

1963

State of Utah v. Darrell Devere Poulson : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

— vs. —

DARRELL DEVERE POULSON,

Defendant-Appellant.

} Case
No. 9656

} JAN 7 1963
UTAH

BRIEF OF RESPONDENT

Appeal From the Judgment of the
Fourth District Court for Utah County
HON. R. L. TUCKETT, *Judge*

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

— vs. —

DARRELL DEVERE POULSON,

Defendant-Appellant.

} Case
No. 9656

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant has appealed from a conviction of murder in the first degree upon jury trial in the Fourth Judicial District, Utah County.

DISPOSITION IN LOWER COURT

The appellant was convicted of murder in the first degree, and the jury, which heard the case, made no recommendation for mercy. The appellant was, therefore, sentenced to death.

RELIEF SOUGHT ON APPEAL

The State contends the appellant's conviction should be affirmed.

STATEMENT OF FACTS

The State submits the following statement of facts in supplement to those offered by the appellant.

On Saturday, September 16, 1961, the appellant, Darrell DeVere Poulson, left Provo, Utah, and drove to American Fork, Utah. He parked his automobile near the apartment of Darlo Sawyer. He approached the apartment, which was within a cluster of apartments, in one of which Karen Mechling lived (R. 190-192, Exhibit 1). He knew the place he was looking for, because he had resided there before (Exhibit 5). He "window peeked" at the apartment of Mr. Sawyer where Karen Mechling was baby tending. He noticed the girl, who was eleven years old (Exhibit 20), was asleep in a chair. He tried the door, found it unlocked, then went back about one-half block to the home of Harry Loader, where he took a caulking gun. He returned to the Sawyer home and quietly entered. He struck Karen Mechling in the head with the caulking gun two or more times (Exhibit 5). He then carried the girl outside in the weeds behind the home, where he raped her. Poulson later recalled that she groaned during the rape and he used his fingers to widen her vagina so that he could insert his penis (Exhibit 5). During the rape, the child's vagina was torn from high in the vaginal vault to the anus (R. 233).

Karen Mechling died within four to five minutes from the time the appellant struck her, and she died from the blows to the head (R. 234-237). Semen was found in the girl's vaginal vault by the examining pathologist (R. 237). After the crime, appellant went to the home of his mother-in-law, took money from his wife's purse, changed his clothes "so no one would see the blood" on him, and left for Las Vegas (Exhibit 5). He was picked up in Las Vegas, at the request of the Utah County Sheriff, for another assault that was attempted by the appellant on another girl the same day as that upon Karen Mechling. During the latter incident, he was scared off when someone "hollered" at him (R. 294). Upon being brought back from Las Vegas, he confessed, almost spontaneously, to the killing of Karen Mechling (R. 247, 248). The appellant did not endeavor to place in issue any other theory or raise a lesser included offense. This is evidenced from the defense counsel's statement to the court (R. 283):

"Of course the offense is first degree murder no matter . . . in the instructions."

The evidence before the jury, going to the appellant's mental condition, shows the following: The appellant attended public schools up to the eighth grade (Exhibit 21). He had a reasonably good attendance rate, but his school marks were generally low, except in health and physical education. His I.Q. level for this period, however, showed a tendency to rise (Exhibit 21). A teacher evaluation of the appellant made in the sixth grade showed he displayed poor intellectual behavior, but good aesthetic behavior, and that he was generally

obedient and reverent (Exhibit 23). The appellant was thereafter transferred to the Utah State Training School at American Fork, Utah, after engaging in general criminal misconduct finalizing in an attack on his half-sister in 1955 (Exhibit 24). He was discharged from the school in 1958 (Exhibit 28). During his stay at the American Fork School, he was allowed to visit at home on holidays and weekends. He was also allowed away from the school for extended visits with his mother (Exhibit 28). The testimony also reflected that many persons who attend the American Fork School are able to lead useful social lives in their communities (R. 341-342). Counsel for appellant admitted that the attendance of appellant at the State school was of little importance (R. 372). The school psychologist concluded that the appellant was "mentally deficient" (R. 354). He was also classified as being one of the most "competent" children at the school, and was no trouble at the institution (R. 342).

The appellant's mother testified that the incident came as a "shock" and a surprise and that she would not have expected it (R. 350-351).

The strongest testimony for the appellant came from Dr. Ija Korner, a psychologist, who examined the appellant on one occasion for 2½ hours, during which time he gave the appellant a few psychological tests (R. 362, 367, 375). He did not give the appellant a "complete" I. Q. test but on the "oral" part of the Wechsler Bellvue Test, the psychologist appraised the appellant's I. Q. level at 67, which he said would be classified as "feeble minded" (R. 364). He felt that intellectually speaking,

appellant had “nothing on the ball.” (R. 364). He further felt that appellant was suffering from “mental illness” (R. 368). He defined such mental illness as where an individual was unable to control his impulses (R. 395). He further indicated that he did not attempt to ascertain whether appellant knew the difference between right and wrong (R. 395-396). He characterized appellant’s illness as a limited capacity to control or stem his emotions (R. 368). He indicated that once “launched on an impulse,” appellant has no means to prevent the act from being completed. Dr. Korner further indicated that appellant’s I. Q. could vary up to seven points. He testified that his opinion was not based upon a knowledge of the particular facts of the case (R. 391). On cross-examination and in response to a hypothetical question posed by the district attorney, Dr. Korner testified that it would be “possible” that appellant acted under an impulse over which he had no control (R. 393), but he could not say at what stage the control would be lost (R. 397). No questions relating to the appellant’s intent were asked Dr. Korner, and the only question that might have weighed on the matter was without answer (R. 396):

“Q. If he went into a room and hit a girl on the head with an instrument such as this, (indicating) from your examination would you be able to determine whether he knew what he was doing?

“A. Nobody can.

“Q. No one, you say?

“A. No one can. Only he and, I think, his Maker.”

A psychologist at the Utah State Hospital testified that he interviewed the appellant on two occasions to determine his I. Q. and personality integration. He gave appellant a complete Wechsler Adult Intelligence Scale, a complete draw a person, a complete Rorschach and a complete Thematic Apperception Test (R. 410). He determined that the appellant had a score of 73 on the verbal I. Q. test, 94 on the performance test, and a full scale I. Q. of 81. From this, he concluded that the appellant had a "mild mental deficiency." (R. 412-413) He also felt that the I. Q. test could vary from 5 to 7 points (R. 414).

A psychiatrist at the State Hospital, Dr. Carl Kivler, testified that he had been appointed to examine the appellant by the court. He saw the appellant on the 8th, 10th, 17th, 22nd and 29th of November, 1961, at which times he made a psychiatric evaluation of the appellant. He characterized the appellant's mental capabilities as being "mentally retarded in a degree as mild." (R. 421) He further testified that he felt appellant knew the difference between right and wrong at the time of trial and at the time of the crime (R. 423). He also was of the opinion that Poulson knew the nature and quality of his acts (R. 424). The doctor found no evidence of psychosis and further discussed the facts of the case with the appellant in some detail (R. 424). He was of the opinion that the accused was able to control his emotions and was so capable at the time of the crime (R. 425).

Dr. Louis G. Moench, a psychiatrist, was also called as a witness and testified (R. 433). He testified that upon

examination of the appellant, he concluded that appellant was mentally deficient, and characterized it as a "mild mental retardation." (R. 435) The doctor found no psychosis and felt that appellant knew the difference between right and wrong, would understand the seriousness and gravity of the charges against him, the nature and the seriousness of the consequences of his action, and could control his impulses (R. 437, 438).

Additionally, the record reflects that the appellant was married and attending school at the time of the crime.

Additional facts, as they relate to specific legal arguments, will be presented under the argument portion of this brief.

ARGUMENT

POINT I

THE APPELLANT CAN CLAIM NO ERROR BECAUSE OF A FAILURE OF THE TRIAL JUDGE TO INSTRUCT THE JURY THAT THE MENTAL CONDITION OF THE APPELLANT COULD BE CONSIDERED IN DETERMINING HIS CAPACITY TO INTEND AS AN ELEMENT IN BURGLARY, SINCE:

A. THE ISSUE WAS NOT RAISED AT TRIAL NOR DID THE APPELLANT PRESENT SUCH A THEORY IN DEFENSE, NOR REQUEST INSTRUCTIONS ON SUCH A THEORY, AND HAS, THEREFORE, WAIVED ANY SUCH ISSUE.

B. THE LEGAL THEORY OF PARTIAL IMPAIRMENT IS NOT PROPER BECAUSE THE EVIDENCE RELATING TO RAPE MADE IRRELEVANT SUCH A THEORY.

C. THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED OF APPELLANT'S IMPAIRED INTENT AT THE TIME OF THE OFFENSE AS WOULD REQUIRE THE COURT TO INSTRUCT ON THAT ISSUE.

D. THE DOCTRINE OF "PARTIAL RESPONSIBILITY" IS NOT COMPATIBLE WITH PSYCHIATRIC REALITIES NOR THE LEGAL TESTS OF INSANITY AND SHOULD NOT BE APPLIED IN CASES OF THIS NATURE.

* * * * *

A. THE ISSUE WAS NOT RAISED AT TRIAL, NOR DID THE APPELLANT PRESENT SUCH A THEORY IN DEFENSE, NOR REQUEST INSTRUCTIONS ON SUCH A THEORY, AND HAS, THEREFORE, WAIVED SUCH ISSUE.

In the instant case, the appellant contends for the first time, on appeal, that the trial court should have instructed the jury that appellant's mental condition might have been considered in determining whether or not the appellant had the requisite intent for the crime of burglary; and if he had no such intent, the jury should have been instructed to return a finding of second degree murder. The trial court instructed the jury on the elements of first degree murder upon the theory of a killing committed during the course of rape or burglary. Appellant's contention is that if the specific intent required for burglary could not be formed by appellant, the jury could have found the killing was not committed during the commission of burglary and, thus, a finding of second degree murder would be required.

The State submits the issue was never raised before the lower court, and that since appellant did not advance such a contention before the trial court, he may not raise the issue for the first time on appeal. The record discloses that appellant's counsel at trial adopted an all or nothing position. Thus, counsel stated (R. 283) :

“Of course the offense is first degree murder no matter . . . in the instructions.”

No questions were asked by appellant, either of his own witnesses or those of the State, which related to whether the appellant could entertain the requisite intent to commit the crime of burglary. No instructions were requested from the court specifically calling the jury's attention to the weight of mental evidence on the intent element of burglary. The appellant cannot now for the first time contend that the trial court should have *sua sponte* instructed on an issue which was not raised nor any instructions requested thereon. It is stated in 41 C.J.S. Homicide, Sec. 414:

“The rule applicable in criminal cases generally, as discussed in Criminal Law §§ 1669-1700, that questions cannot be raised for the first time on appeal, together with the various subsidiary and detailed rules as to the necessity, as a condition precedent to the review of a particular matter, of first calling it to the attention of the trial court in some way as by motion, objection, or request for an instruction, and of excepting to the ruling of the trial court thereon and of assigning the alleged error as a ground of a motion for a new trial, is generally applied in homicide cases; and if error is not properly objected to in the lower court it is waived.”

Certainly, the defendant has the duty, where he relies upon an affirmative fact of exoneration, to prove that fact and raise that issue. *People v. Tidwell*, 4 U. 506, 12 P. 61 (1886). The failure of defendant to carry this burden in a homicide case precludes his claim of error. *People v. Rodriquez*, 182 Cal. 197, 187 P. 423; *People v. McCurdy*, 140 Cal. App. 499, 35 P. 2d 569; *Lee v. State*, 27 Ariz. 52, 229 P. 939.

In *State v. Thompson*, 110 U. 113, 170 P. 2d 153 (1946), this court expressly spoke against giving to a jury an instruction where no issue or evidence has been placed before them. The court stated:

“* * * We have repeatedly criticized the giving of abstract statements of the law to the jury, and held that it is the duty of the court to apply the law to the facts supported by the evidence and to not instruct on any question which is not involved in the case under the evidence.”

Certainly, where defense counsel has expressly stated that no issue of degrees of murder is involved, offered no instructions, took no exception to the failure to give an appropriate instruction, did not argue such a theory, and did not pattern his evidence so it would fairly raise the issue, the court has no duty to instruct the jury beyond stating the elements of the major offense. To compel such an instruction would place the trial judge in a dilemma, since he would have the admonition in the *Thompson* case to the contrary; and if he did instruct, a defendant, in a similar position as appellant, could contend that such action could cause a compromise verdict

to a lesser offense, whereas, otherwise, the jury may be disposed to acquit, and thereby raise an issue of error.

The trial court, in this case, did instruct the jury that a "specific intent" was needed in the crime of burglary (R. 443). Further, the jury was instructed that there had to be a union of act and intent (R. 448). If any additional specific instruction were needed, it was certainly incumbent upon the appellant to request it at trial. *State v. Cobo*, 90 U. 89, 60 P. 2d 952 (1936). His failure to do so must be deemed a waiver of any claim on appeal.

It is submitted that an additional reason indicates that the appellant consciously did not raise the issue of mental impairment as it relates to specific intent. The appellant requested an instruction from the court on the so-called Durham test. *Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954). It has been held by the Circuit Court for the District of Columbia that the partial responsibility test is not applicable in the face of the Durham test. *Stewart v. United States*, 94 App. D.C. 293, 214 F. 2d 879 (1954); *Stewart v. United States*, 275 F. 2d 617 (D. C. Cir. 1960).¹ It would, therefore, have been inconsistent with the position assumed by the appellant had the court so instructed. See *Mark v. State*, 236 Ind. 455, 141 N.E. 126 (1957) for recognizing the failure to raise a defense of mental abnormality on the basis of trial strategy.

It is submitted, therefore, that there was a waiver of any claim to an instruction on reduced responsibility.

¹ The court speaks of "diminished responsibility" but confuses "partial responsibility" with the concept. See Williams, *Criminal Law*, 2nd Ed., Gen. Part., Sections 172, 173.

**B. THE LEGAL THEORY OF PARTIAL
IMPAIRMENT IS NOT PROPER BECAUSE
THE EVIDENCE RELATING TO RAPE MADE
IRRELEVANT SUCH A THEORY.**

The theory upon which the instant case was submitted to the jury was upon the felony murder rule. The felony murder statute encompasses both a killing committed during commission of the crime of rape and that committed during burglary. Section 76-30-3, Utah Code Annotated 1953. Burglary may involve entering a building in the night time to commit rape. Section 76-9-2, Utah Code Annotated 1953. When the rape is actually consummated, two crimes have been committed, burglary and rape.

Rape does not require a specific intent, but rather only requires a general intent to commit the act. Thus, in *Walden v. State*, 178 Tenn. 71, 156 S.W. 2d 305 (1941), the Tennessee Supreme Court stated the general rule:

“In the crime of rape, no intent is requisite other than that evidenced by the doing of the acts constituting the offense [citing authorities].”

The court therein held intoxication to be no defense to a rape charge. This is supported by substantial authority. *McGuinn v. United States*, 191 F. 2d 477; *Smith v. State*, 38 So. 2d 347 (Ala.); *State v. Michel*, 225 La. 1040, 74 So. 2d 158; 44 Am. Jur., Rape, Sec. 40. In *State v. Mays*, 225 N. C. 486, 35 S.E. 2d 494 (1945), the defendant was charged with murder under the felony murder rule. The defendant contended that his mental deficiencies should be considered as to his capacity to deliberate or premed-

tate. The court noted that where a murder is committed in the course of rape, the mental issue short of insanity has no weight. The court stated:

“In this connection, we may note that the mental capacity of the defendant to deliberate and pre-meditate is not at issue. If he possessed sufficient sanity to enable him to commit the crime rape then he is legally responsible for the homicide that resulted.”

See also *Commonwealth v. Prenni*, 357 Pa. 572, 55 A. 2d 532.

It is submitted that when the intent to commit rape would be the element of burglary involved, and when the rape was in fact consummated, and an unlawful killing committed incident to rape, the intent aspect in burglary becomes secondary to the rape and specific intent is, therefore, immaterial.

If the homicide is committed during the *res gestae* course of rape, or incidental to the commission of rape, the felony murder rule is applicable. *MacAvory v. State*. 144 Neb. 827, 15 N.W. 2d 45 (1944) ; *Commonwealth v. Bolish*, 381 Pa. 500, 133 R. 2d 464. The evidence in the instant case clearly shows the commission of rape. Extensive vaginal damage and the presence of semen was noted by the pathologist, and the appellant's statement to the sheriff indicated he approached the deceased child with the thought of rape, and did in fact commit rape upon her. The appellant by his statement makes clear he was aware of his actions since he had to use his fingers to effect penetration. The fact that the appellant took

flight to escape also supports such a conclusion. This was corroborated by the psychiatrists who examined the appellant, since they testified to similar statements from the appellant. Based on this evidence, it is clear that the court, in instructing on burglary, granted the appellant a more favorable position than was necessary. It is submitted that when uncontroverted evidence of rape is shown, no issue of partial responsibility is involved since no issue of specific intent is involved. To so construe otherwise would place the jury in unnecessary confusion.

C. THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED OF APPELLANT'S IMPAIRED INTENT AT THE TIME OF THE OFFENSE AS WOULD REQUIRE THE COURT TO INSTRUCT ON THAT ISSUE.

The appellant presented no evidence to the court that would be sufficient to justify an instruction on the issue of an impaired ability to intend. Not one question was asked of any of the psychiatric or psychological experts who testified as to whether the appellant could harbor the specific intent to commit rape upon entering the apartment where Karen Mechling was baby sitting. The only evidence introduced that could even bear on the matter was that of Dr. Ija Korner, whose opinion was that the appellant had an impaired ability to control his impulses (R. 364). This conclusion was based on the results of psychological tests.² Dr. Korner testified specifically that he did not look to determine whether the appellant understood the "consequences of

² Dr. Korner stressed that he was functioning as a psychologist and was limiting his opinion to the results achieved from testing (R. 367, 383, 390, 392, 396, 401-402).

his acts," because it was not "part of my job." (R. 396) The only question asked of appellant's key defense witness as to appellant's comprehension of his act at the time, which would relate to his intent, was answered with a conclusion that no one except the appellant and his "Maker" could tell. Finally, in response to a hypothetical question, Dr. Korner said it was "possible" appellant could not control his actions. This conclusion would be insufficient to establish medical causation in a civil trial. *Salt Lake City v. Industrial Commission*, 104 U. 436, 140 P. 2d 844 (1943); *Chief Consolidated Mng. Co. v. Salisbury*, 61 U. 66, 210 P. 929 (1922). The psychiatric testimony was that the accused was only mildly mentally deficient, and the appellant's background and childhood did not indicate a total inability to comprehend.

It is submitted that the above-mentioned evidence was not sufficient to require the court to instruct on the issue of partial responsibility. In *State v. Van Vlack*, 57 Ida. 316, 65 P. 2d 736 (1937), the Idaho Supreme Court was faced with a contention that it should adopt the "partial responsibility" standard to reduce first degree murder to second degree murder. The court refused to hold it error to fail to give such an instruction. In the first instance, the court rejected the theory of the rule, but also noted that no evidence was before the court to show that the defendant could not form the requisite intent. The court held that mere testimony of "mental illness" as such was not sufficient to require submitting the case to the jury, since the jury should have evidence before them showing the "line of demarcation" beyond which a defendant's mental powers to intend would not

go. Having established such a requirement, the court stated:

“There are three reasons therefore why the requested instruction was properly refused. * * * no basis in law for a distinction between the mental ability to entertain deliberation and premeditation, and malice aforethought has been presented. * * * such line of demarcation was not and has not been pointed out in the evidence adduced by either party.” (65 P. 2d at 759)

Weihsfen and Overholser, *Mental Disorder Affecting the Degree of Crime*, 56 Yale Law Journal 959 (1947), at page 974, made note of this aspect of the *Van Vlack* case:

“A third reason put forth in *State v. Van Vlack* for rejecting the requested instruction was that there was no demarcation made in the testimony between ability to entertain malice aforethought or deliberation and premeditation. The medical evidence presented on behalf of the defense was that defendant did not know right from wrong, and suffered from a delusion and a maniac depressive form of insanity. There was no evidence and no standard by which the jury could determine whether defendant had that greater degree of mentality required to deliberate and premeditate.

“This was a point of evidence. The requested instruction was not supported by the evidence as summarized by the court. This ground was enough to support the decision * * *.”

Certainly, evidence merely meeting the tests of general insanity and evidencing some mental problem is not a sufficient showing to warrant the jury being instructed on the partial responsibility theory. Here, there was no

evidence before the jury demonstrating how the appellant could understand the nature and consequences of his act, know right from wrong, and adhere to the right, yet still have a total impairment of his intent to commit the act.

In *United States v. Storey*, 9 U. S. C. M. A. 162, 25 C. M. R. 424 (1958), the defendant was convicted of assaulting a military policeman in the execution of his duties. The evidence showed the accused entered a barracks and fired his weapon at the wall. He was ordered to leave and did so. An air policeman approached the accused to apprehend him. The air policeman ordered the accused to drop his weapon; instead, the accused advanced on the policeman and did not stop until the policeman had fired four warning shots. A psychiatrist testified that the accused was legally sane but was suffering from a “mental disorder” falling within the character and behavior group. He further testified that the accused’s ability to adhere to the right was impaired and he believed the offenses charged were largely the result of the mental condition. He also stated his belief that the accused’s ability to adhere to the right was impaired and degree of premeditation, intent, willfulness or malice required by the charges. The accused was convicted and on appeal attacked the law officer’s instructions to the court on the question of partial responsibility. The government admitted the instruction was inadequate, but submitted the evidence did not raise the issue or require such an instruction and, hence, the error was not prejudicial. The Court of Military Appeals affirmed the conviction, holding the issue of partial responsibility was

not validly raised. The court held that the evidence must raise an issue of a "total" inability to intend. It stated:

"In the instant case there is a complete absence of any evidence showing *lack of capacity to intend*, as distinguished from an *impaired ability to intend*. We conclude, therefore, that the issue of lack of mental capacity to intend was not raised and accordingly the law officer was under no duty to so instruct." (Emphasis added)

The court required more than impairment, but rather evidence of total inability to form the required intent. In *United States v. Gray*, 9 U. S. C. M. A. 208, 25 C. M. R. 470 (1958), the Court of Military Appeals had similar evidence before it with a claim that an instruction was required. The court again held the evidence insufficient to warrant instruction.

In *Commonwealth v. Markle*, 394 Pa. 34, 145 A. 2d 544 (1958), the appellant, convicted of murder in the first degree, contended that his mind was so "disordered" that he could not have formed the specific intent. The court noted:

"Markle contends that his mind was so disordered and confused that he could not have formed the specific intent to kill his wife. There is evidence indicating that appellant is emotionally and psychologically unstable. There is no contention or evidence of insanity. While we agree with the contention that appellant is not a normal man, we cannot agree that the appellant did not know what he was doing and thus had no specific intent to kill his wife.

"It is undisputed that immediately after the first shot, and again after the second shot, appel-

lant told Leidy that he had shot and killed his wife. He told James Barger, a State Policeman, less than two hours after the killing, that he fired the second shot to stop his wife from screaming and moaning. Moreover he told Gus Zanos, the arresting officer, less than thirty minutes after the killing that he had killed his wife and that he, 'would do it again if [he] had to.' Less than two hours after the killing, in response to a question of Constable Roy Bruner, he said it was none of Bruner's business why he had killed his wife. He also told Bruner, 'It is me [Markle] that is going to get the hotseat.' Finally in his written statement given less than seven hours after the killing, he stated that he remembered getting the gun and shooting his wife.

"A reading of the record indicates that John Markle, an emotionally unstable man, enraged by a slight scuffle with his wife, deliberately shot and intentionally killed her while fully conscious of his acts.

"Markle contends that this killing could not rise higher than murder in the second degree because he had a life-long history of emotional instability; he was a heavy drinker; he was discharged from the Army because of psychoneurosis; he is a constitutional psychopath; from earliest childhood, he was never able to get along with his family; he severely bumped his head during childhood (as does every American boy); he attended twenty-seven different schools in eight years and could not finish the eighth grade, he married a girl who was only fourteen years old; he struck his wife several times; he had great difficulty in keeping a job and changed jobs frequently. Assuming that all of this is both accurate and true, it would not be legally sufficient to justify a finding by the trial judges of second degree murder. *A fortiori* it is

not legally sufficient to warrant a finding by this Court of abuse of discretion, or error of law, or any error that would justify a reduction of the crime to second degree murder.”

The evidence in the instant case is not as compelling as that in *Markle*, which the court held would not justify a finding of second degree murder. If such evidence would not justify a finding, it would not justify an instruction on the issue where the evidence is less compelling. Especially would an instruction be out of order where the evidence was not of such definition as to allow a jury to meet the issues.

The evidence in the instant case was certainly not couched in terms of impaired intent nor was it sufficient, in view of the above cases, to raise an issue as to the appellant’s ability to intend. Finally, the only evidence suggestive of the issue was of a possible impaired ability to control impulses, not a total inability to intend. This evidence was based on psychological tests. In *Stewart v. United States*, 275 F. 2d 617, 624 (D. C. Cir. 1960), the court that promulgated the *Durham* test refused to recognize partial responsibility where the evidence of impairment was based on psychological tests. The court noted:

“The concept relies essentially on intelligence tests which are acknowledged by responsible psychologists and psychiatrists to be guides not absolutes in determining true intelligence or mental capacity of a human being. The results of these tests can vary materially depending on the education, training and environment of the subject. Guttmacher and Weihofen state: ‘The authors are

in agreement with the general view of psychiatrists that at no time does the intelligence test, or any other psychological test, alone establish the diagnosis. They are ancillary devices of the greatest value, but they cannot replace sound clinical judgment.' Guttmacher & Weihofen, *Psychiatry and The Law* 179 (1952).''

It must, therefore, be concluded that even if the concept were sound in the present case, the posture of the evidence did not warrant its application.

D. THE DOCTRINE OF "PARTIAL RESPONSIBILITY" IS NOT COMPATIBLE WITH PSYCHIATRIC REALITIES NOR THE LEGAL TESTS OF INSANITY AND SHOULD NOT BE APPLIED IN CASES OF THIS NATURE.

The appellant as a basic premise to his contention argues that a mental condition short of insanity may be considered by the jury in determining whether an accused could form any specific intent required in the commission of the crime. It is submitted by the State that even if there were not evidence of rape in this instance, thus vitiating the need to consider the burglary claim, the law should not be extended to encompass such a theory.

The appellant relies upon *State v. Anselmo*, 46 U. 137, 148 P. 1071 (1915), and *State v. Green*, 78 U. 580, 6 P. 2d 177 (1931), to support an application of his theory to burglary. The *Anselmo* case primarily concerned itself with the question of intoxication and epilepsy as they may have inhibited the defendant in being able to premeditate where the killing was committed in a hurried or

excitable state.³ The case does not support an extension to non-homicide crimes, nor does it support a claim that any mental condition may be weighed in considering the ability to specifically intend a crime where there is no evidence of excitable or distracting circumstances that would warrant concern as to whether a person could form the required intent. No such circumstances are apparent in this case. In *State v. Green*, supra, the question of mental condition as it affected the ability to reflect and premeditate was mentioned. The reference to the theory was dicta since the case was reversed, adopting the “irresistible impulse” rule. In neither case did the court concern itself with an analysis of whether such a theory should apply to lesser offenses, nor did it analyze the theory to see as it was otherwise consistent with the theories of mental responsibility.

To the degree that *Anselmo* and *Green* may relate to the ability to premeditate during an excitable or emotional situation, they are not relevant to the instant case. It is submitted by the State that they should not be applied beyond the above limitation, and that the theory of partial responsibility is not reasonably consistent with the test of insanity applicable in this State.

The doctrine of partial responsibility has been rejected by the majority of the courts and jurisdictions that have considered the matter. *Fisher v. United States*, 328 U. S. 463 (1946); Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 Yale Law

³ It is doubtful whether present medical knowledge would support a claim that epilepsy would impair a premeditation in the absence of evidence of the killing occurring during a fugue. Davidson, *Forensic Psychiatry*, p. 20 (1952).

Journal 959 (1947), p. 965. It is submitted that where the test for insanity requires that the accused know the nature and quality of his acts, know right from wrong and be able to adhere to the right, that it is ludicrous to say that a person could meet all these standards and yet be totally unable to form the required intent. Especially is this so in the case of using the absence of specific intent in burglary to reduce a case to second degree murder. In *State v. Russell*, 106 U. 116, 145 P. 2d 1003 (1944), this court said that in second degree murder, there need not be a specific intention to kill, but a premeditated design to cause great bodily harm or the doing of an act *knowing* that the reasonable and natural consequences thereof are likely to produce great bodily harm. Therefore, if appellant's theory were correct, the jury could find that appellant could not form the specific intent necessary in burglary, but he could form a premeditated design to cause great bodily harm, or know the consequences of his act were likely to produce such results. Such legal compartmentalization of the mind is a clear absurdity. In *Commonwealth v. Heidler*, 191 Pa. 375, 43 A. 211 (1899), the Pennsylvania court rejected such an absurdity, noting:

“To say that a man is insane to an extent which incapacitates him from fully forming an intent to take life, yet enables him to fully and maliciously form an intent to do great bodily harm without a purpose to take life, is absurd, for the one involves the same test of responsibility as the other, the ability to distinguish between right and wrong.”

See also *State v. VanVlack*, 57 Ida. 316, 65 P. 2d 736 (1937).

Additionally, the theory advanced by appellant contemplates a division of intents, both specific and general, not for legal classification, but a for weighing against the mental capacity of the accused. This is, of course, a psychiatric absurdity. Weihofen and Overholser, *supra*, 56 Yale L. J. at 978. Where the defendant is fully incapable of forming the "intent" to act, he obviously cannot adhere to the right or comprehend the nature and quality of his actions, and should be acquitted. Williams, *Criminal Law*, 2 Ed. General Part (1961), comments on the practical realities of such a theory by noting:

"* * * Although the argument is technically sound, it appears, at least on the English view, to have small practical importance as applied to insanity. In practice the prosecution will nearly always indict for the graver offence; generally the accused, if he was insane at the time of the act, will have to raise the defence of insanity if he is to avoid conviction; and the result of so doing will (or should) be a verdict of insanity. No question arises therefore of convicting him of a lesser offence." (Section 172 at page 540.)

The appellant contends that the Royal Commission on Capital Punishment (Gower Report) supported the adoption of such a theory by the English Parliament in the Homicide Act of 1957. This confuses what was in fact adopted by Parliament in the Homicide Act. It was a concept of "diminished responsibility" not based on a failure of the accused to meet the guilt or innocence tests, but reducing culpability because criminal justice and "equity" require a reduction from the maximum punishment where it would not be carried out anyway. It is

based on a diminished responsibility as to *all* elements of the crime. Williams, *supra*, page 541, Sec. 173. This would require legislative action rather than a judicial action. Mueller, *Criminal Law and Administration*, 1960 Annual Survey of American Law, p. 107-8. *Infra* page 33.

Substantial criticism has recently been directed towards the feasibility and the logical basis of the limited responsibility tests. *United States v. Stewart*, *supra*; 43 Cornell Law Quarterly 283 (1957). The general attack takes two forms: (1) That the test is adequately encompassed in the general instructions on insanity; and (2) that the psychiatric experience has not justified a distinction between being able to meet one mental standard and not another when both involve the same psychiatric realities. It is noted in 43 Cornell L. Q. 283 at page 284:

“It is conceded by psychiatrists that the bearing of a mental disorder on the crime committed is not something which can be determined with any degree of precision; the most that can be expected is an estimate concerning the probability of connection between the crime committed and mental condition * * *. The psychiatrist obviously would serve only to confuse the jury by testifying in medical terms usually unintelligible to a lay juror.”

It is submitted that any extension of the partial responsibility tests should await a more thorough investigation, and should at least be logically consistent with allied legal principles and with medical science.

Finally, two reasons of a pragmatic nature, militate against the acceptance of the appellant's position in

Utah. First, if appellant's contention were deemed correct, in the case of a specific intent crime in a felony murder case, the presence of mental impairment under appellant's theory would reduce the degree of murder to second degree. However, under the *Green* case, supra, if the murder were charged as occurring with premeditation and not as a felony murder, the presence of impaired mentality may reduce the degree to manslaughter. This would create an inconsistency not based on reality. Secondly, Utah has no statutory scheme to "treat" people who may be found to suffer from diminished responsibility. Such persons would be handled like regular prisoners which defeats much of the purpose for the application of the doctrine. Silving, *Criminal Law of Mental Incapacity*, 53 Jnl. of Criminal Law, Criminology and Pol. Sci. 129 (1962).

It is, therefore, submitted appellant's theory should be rejected.

POINT II

THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S REQUESTED INSTRUCTION EMBODYING THE SO-CALLED DURHAM RULE, SINCE:

A. THE REQUESTED INSTRUCTION WAS INCONSISTENT WITH OTHER INSTRUCTIONS REQUESTED BY THE APPELLANT.

B. THE INSTRUCTION WAS NOT PROPER UNDER THE LAW OF THE STATE OF UTAH, AND NO BASIS FOR CHANGING THE PRESENT RULE EXISTS.

**C. THE LEGISLATURE ALONE MAY PRE-
SCRIBE A NEW RULE OF CRIMINAL
RESPONSIBILITY AT THIS TIME.**

* * * * *

**A. THE REQUESTED INSTRUCTION WAS
INCONSISTENT WITH OTHER INSTRU-
CTIONS REQUESTED BY THE APPELLANT.**

The trial court is under no obligation to give an instruction that would be inconsistent with other instructions or mislead or confuse the jury. *State v. Erwin*, 101 U. 356, 120 P. 2d 285 (1942); Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 663. The appellant in his request for additional instructions made a request embodying the M'Naghten rules with the irresistible impulse theory which was given in part by the court (R. 60, etc., Document Folder) Instructions 10 and 14.

Instruction No. 12, also requested (R. 62), embodied the *Durham* test, which is inconsistent with M'Naghten. Further requested Instruction No. 13 was inconsistent with both theories. It does not appear from the record that such instructions were proposed in the alternative. It is submitted, therefore, that the trial court, having been deluged with various theories, some inconsistent with the others, could properly refuse the requests on this basis.

**B. THE INSTRUCTION WAS NOT PROPER
UNDER THE LAW OF THE STATE OF
UTAH, AND NO BASIS FOR CHANGING THE
PRESENT RULE EXISTS.**

In the case of *State v. McWhinney*, 43 U. 135, 134 P. 362, this court adopted the M'Naghten rules for deter-

mining legal responsibility in cases of claimed insanity. The standard set out by the judges in *M’Naghten’s Case*, 10 Clark & F. 200, 8 Eng. Reprint 718 (1843), is simply stated:

“To establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.”

In *State v. Green*, 78 U. 580, 6 P. 2d 177 (1931), this court added to the basic structure of the M’Naghten formula the so-called “irresistible impulse” test, which simply requires that in addition the accused must be able to adhere to the right. This has been the applied rule in Utah since that time. Appellant would now ask the court to abandon its previous test in favor of the rule laid down in *Durham v. United States*, 214 F. 2d 852 (D. C. 1954), wherein the court stated:

“* * * an accused is not criminally responsible if his unlawful act was the *product* of mental disease or defect.” (Emphasis added)

It is noteworthy that the Durham court did not define any of the terms it used as a basis for its test. Indeed, the District of Columbia Circuit had some difficulty defining what was meant by the term *product* as used in the rule, *Carter v. United States*, 252 F. 2d 608 (1957), and substantial difficulty in defining what was meant by disease. *Blocker v. United States*, 288 F. 2d 853 (1961). In *State v. Kirkham*, 7 U. 2d 108, 319 P. 2d 859 (1958), this

court took a detached look at an instruction embodying the right and wrong test plus the irresistible impulse rule, and concluded that the instruction was the proper test to be applied in Utah. The court was aware of the Durham rule, but even so approved the standard of *State v. Green*, *supra*, saying:

“In our opinion, the subject instruction, approved in *State v. Green*, strictly from the standpoint of what is most favorable for the accused in a criminal case, is one of the most liberal that can be found in the country. Reading it as we do, without indulging fine distinctions between legal and medical terminology — frequently misunderstood or not understood by laymen — and without espousing the philosophy advanced by some that the question of insanity should be taken from the jury and vested in professional people, we believe such instruction to be the embodiment of almost all of the approved instructions on the subject which have been sired by M’Naghten’s case (the so-called right and wrong test), *State v. Pike* (no legal responsibility if the act is the product of mental disease), *People v. Schmidt* (no legal responsibility if the accused did not know the act was wrong morally), *Durham v. United States* (no legal responsibility if the act is the product of mental disease or mental defect), and what we believe to be the most recent case on the subject, *State v. Collins* (right and wrong test representing the great weight of authority). In these cases is found a wealth of authority practically exhausting the arguments that perennially are presented in the continuing debate among professional men as to what test properly should be applied in determining guilt or innocence where the factor of mental disturbance of one degree or another is involved.

“The instruction we espouse, set out above, pretty much represents a reflection of both facets of the M’Naghten jewel, satisfied the eminent Mr. Justice Cardozo’s eruditely expressed preferences in the Schmidt case, should satisfy the classmates of the irresistible impulse school, and even should not be too offensive to the Durham rule advocates.”

Certainly, the *Kirkham* case can be claimed for the proposition that Durham has no place in Utah. Durham has not found support in other jurisdictions either. Recently, in *Case v. State*, 369 P. 2d 997 (Alaska 1962), the Alaska Supreme Court was urged to abandon M’Naghten the court noted that the Durham rule had been rejected in “three federal courts of appeal, the United States Court of Military Appeals, and the highest courts of twenty states.” With this in mind, it is submitted that there is no basis that would warrant the State of Utah in adopting the Durham rule. Certainly, the Durham case has many defects, but the major reasons for rejecting its adoption were summed up in the *Chase* opinion, where the Alaska court said :

“We are not persuaded to adopt Durham in this jurisdiction. The ‘disease-product’ test has no real meaning to us, and we venture to say, would have none to jurors who would apply it to the facts nor to the judges who would frame instructions. The terms ‘mental disease’ and ‘mental defect’ are not defined, and hence they would mean in any particular case whatever the experts say they mean. A further difficulty is that the psychiatrists disagree on what is meant by ‘mental disease,’ or even if there is any such thing. We shall not impose upon the trial courts

and jurors the formidable, if not impossible task of understanding and applying terms whose meaning is unclear to acknowledged experts.

“We fully recognize the great difficulty in many cases of ascertaining the mental condition of an accused and of assessing its effect on his conduct at the time of the commission of the criminal act. It is difficult because the criterion of responsibility cannot be defined with complete scientific precision; psychiatric evidence is technical and complex, and diametrically opposed views will frequently be expressed by expert witnesses. Because of these factors we consider it important that the jury, which must make the final decision as to criminal accountability, should be given as far as possible clear and simple principles on which to base their verdict. Such is not accomplished by the Durham rule.”

Although Durham received much comment and acclaim upon promulgation, the operation of the rule in practice and subsequent reflection of the premises upon which it is based have led many authorities, apart from the courts, to renounce its doctrine. Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 Catholic U. L. Rev. 25 (1955); 116 Am. J. of Psychiatry 295 (1959); Mueller, *Criminal Law and Procedure*, 1959 Annual Survey of American Law 111, 112-113. Further, one of the strongest blows of all against the Durham rule came in *Blocker v. United States*, 288 F. 2d 853 (D. C. Cir. 1961), wherein Justice Burger of the Court of Appeals of the District of Columbia called for abandonment of the Durham rule.⁴ Judge Burger found two principal defects in

⁴ Congress may well concur since H. R. 7052, 87th Cong., 1st Sess. 1961, proposed the adoption of the A. L. I. test rather than continue under Durham. See also H. R. Rep. 563, 87th Cong., 1st Sess. (1961).

the rule: (1) That the definition of "disease" was inadequate;⁵ and (2) that the concept of "product" was without significant meaning.

Probably the most telling argument against its adoption comes by virtue of the judges of the many courts who have rejected the test. In *State v. Collins*, 50 Wash. 2d 740, 314 P. 2d 660 (1957), the Washington court concluded that they should:

"[be] concerned * * * not only with what psychiatrists and writers for legal periodicals believe the test should be, but with what trial judges * * * believe would be the effect of any change."

Washington most recently reaffirmed the M'Naghten rule, *State v. White*, 374 P. 2d 942 (Wash. 1962).

Certainly, therefore, the weight of authority, as well as reason, rejects adoption of Durham. It was stated by Mueller & Pieski, *Criminal Law and Administration*, 1961, Annual Survey of American Law, 107, at 113, in commenting on a statutory adoption of Durham in Maine:

"The good people of Maine may not know it, but they bought last decade's fashionable wardrobe. Really modern judges, legal scholars and advanced psychiatry have long shed Durham's ill-fitting toga and returned to fitting and sensible patterns."

Appellant has further called to the court's attention the recent American Law Institute proposal in the Model

⁵ For a most compelling case in argument for the conclusion that mental disease means only what the psychiatrist says it does, see *In re Rosenfield*, 157 F. Supp. 18 (1957).

Penal Code. It suffices for this case to note that the test was not passed on by the trial court. *Kevosek v. State*, 8 Wis. 2d 640, 100 N.W. 2d 339 (1961). However, many of the ambiguities of the Durham test are equally apparent in the Model Penal Code, Weihofen *The Urge to Punish* (1956), p. 63-98, and more courts are declaring the question of the adoption of the Model Penal Code rule to be one of legislative discretion and not for the courts. *People v. Johnson*, 13 Misc. 2d 376, 169 N.Y.S. 2d 217 (1962). Until such time as the knowledge of mental problems reaches a point where it can be shown that the rule in *Green* and *Kirkham* should be replaced, these cases should still control. *People v. DeFrancesco*, 20 Misc. 2d 854, 193 N. Y. S. 2d 963 (S. Ct. 1959). The most compelling argument, it is submitted, for continuing the present Utah standard is that the ultimate judgment is not medical but moral, and the present tests adequately balance both aspects.⁶

*C. THE LEGISLATURE ALONE MAY
PRESCRIBE A NEW RULE OF CRIMINAL
RESPONSIBILITY AT THIS TIME.*

It is submitted by the State that this court is, at the present time, interdicted by statute from accepting the Durham rule or any other test recently promulgated. Section 68-3-1, U. C. A. 1953, provides:

“The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States, or the Constitution or laws of this State, and so far only as it is

⁶ Silving, *supra*, 53 Jnl. Criminal Law, Criminology and Pol. Sci. 129 (1962).

consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state.”

The rule of common law that would be applicable under this statute would be the common law as it was generally conceded to be at the time of the adoption of the above statute. R. S. 1898, Sec. 2488; *Hatch v. Hatch*, 46 U. 116, 121, 148 P. 1096. As a consequence, the general M’Naghten rules would be applicable to Utah unless they were inconsistent with the “necessities of the people” of Utah. It is not now a question of concern whether the court met this issue in *State v. Green*, supra, when it adopted the irresistible impulse test; however, this statute is presently applicable to the criminal law of the state. *Oleson v. Pincock*, 65 U. 507, 251 P. 23; *State v. Johnson*, 44 U. 18, 137 P. 632; *State v. Dean*, 69 U. 260, 254 P. 142. This court would only be justified in abandoning the M’Naghten plus the irresistible impulse rule if it could be shown that they were improper because of changed conditions, or unsuitable as being too “harsh” or rigorous. *Hatch v. Hatch*, supra. It is submitted that no such finding is possible. This court rejected as much of a suggestion in the *Kirkham* case, supra. Certainly, the moral judgment implicit in the present Utah test can hardly be said to have been rejected by the times, nor can it be said to be inapplicable to the needs of the citizenry. For this reason, it is submitted that, for the present time, any change in the standard of criminal responsibility should await legis-

lative action. *People v. Johnson*, 13 Misc. 2d 376, 169 N. Y. S. 2d 217 (1962).⁷

POINT III

THE APPELLANT HAS NO BASIS UPON WHICH TO CLAIM ERROR FROM THE SUMMATION ARGUMENT OF THE TRIAL PROSECUTOR.

The appellant contends that the actions of the prosecutor for the State, in making his summation, were prejudicial to his rights. It is submitted that this contention is wholly without merit. The import of the appellant's contention is twofold. It is contended, first, that there was placed before the jury a personal belief of the accused's guilt and, second, that the "personal" references of the prosecutor were of such a nature as to incite the passions and prejudices of the jurors.

The first contention is based on the statement appearing on page 451 of the record, set out on page 28 of appellant's brief. The essence of the statement is that all of the public officials associated with prosecution and investigation of the crime had no doubt that they "were trying the right man." This reference in no way takes from the jury the sole issue before it of the accused's mental responsibility. It is merely a clear statement of fact that there is no doubt that the appellant committed the killing. The statement of the prosecutor was no more than the same statement made by

⁷ It might also be noted that even were this court to adopt a different standard of insanity, it could avail the appellant nothing, since the evidence supports exculpation under neither Durham or the A.L.I. standards.

the defense counsel to the jury during opening argument (R. 287):

“There is no question, ladies and gentlemen, that the tragic and unfortunate thing has occurred, occurred over in American Fork on or about the 17th of September. I don’t think there is any question but what Darrell Devere Poulson, the defendant in this action, was a *cause* of this unfortunate and tragic occurrence.”

Additionally, defense counsel stated on closing argument that, “The crime was a terrible thing.” (R. 459) The crime was a terrible thing and it is absurd to say that when a prosecutor merely comments to the jury that the accused is the person responsible for the crime, a fact admitted during the course of the trial by both sides, there has been any forensic error committed. The facts of this case in this respect are not different from those in *State v. Jameson*, 103 U. 129, 134 P. 2d 173 (1943), where the court found a similar argument unobjectionable. A prosecuting attorney has reasonable latitude in commenting to the jury on what is in fact a matter of uncontradicted evidence. Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 651. There can, therefore, be no serious claim of error on this point.

The second contention, that the prosecutor’s comments, relating to the fact that he was familiar with the incident and area where the crime occurred, were error, is equally without merit. This statement must be placed in the context in which it was given. A clear reading of the statement on page 452-3 of the record in no way shows that because of these references, he was ask-

ing the jury to take any action against the defendant. It clearly appears that he was calling to the jury's attention the fact that his argument may be biased by the fact that he was so close to the case. The statement was obviously made in complete candor in order to have the jury weigh the facts which he was then about to disclose. The statement, far from being legally objectionable, is to be commended, for it is well that a prosecutor call to the attention of the jury circumstances in his background that may affect the weight of his argument. It is unfortunate that appellant has sought to twist this commendable action into a claim for prejudice when, in fact, it benefitted rather than injured his position.

The appellant contends that a portion of the prosecutor's argument, to the degree that it refers to the horrible nature of the crime and the damage committed by the appellant, is inflammatory. It should be remembered that this case was a capital case in which, under Utah procedure, the jury determines whether or not the defendant must be put to death. It, therefore, is fully proper for a prosecutor to weigh for the jury all the community and social aspects of the crime, for these are matters very much a part of the question of whether the defendant should pay with his life.⁸ The reference in this instance was to the sorrow caused the relatives and family of the victim. In *State v. Zakoura*, 145 Kan. 204, 68 P. 2d 11, 16 (1937), the Kansas Supreme Court considered a similar claim of error in a murder case where the prosecutor stated:

⁸ No more liberal person than Emmanuel Kant, the great German philosopher, espoused the same reasoning as a basis for criminal punishment.

“* * * ‘Gentlemen of the jury, as you go to the jury room, think of that little grave down here in the cemetery. * * * Let’s not forget the sorrowing sisters — let’s not forget the sorrowing relatives of the deceased.’ ”

The Kansas court found the statement to be far from prejudicial, noting that it must be clearly shown that the statement was likely to prejudice the jury. At the worst, it can be said the statement of the prosecutor was an appeal to the sympathy of the jury, but this is not a basis to claim error; for, a prosecutor, like a defense counsel, may comment on all matters affected by the crime, and sympathy for the deceased and those injured by the crime is one of them. Abbott, *supra*, Sec. 655. Certainly, in a capital case, the jury has a right to hear from both sides on the merits of inflicting the death penalty and not merely be limited to receiving bland platitudes of mercy from the defendant.

The appellant contends that the comments of the prosecutor were in fact personal references to a belief of guilt or innocence. Such, they were not. They were merely a deduction of fact from all the evidence and, therefore, not objectionable. The general rule recognized in this area is stated in Wharton’s *Criminal Law and Procedure*, Vol. 5, p. 246:

“* * * It is generally held, accordingly, subject to certain exceptions, that statements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt of the accused, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible and unobjectionable.”

This court has recognized the general rule to that effect in *State v. Martinez*, 56 U. 351, 191 P. 314 (1920), also a murder trial. There the court said:

“Defendant also excepts to a statement made in the argument to the jury by one of the state’s counsel who tried the case to the effect that ‘this man (meaning the defendant) committed one of the gravest crimes ever committed in the state of Utah.’ This was simply a statement of counsel’s opinion made in the course of argument. Counsel had the right to state his conclusions from the evidence even though his conclusions were wrong. There was no error in this regard.”

See also *State v. Spencer*, 15 U. 149, 49 P. 302 (1897), for a case of much more severe comment, wherein this court refused to reverse. See also cases collected in 50 A.L.R. 2d 766.

Certainly, the prosecutor made no such objectionable statement as that made by defense counsel, which is directly contrary to the Canons of Ethics of the American Bar Association, Canon 15, when he stated (R. 470), “I am firmly convinced, myself, of the insanity of this boy.”

Finally, the appellant certainly cannot complain where he failed to take exception or render an objection to the argument. *State v. Romero*, 12 U. 2d 210, 364 P. 2d 828 (1961). The general rule is noted in Warren, *Homicide*, Vol. 4, p. 366:

“As a general rule, improper conduct, argument, or statements by the prosecuting attorney at a trial for homicide will not, in the absence of objection or exception at the trial, be available on appeal or error.”

See also Wharton's *Criminal Law and Procedure*, Sec. 2079; Abbott, *Criminal Trial Practice*, 4th Ed., Sec. 649; *People v. Hardenbrook*, 48 Cal. 2d 345, 309 P. 2d 424; *State v. Spears*, 76 Wyo. 82, 300 P. 2d 551. Indeed, the strongest reason in favor of concluding that no prejudice occurred to the appellant from the prosecutor's argument was the failure of experienced and capable counsel to object, move to strike, move for mistrial, or ask for limiting instructions. This obviously leads to the belief that the prosecutor's argument was thought to be innocuous by defense counsel.

CONCLUSION

The appellant has been accorded a full and fair trial; the issues raised on appeal afford no basis for relief; nor do they raise matters of such a nature as would warrant this court in ordering a retrial. The appellant has committed a horrible and bestial crime, but the processes of the law have been steadfastly accorded him. Having received his days in court, having been found guilty by a fair and impartial jury of citizens, and no error having been committed that would warrant reversal, this court should affirm and the appellant pay for his crime with his life.

Respectfully submitted,

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