, stated at page 346 of 295 P. 2d:

“Without determining the debatable question as to whether this language was dictum or not [in the *Spencer* case], logic would dictate that without such language the conclusion is almost inescapable that one offense was included in the other *and an accusation of perjury, without specifying the degree, would have been sufficient, since applicable statutes seem to say so and actually authorize charging perjury in the following form: ‘A. B. committed perjury by testifying as follows.’*” (Emphasis added.)

The “applicable statutes” referred to by the Court are Sections 77-21-8, 77-21-38, and 77-21-47, U. C. A. 1953, which are herewith set forth:

“77-21-8. CHARGING THE OFFENSE.—(1) The information or indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted in one or more of the following ways:

“(a) By using the name given to the offense by the common law or by a statute.

“(b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged.

“(2) The information or indictment may refer to a section or subsection of any statute creating the

offense charged therein, and in determining the validity or sufficiency of such information or indictment regard shall be had to such reference."

"77-21-38. OFFENSES DIVIDED INTO DEGREES.—In an information or indictment for an offense which is divided into degrees it is sufficient to charge that the defendant committed the offense without specifying the degree."

"77-21-47. FORMS FOR CERTAIN OFFENSES.—The following forms may be used in the cases in which they are applicable:

"* * *

"Murder—A. B. murdered C. D.

"Perjury—A. B. committed perjury by testifying as follows: (set forth the testimony). * * *"

It is apparent that this Court overruled the *Spencer* case in order to give effect to the plain language and legislative intent evidenced by the above statutory provisions which are applicable with identical effect upon either of the penal statutes relating to perjury or murder. By substituting the word "murder" in the place of "perjury" in the above quoted portion of the *Hutchinson* case we must conclude that even an information charging murder without specifying the degree, which is not the fact of this case, would be sufficient under Utah law.

In view of the above authorities we feel that this Court must find that the complaint filed in this case and the defendant's subsequent conviction of murder in the first degree are not contrary to and in violation of the laws of the State of Utah and the Constitution of the State of Utah.

With respect to defendant's claim that the acts complained of are contrary to and in violation of Article V and Article VI of the Amendments to the Constitution of the United States, let it suffice to state that the first ten amendments to the Federal Constitution apply to the procedure and trial of causes in the federal courts and are not limitations on those in state courts. *Gaines v. Washington*, 48 S. Ct. 468, 277 U. S. 81, 72 L. Ed. 793. And this is true in the case of the Fifth Amendment. *Feldman v. United States* (New York), 64 S. Ct. 1082, 322 U. S. 487, 88 L. Ed. 1408, 154 A. L. R. 982, rehearing denied 65 S. Ct. 26, 323 U. S. 811, 89 L. Ed. 646; *Grafte v. United States*, (C. C. A., Utah) 49 F. 2d 270, certiorari denied 52 S. Ct. 24, 284 U. S. 644, 76 L. Ed. 548. It is also true in the case of the Sixth Amendment. *People v. Raffington*, 98 Cal. App. 2d 455, 220 P. 2d 967, certiorari denied 71 S. Ct. 292, 340 U. S. 912, 95 L. Ed. 659.

POINT II.

THE LOWER COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO QUASH THE INFORMATION MADE AT THE TIME OF ARRAIGNMENT AND BEFORE PLEA ON THE GROUNDS THAT THE DEFENDANT DID NOT HAVE A PRELIMINARY HEARING ON THE CHARGE OF FIRST DEGREE MURDER AND THAT THE COURT THEREFORE WAS WITHOUT JURISDICTION TO HEAR THE CASE.

The plaintiff relies upon the argument contained under Point I to sustain its position that the lower court did not

err in denying defendant's motion to quash the information made at the time of arraignment and before plea upon the grounds that defendant did not have a preliminary hearing on the charge of first degree murder and that the Court therefore was without jurisdiction to hear the case.

POINT III.

THE LOWER COURT DID NOT ERR IN OVER-RULING THE DEFENDANT'S MOTION TO QUASH THE INFORMATION OR IN LIEU THEREOF TO AMEND SAME TO CONFORM TO THE CHARGE THAT WAS MADE IN THE ORIGINAL COMPLAINT AND THE CHARGE FOR WHICH THE DEFENDANT WAS BOUND OVER BY THE COMMITTING MAGISTRATE TO STAND TRIAL.

POINT IV.

THE LOWER COURT DID NOT ERR IN OVER-RULING THE DEFENDANT'S OBJECTION TO THE INTRODUCTION OF ANY TESTIMONY WITH RESPECT TO FIRST DEGREE MURDER.

POINT V.

THE LOWER COURT DID NOT ERR IN OVER-RULING DEFENDANT'S MOTION IN ARREST OF JUDGMENT BASED ON THE FOLLOWING GROUNDS:

(A) THAT THE DEFENDANT IS INSANE, AND,

(B) THAT THE TRIAL COURT WAS WITHOUT JURISDICTION TO TRY THE DEFENDANT FOR THE CRIME OF MURDER IN THE FIRST DEGREE BECAUSE THE DEFENDANT WAS CHARGED IN THE COMPLAINT WITH WHAT CONSTITUTES THE CRIME OF MURDER IN THE SECOND DEGREE; THAT THE PRELIMINARY HEARING WAS BASED UPON SAID COMPLAINT AND THAT THE DEFENDANT WAS BOUND OVER BY THE COMMITTING MAGISTRATE TO STAND TRIAL FOR THE OFFENSE STATED IN THE COMPLAINT TO WIT: MURDER IN THE SECOND DEGREE.

The plaintiff incorporates its argument under Point I insofar as it relates to the sufficiency of the pleadings and constitutional rights and guarantees of the defendant in answer to Points III, IV and V contained in defendant's brief.

POINT VI.

THE LOWER COURT DID NOT ERR IN OVER-RULING THE DEFENDANT'S MOTION FOR A NEW TRIAL IN THAT THE VERDICT RENDERED IN THIS CASE IS SUPPORTED BY THE EVIDENCE AND FURTHER THAT THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO CONCLUDE THAT THE DEFEN-

DANT WAS NOT INSANE AND INCAPABLE
OF CONTROLLING HIS ACTIONS BY REASON
OF AN ORGANIC MENTAL DISORDER.

Defendant contends that the evidence introduced at his trial is uncontradicted that he was acting under an irresistible impulse produced by mental disease and, therefore, the defense of insanity, as a matter of law, is available to him under the doctrine established in *State v. Green*, 78 U. 580, 6 P. 2d 177. Defendant relies solely upon testimony to the effect that upon two separate Kolmer Complement Fixation tests, a form of spinal serology for syphilis, upon which positive reactions of three plus and two plus were obtained in tests made upon defendant, as proof of organic syphilitic infection of his central nervous system. Upon this evidence he attempts to establish that he acted under an irresistible impulse resulting from a mental disease. Such was the expert opinion testimony of Doctors John Landward and Craig Nelson, both of whom testified on defendant's behalf.

In addition to the spinal fluid tests referred to above, two separate samples of defendant's blood were subjected to four separate tests for syphilis, namely the V. D. R. L. (used by the Venereal Disease Laboratory of the U. S. Public Health Service), Kahn Standard, Hinton, and Kolmar Compliment Fixation tests, all of which were negative, or non-reactive (R. 309-310, 318-319). Defendant's witness Dr. Chester B. Powell, a specialist in the field of neurology and neuro-surgery, in commenting upon the opposite results obtained in the tests made upon defendant's spinal fluid and blood, testified that "About three percent on the aver-

age of patients with syphilis of the nervous system will show a negative blood serology" (R. 324). Furthermore, he testified that the defendant "doesn't have any prominent clinical signs of syphilis" (R. 325). He also mentioned the possibility of a "false positive" spinal fluid test reaction but noted that this is "exceedingly rare", and, after ruling out the known causes of false positive serology, concluded that the defendant was suffering from syphilitic infection of the central nervous system (R. 325-326). Upon cross examination he admitted that his interview with the defendant did not reveal any abnormality as to judgment, memory and other intellectual functions nor did his electro encephalograph test of the defendant indicate any abnormality of the brain wave pattern (R. 330-331). Dr. Powell also testified that persons may have syphilis of the brain and be "perfectly responsible" without necessarily acting under hallucinations, and most such patients do know the difference between right and wrong, and such a condition doesn't mean that the individual doesn't know the nature of his acts (R. 332-333). He also testified that upon questioning the defendant, the latter had stated that he had never had syphilis nor been treated for it (R. 333). And that the patient had no signs of congenital syphilis (R. 334).

The above noted evidence is representative of what defendant terms "uncontradicted evidence" that the defendant was suffering from an organic mental disease which rendered him insane and incapable of controlling his actions. This Court is asked to hold, as a matter of law, that a 3% possibility (syphilis diagnosis upon positive spinal fluid test and negative blood test) constituted uncontra-

dicted evidence of organic disease in defendant's central nervous system such that he could not suppress an irresistible impulse, and that the jury could not give credence to the following:

1. The 97% norm of diagnosis (spinal fluid test and blood test confirming each other),
2. The absence of clinical signs of syphilis in defendant,
3. The possibility of a "false positive" spinal fluid test reaction,
4. The lack of any observed abnormalities in the realm of judgment, memory and other intellectual functions evidenced by defendant's behavior,
5. The failure of the electro encephalograph test to reveal any brain wave abnormality in defendant,
6. The probability that, even assuming organic disease of the central nervous system, the afflicted individual does know right from wrong, does know the nature of his actions and does not necessarily act under hallucinations,
7. The defendant's own statements to the above witness that he had never had syphilis nor been treated for it, and
8. The absence of any signs of congenital syphilis in the defendant.

We do not think the Court will so hold. It certainly required no stretch of the imagination for this jury to find from the above medical testimony contrary to the defendant's position, nor could it be said that such a finding was

unsupported by evidence. And it should be here noted that this is evidence adduced from the defendant's own witness. We shall hereafter examine the sufficiency of additional evidence to support the verdict in this case.

Defendant relies heavily upon the expert opinion testimony of Dr. John Landward, a clinical psychologist, who performed a series of tests upon the defendant such as the Bender-Gesthalt Motor Test (figure reproduction), the Wexler Bellview Adult Intelligence Scale Test (block design), and the Rorschach Ink Blot Test (image perception), from which he ascertained certain sensitivity which, in his opinion, was an indication of some brain damage in the defendant (R. 341-346). As a result of these tests Dr. Landward recommended that the defendant be given an E. E. G. (electro encephalogram), presumably as a reliable procedure to confirm his findings (R. 343). As we have discussed earlier, the electro encephalograph test made upon the defendant did not indicate any brain impairment (R. 330-331). Furthermore, Dr. Landward recognized a slight possibility of an individual being able to falsify his responses so as to obtain a certain test result by design (R. 355). And most important, this witness recognized the element of human error, and particularly his own, to be reckoned with under these test procedures (R. 358). Again we emphasize that the defendant's claim of "uncontradicted evidence" does not hold even in the case of his own witnesses. It was properly within the province of this jury to consider the opinions of these expert witnesses with due regard for each exception, qualification, conflict or inconsistency contained therein. And this Court should not upset

the verdict of the jury where the evidence is so clearly capable of divergent interpretation as that involved herein.

Another witness for the defendant, Dr. Craig Nelson, a psychiatrist, also testified that it was his opinion that the defendant acted under an irresistible impulse as the result of a paranoid and psychotic personality aggravated by an organic infection of the central nervous system (R. 366-368). He based this opinion upon observations of slurred speech and methodical rigidity of speech (perseveration) evidenced by defendant's verbal interview with him considered in connection with the positive reaction of the spinal fluid tests (R. 361, 363, 370). Upon cross examination, Doctor Nelson admitted that slurring of speech doesn't necessarily indicate brain infection (R. 369). Thus it is evident that the spinal fluid tests were of primary importance to this doctor's opinion. The uncertainties surrounding the conclusiveness of these tests in diagnosing syphilis have heretofore been discussed, and the jury certainly had the right to consider all aspects of the evidence in its evaluation. Furthermore, there is a manifest inconsistency between the testimony of Dr. Nelson and Dr. Powell—the former relying upon claimed abnormalities observed in the defendant's behavior for his opinion, and the latter claiming that there were "no clinical signs of syphilis" in defendant's behavior and that his interview with the defendant did not reveal any abnormality as to judgment and intellectual functions. Can there be any question that the jury had the absolute right to resolve this conflict and to determine the credibility of these witnesses in this matter? Again we point out to the Court that the above inconsis-

tencies and uncertainties have arisen from the testimony of defendant's own witnesses.

In addition to the above, the jury had the testimony of Dr. William D. Pace, a psychiatrist, who was called by the State as a rebuttal witness, to consider in arriving at its verdict. Dr. Pace testified that, as a result of his psychiatric examination of the defendant, it was his opinion that the defendant was not mentally ill or psychotic (R. 374). And that he was not suffering from a mental disease, but rather his actions represented abnormal personality traits or character traits (R. 375). In answer to the hypothetical question concerning the conditions under which the shooting occurred, Dr. Pace testified that, in his opinion, the defendant did know right from wrong, that he did know the nature of the act he was doing and that he did not control his impulses but this was not the result of mental disease (R. 375-378). Upon cross examination by defendant's counsel, Dr. Pace testified that his examination of the defendant did not reveal any organic disorder and that he observed nothing unusual about the defendant's speech, nor did the personal history given by the defendant indicate that his behavior since childhood was the result of syphilis (R. 380-382).

The defendant takes the position that no conflict exists between the testimony of Dr. Pace and his own expert witnesses primarily on the ground that Dr. Pace allegedly made no inquiry into the possibility of an organic mental disease. In answer to this point we quote the following from line 30, page 280, to line 15, page 281 of the record on appeal:

"Q. Well, did you when you examined Mr. Rodgers here, did you find any evidence at all of any organic disorder?

"A. No I didn't.

"Q. Did you notice any slurring of speech, for example, which might have shown you that he was inarticulate and that he couldn't talk properly which might indicate an organic disorder?

"A. I didn't notice anything unusual about his speech. He talked very freely.

"Q. He talked freely, but I meant by that did you notice any slurring of the words that he used?

"A. I didn't notice any.

"Q. Was there anything else that was brought out in your examination that would indicate any possibility of organic trouble in this man's mind?

"A. No, *I saw nothing whatever that would indicate organic changes in the central nervous system.*" (Emphasis added.)

In answer to defendant's claim that Dr. Pace's examination was perfunctory, superficial and without sufficient inquiry into the condition of the defendant, we bring to the Court's attention that his examination of two hours duration (R. 374) exceeded the time consumed by Dr. Nelson in his examination of defendant by one-half hour, (R. 360) and equalled the time spent by Dr. Landward in his interview with the defendant (R. 353). There is no claim made by defendant that Dr. Pace was not qualified to make a psychiatric examination of equal dignity with that of his own expert witnesses. His only complaint is that Dr. Pace did not agree with his witnesses. This is not sufficient to allow collateral attack upon the unwanted testimony. We think the above recital clearly indicates a conflict of opinion

between the defendant's expert witnesses and the plaintiff's rebuttal witness, in addition to the conflicts inherent in the testimony of defendant's own witnesses as heretofore set forth. Where there is a conflict of evidence, a verdict cannot be reversed upon appeal on the ground that it is not supported by evidence. *Lee v. New York Life Insurance Co.*, 95 U. 445, 82 P. 2d 178. It was also held in the *Lee* case that it is for the jury to decide a question upon which expert witnesses disagree. This is in accord with the general rule that the value of conflicting expert testimony is not determined by the numerical weight thereof. *Simonet v. Frank F. Pellissier & Sons*, 61 Cal. App. 2d 41, 141 P. 2d 922; *Appeal of City of Pittsburg*, 350 Pa. 421, 39 A. 2d 601; *Monark Battery Co. v. Industrial Commission*, 354 Ill. 494, 188 N. E. 413; *Putnam v. Murden*, 97 Ind. App. 313, 184 N. E. 796; *Ferguson v. Department of Labor and Industries of Washington*, 197 Wash. 524, 85 P. 2d 1072, reversed on other grounds 90 P. 2d 280; *Ramberg v. Morgan*, 209 Iowa 474, 218 N. W. 492. In the *Simonet* case the jury chose to accept the medical testimony of plaintiff's single expert witness instead of the medical evidence introduced by the defendant's five expert witnesses. In sustaining the right of the jury to so decide the court stated as follows, at page 924, 141 P. 2d Reporter:

“* * * As to the probative value of such testimony, there can be no significance attached to the fact that the score was five to one. The court is not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in the mind of the court, against a less number or against a presumption or other evidence * * *.”

In addition to the medical testimony in this case, it is clear that the defendant acted in the most deliberate and premeditated manner. Contrary to defendant's allegation that he acted under an "irresistible impulse" or "delusion" the plaintiff submits that defendant's actions in securing the murder weapon and his calmly smoking a cigarette as he awaited the filling of a dump truck from a power shovel operated by his intended victim, after which he shot once into the ground and motioned to his victim to come down from his position on the shovel and then repeatedly shot his victim to death, indicate that this killing was not the result of "impulsive" action or "delusions" (R. 135-140, 160-161, 167, 173, 179-183, 200-201, 218-219).

CONCLUSION

Defendant's appeal in this case should be denied and the verdict and judgment of the District Court in this matter should be affirmed upon the following grounds:

1. The conviction of defendant for first degree murder upon an information filed by the District Attorney charging the commission by defendant of the crime of "murder in the first degree", following the filing of a complaint and preliminary hearing upon the charge of murder did not violate the laws of the State of Utah, the Constitution of the State of Utah nor the Constitution of the United States of America.

2. The lower court did not err in denying defendant's motion to quash the information.

3. The lower court did not err in overruling the defendant's motion to quash the information or, in lieu thereof, to amend the information to conform to the charge as made in the original complaint.

4. The lower court did not err in overruling the defendant's objection to the introduction of any testimony with respect to first degree murder.

5. The lower court did not err in overruling defendant's motion in arrest of judgment.

6. The lower court did not err in overruling defendant's motion for a new trial in that the verdict is supported by the evidence which was sufficient for the jury to conclude that the defendant was not insane and incapable of controlling his actions by reason of an organic mental disease.

Respectfully submitted,

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