

1965

State of Utah v. Lewis Elmer Frayer : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

— vs —

LEWIS ELMER FRAYER, alias

WILLIAM CLIFFORD LYNN,

Defendant-Appellant.

Case No. 10175

BRIEF OF RESPONDENT

Appeal from the Judgment of the
2nd District Court for Davis County
Honorable Thornley K. Swan, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

— vs —

LEWIS ELMER FRAYER, alias

WILLIAM CLIFFORD LYNN,

Defendant-Appellant.

Case No. 10175

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant Lewis Elmer Frayer, alias William Clifford Lynn, appeals from his conviction of the crime of second-degree murder in the District Court of Davis County, State of Utah.

DISPOSITION IN LOWER COURT

The appellant Lewis Elmer Frayer was charged with the crime of first-degree murder. Jury trial was had in the District Court of the Second Judicial District, Davis County, State of Utah, and the jury returned a verdict of guilty of murder in the second degree. The appellant was committed to the Utah State Prison for the indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

The respondent State of Utah submits that the appellant's conviction should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts.

The appellant Lewis Elmer Frayer, alias William Clifford Lynn, was charged with the crime of first-degree murder in that it was alleged that he murdered Louis Sylva Garcia on or about the 7th day of July, 1963, at Centerville, Utah.

Richard Engstrom, a student at the University of Utah, met the appellant at the Streamliner Lounge on Redwood Road in Salt Lake City, Utah, on Sunday, July 7, 1963 (Tr. 57). The appellant requested Engstrom to give him a ride to Salty's Lounge (Tr. 58). As the two were riding in Engstrom's car, the appellant indicated that he wanted to smoke but said that he had no matches. Engstrom told him there were some in the glove compartment. Whereupon appellant opened the glove compartment in Engstrom's car and found a .22 caliber Rueger semi-automatic pistol (Tr. 58-59). The appellant stated that he knew of a dance that was supposedly taking place in Evanston, Wyoming, and suggested that he and Engstrom go there (Tr. 60, 519). The appellant and Engstrom then went to Salty's Tavern and purchased some beer (Tr. 6). The appellant, when they stopped at Salty's Tavern, grabbed the ignition keys to Engstrom's car and kept them in his possession throughout the evening except when it was necessary to give them to Engstrom to operate the vehicle (Tr. 60).

The pair proceeded to Evanston, Wyoming, and on the way stopped at the Skyline Cafe in Summit County, Utah,

for gasoline. The pumps were closed and they went inside the cafe (Tr. 61-62). Two waitresses who were in the cafe told the appellant that the pumps to the gas station were locked and that the attendant was not around. The appellant indicated that he would shoot the locks off the tanks (Tr. 62, 95). The waitresses advised him that he could obtain gas at Kimball's Junction and he then left in the company of Engstrom (Tr. 62).

In the area of the Wanship Dam, the appellant asked Engstrom to pull over to the side of the road and then asked Engstrom to perform a homosexual act with him and Engstrom refused (Tr. 62). When the pair reached Coalville, the appellant became ill and vomited. However, they continued into Evanston (Tr. 63).

The appellant advised Engstrom that he had killed two people before and had not been caught (Tr. 63).

In Evanston, the pair could not find the dance and after looking unsuccessfully for a house of prostitution, they started back toward Salt Lake City (Tr. 63). They again stopped at a cafe where the appellant purchased some fire crackers. He bought one pack and stole three (Tr. 64).

Thereafter, they proceeded down the road and then stopped at the side of the road. The appellant jumped out, grabbed the keys to the car and pulled Engstrom's pistol from behind his back and started firing some shots into the side of a mountain (Tr. 64). The gun jammed but the appellant was able to unjam the gun and place another shell into the chamber. He then fired some shots close to Engstrom, towards the ground (Tr. 65). He then turned the gun towards Engstrom's stomach and pulled the trigger (Tr. 66). Engstrom asked the appellant why he wanted to kill him and the appellant said that he did not want to kill him because the latter was his friend (Tr. 66). They

got back into the car and started toward Salt Lake City. The appellant still had the gun in his possession (Tr. 67). Engstrom told appellant to put the gun back in the glove compartment. The appellant opened the glove box and asked Engstrom if there were more shells. Appellant observed additional bullets in the glove box, including .22 caliber shorts. The appellant grabbed the box of shells and Engstrom told him they would not work in the gun. Engstrom said that the gun had to be cocked each time a .22 short was fired and it would not work automatically. Thereafter, he heard the glove-box door slam and assumed that the appellant had replaced the gun. Engstrom grabbed some of the shells from the appellant and threw them away (Tr. 68). Engstrom was certain the appellant did not give him all the shells taken from the glove box.

On the way between Ogden and Farmington, near Hill Air Force Base, the appellant observed a blue Ford Falcon at the side of the road with a middle-aged woman asleep inside. The appellant said that this was his aunt and that she had probably stalled. He asked Engstrom to make a U-turn to find her. They parked side by side with the Falcon automobile and the appellant indicated that it was not his aunt's car (Tr. 71). Thereafter, they started back toward Salt Lake City and as they neared a radio station, past Lagoon, the appellant observed a 1958 orchid-colored Oldsmobile. Appellant told Engstrom that this car was his uncle's and that his uncle would take him home (Tr. 72). Engstrom noticed the car had Missouri license plates and advised the appellant. The appellant said it was still his uncle's car and that his uncle "traveled a lot." Engstrom did not believe him but was happy to get rid of him. Engstrom let the appellant out at the car and drove home. When he got home, there was no gun (Tr. 72-73).

The 1958 Oldsmobile was owned by Barbara Haarman. Mrs. Haarman was a twenty-two year old divorcee and was in the company of Louis Garcia and Rocky Bierschwal (Tr. 25). They had arrived in Ogden from Idaho on July 5th. Garcia and Bierschwal were musicians. Garcia was able to obtain employment from the Flare Club in Ogden on the nights of July 5th and 6th (Tr. 26-28). On the night of the 6th of July, or the morning of the 7th, Garcia, Mrs. Haarman and Bierschwal started toward Salt Lake. They purchased some baloney sandwiches and finally stopped by the side of the road near Parish Lane in Davis County because they were sleepy.

The next thing Mrs. Haarman recalled, he awoke and saw the appellant holding a gun (Tr. 28). Bierschwal was cleaning out part of the back seat. The appellant then put his hand up Mrs. Haarman's dress, at which time she called for assistance from Mr. Bierschwal (Tr. 29). Bierschwal then grabbed the appellant and hit him with a stick and told him to get going. Appellant said that he wanted his gun back. In the meantime, Mrs. Haarman shook Garcia but could not awaken him (Tr. 30). The appellant came back with a board and demanded his gun and said he would hit Bierschwal with the board if he didn't give him back his gun. Bierschwal then checked the gun to see if it was empty and then returned it to the appellant. The appellant stated that the only thing he wanted was a ride to Salt Lake.

Bierschwal testified that the first time he saw the appellant, the appellant was in the car with a pistol in his hand (Tr. 46-47). Bierschwal said that the appellant said that the gun was not real and that appellant indicated that he just wanted to sleep and get a ride to Salt Lake City. Bierschwal said that he had then fixed a place for him in the back seat. When he started to arrange a place for the

appellant, he heard Mrs. Haarman call out and observed the appellant trying to get on top of her (Tr. 48-49). Thereafter, the incident of Bierschwal striking the appellant with the stick and the appellant coming back to get his gun occurred. Bierschwal told the appellant he would give him a ride into Salt Lake City after he calmed down (Tr. 51). According to Bierschwal, the appellant appeared intoxicated or high when he first saw him (Tr. 55). At this time, it was noticed that Garcia had a spot of blood on his face, apparently coming from his nose (Tr. 31-32, 53). They started to drive into Salt Lake and stopped at a filling station where they moistened a rag and wiped Garcia's nose and head (Tr. 53, 88). Thereafter, they drove to St. Mark's Hospital and Bierschwal went into the hospital to obtain a doctor (Tr. 54). When he returned, the appellant was gone and Mrs. Haarman said that the appellant had stated that he had to find a restroom and left (Tr. 34).

Garcia died at approximately 5:00 a.m. at the St. Mark's Hospital from a .22 caliber bullet wound in the head (Tr. 54, 130-131).

Engstrom read about the killing in the newspaper the next day, advised his parents, and the police were called (Tr. 76-77).

Officer Wade Robinson testified that he made a latent fingerprint search of the 1958 Oldsmobile and removed several prints from the automobile (Tr. 96-99). He identified some of these prints as belonging to the appellant (Tr. 106).

The Davis County Sheriff's office sent deputy sheriffs to Salty's Tavern, based upon Engstrom's assistance, and there obtained an identification from the bartender that appellant frequented the bar. On July 9th, appellant was ap-

proached at Salty's Bar. He gave the officers the name of Clifford Lynn. He was then taken and placed in a lineup where he was identified by both Mrs. Haarman and Rocky Bierschwal (Tr. 117-122). Thereafter, the appellant was taken to Davis County where he was questioned. He gave a false alibi that he had been various places (Tr. 124-126, 545-546). At all times before the appellant was questioned, he was thoroughly advised of his rights and given full opportunity to contact an attorney (Tr. 192, 193).

On July 10th, the appellant requested permission to talk to the Davis County Sheriff. After being thoroughly advised of his rights (Tr. 196, 202), the appellant advised the Sheriff that he wanted to get the matter off his chest. He had previously asked someone at Salty's Bar to get an attorney for him (Tr. 207). He first advised the Sheriff that he had not committed the shooting (Tr. 209). The Sheriff told him that telling the truth would help and the appellant told the Sheriff that he shot Garcia accidentally while trying to "rifle" the car for pills (Tr. 234). Thereafter, a verbatim written statement was taken from the appellant (Ex. M) in which the appellant admitted shooting Garcia but said that it was accidental during the burglary of the automobile.

While the appellant was being kept in pretrial confinement, he made an admission to other prisoners that he had "killed a man and I am not even shedding a tear." (Tr. 583, 587). Further, he indicated that he did not like Mexicans (Tr. 587). At trial, the appellant denied that he shot Louis Garcia.

Based upon the above evidence, the jury returned a verdict of guilty of murder in the second degree. Additional facts necessary to the determination of the points raised on appeal will be set forth in the argument portion of this brief.

ARGUMENT

POINT I

THE PROSECUTION DID NOT COMMIT REVERSIBLE ERROR IN EXAMINING THE APPELLANT CONCERNING FELONIES HE COMMITTED AS A JUVENILE.

The appellant contends prejudicial error occurred during his trial when the prosecutor on cross-examination inquired into felonies the appellant had committed as a juvenile. The record discloses the following occurred (Tr. 571-573):

“MR. NEWAY: If it please your Honor, before going further into the State’s rebuttal, I ask leave of the Court to call the defendant back for further examination.

MR. HANSEN: We have no objection.

LEWIS ELMER FRAYER

the defendant herein, returned to the witness stand and testified further as follows:

CROSS-EXAMINATION (Continuing)

BY MR. NEWAY:

Q Lewis Frayer, you are the same person that was called and testified. You realize you are still under oath?

A Yes, sir.

Q You have testified on direct-examination as to your reputation for working, and not having been before the authorities, no trouble or problems; is that right?

A No, sir. Mr. Hansen asked me if I was ever in prison.

Q Let me ask you this: Have you been before the juvenile authorities for things that would be tanta-

mount to felonies, if you weren't a juvenile — be the same as felonies?

A Yes, sir.

Q And how many times have you been before the Juvenile Court for serious offenses that would be the same as felonies if you had been an adult?

A About three, four, something like that.

Q Did one involve burglary, and setting fires?

A Yes, sir.

Q Another involve unlawful entry and damage to property?

A I believe so.

Q Another one involve theft of some money from a church in Murray?

A Yes, sir.

MR. NEWHEY: I believe that's all.

MR. HANSEN: You may step down, Louie.

(Witness excused.)

MR. HANSEN: Now, at this time, your Honor, before the State goes forward with rebuttal, we move for permission to recall Rocky, to go into his past record, on the same grounds and for the very same reasons that Mr. Newey asked the defendant."

No objection was made at any time to the appellant's cross-examination by the State. Only after the State opposed the recall of Rocky Bierschwal did the appellant move for a mistrial (Tr. 575). The trial court denied the motion for mistrial, noting (Tr. 580) :

"THE COURT: The court is of the opinion that the defendant opened the question on direct-examination. Furthermore, there was no objection made

to the cross-examination when the defendant was recalled. The motion for a mistrial is denied.”

It is submitted that appellant failed to act seasonably to prohibit the alleged improper cross-examination and, therefore, cannot complain. It is well settled that an objection must be made at the time the allegedly prejudicial occurrence takes place or error cannot be claimed on appeal. In *Abbott, Criminal Trial Practice* (4th ed.), Section 350 notes:

“The proper time to object to the introduction of evidence is when it becomes apparent that error will be committed by receiving evidence which is not admissible, as when the evidence is offered or when a question is asked which is in itself improper or calls for an improper answer.

“An objection to a question comes too late after the question has been answer [sic].”

In Section 351, it is also noted:

“Any objection to the admissibility of evidence is waived by failure to object thereto. If defendant fails to object to evidence when first offered, he waives its incompetency. Objection cannot be raised when it is later offered, unless its inadmissibility is not then apparent.”

A party may not allow incompetent evidence to be received and then move for a mistrial unless there was no opportunity to make a timely objection. *Abbott, supra*, Section 352 notes:

“A party who has allowed obviously incompetent evidence to be received without objection is not entitled to have it stricken out,”

It is further noted in the same work at Section 353:

“The failure to object to a question before answer, if the grounds of objection were then apparent, precludes a subsequent motion to strike out the answer.

“If there is no opportunity to object before the question is answered, or if the inadmissible character of the evidence is first apparent from the answer, or subsequently a motion to strike should be made immediately upon its objectionable character becoming apparent. However, it is within the sound discretion of the trial court to entertain the motion at any time subsequent to the admission of the evidence, even where no objection was seasonably made.”

In accord with the above observations is *Wharton, Criminal Law and Procedure* (Anderson ed. 1957), Sections 2044–2047.

In *State v. Tuttle*, 16 U.2d 288, 399 P.2d 500 (1965), this Court noted that a defendant should impose a timely objection to any improper evidence or be foreclosed from complaining. The Court observed:

“A further difficulty with the defendant’s position is that there was no timely objection made to the evidence in question.”

In *People v. Wong Toy*, 189 Cal. 587, 209 Pac. 543 (1922), the California Supreme Court noted that an objection after a question is answered comes too late and cannot be the basis for error on appeal.

In *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964), the appellant was charged with homicide. The prosecution introduced rebuttal evidence that was improper. The court observed:

“In the instant case, no objection was made at the time the testimony of the witness was introduced and not until the jury had heard it in its entirety. We do

not consider this to have been a timely objection. *State v. Spencer*, *supra*; *Schmidt v. Williams*, *supra*.

In *People v. Smith*, 43 Cal. 2d 110, 110 P.2d 472 (1941), the appellant on cross-examination in a grand theft prosecution was asked questions relative to his past livelihood and the origin of his money. The appellate court held that since no objection was voiced until after the evidence was offered, no error could be claimed. The court observed:

“Appellant assigns as error the rulings of the court in requiring the defendant to answer certain questions asked him on cross-examination relative to his past livelihood and the origin of his monies. But as the questions relative to the origin of his monies were answered before the objection, it must be disregarded.”

In *State v. Homolka*, 158 Kan. 22, 145 P.2d 156 (1944), the Kansas Supreme Court refused to reverse a conviction where the appellant was examined as to his juvenile court record and observed:

“First, that the witness had already testified, without objection from appellant, that he had been a ward of the juvenile court; and second, because we cannot say that admission of the record so prejudiced appellant’s rights as to require reversal. Two brothers of Calvin testified substantially as he did. The state offered no evidence to impeach their credibility. It may also be noted that appellant, for the purpose of impeaching the credibility of the state’s principal witness, showed that he too had been a ward of the juvenile court. . . .”

The reason for the timely objection rule was stated in *People v. Wallace*, 89 Cal. 158, 26 Pac. 650 (1891):

“... The rule is one of practice, and is applied in order to save the time of the court, which otherwise would

be uselessly consumed in listening to testimony, and then striking it out; and also to prevent a party from obtaining an advantage by deliberately consenting that a witness may give evidence upon a certain point with the expectation or belief that it may be favorable to him, and then having it excluded when the evidence is not satisfactory.”

In this case, there was ample opportunity for the appellant to raise objection. None was raised, nor did a motion for mistrial come immediately on the heels of the allegedly improper evidence. Appellant’s counsel, instead of moving immediately for relief, sought to recall a prosecution witness to elicit the same information. It would unduly prolong this brief to cite the numerous and legion of cases that support the rule that appellant cannot complain under such circumstances. Further, there was no prolonged examination nor did the prosecution argue the matter to the jury. The issue has not been preserved and is not properly before the court.

Secondly, it is submitted that the examination was not improper. It is acknowledged that under varying circumstances and statutes, courts have found it improper to inquire into juvenile convictions. *People v. Gomer*, 152 Cal. 2d 139, 313 P.2d 58 (1957) ; *Burge v. State*, 96 Tex. Crim. 32, 255 S.W. 754 (1923) ; *Thomas v. United States*, 121 F.2d 905 (D.C. App. 1941) ; Annot., 147 A.L.R. 443. However, the particular construction and limitations placed on the rule have been given varying treatment by the courts. Annot., 147 A.L.R. 443.

The provision of statutory law possibly applicable at the time of the appellant’s trial was Laws of Utah, 1931, ch. 29, § 32, which provided:

“No adjudication upon the status of any child by the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by a conviction in a criminal case, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction. Neither the record of the disposition of a child nor any evidence given in the juvenile court shall be admissible as evidence against the child in any case or proceedings in any other court.”

Section 55-10-105(3), Utah Code Annotated, 1953, presently provides:

“Neither the record in the juvenile court nor any evidence given in the juvenile court shall be admissible as evidence against the child in any proceedings in any other court, with the exception of cases involving traffic violations.”

Thus, what the Utah law prohibits is the introduction of (1) the record of disposition or the record in the juvenile court, or (2) evidence given in the juvenile court. Neither the records of the juvenile court nor evidence presented before it were introduced in the instant case. Consequently, there was no violation of the Utah statutory provisions for protection of juveniles.¹ Further, the Utah statutory law has never been as restrictive as those prohibiting disclosure of the “fact” of conviction or presence in juvenile court. See Anno. 147 A.L.R. 449; *State v. Guerrero*, 58 Ariz. 421, 120 P.2d 798 (1942). Therefore, it would seem unobjectionable to inquire as to the actual commission of felonies

¹ The Utah provision as it now reads is based in part on the National Council on Crime and Delinquency's Standard Juvenile Court Act, 1959. Although that act does not contain an exact provision like that currently in Section 55-10-105, U.C.A., 1953, the model act, comment 25, does not indicate that it was intended from provisions like that in the Utah statute that juvenile misconduct could not be the basis for impeachment.

at the time an individual was a juvenile if the time is relevant to the matter in controversy. Especially should this be so where, as here, the time of juvenile misconduct was relevant to the veracity of the defendant because the defendant was 19 years old at the time of trial, and the defendant admitted commission of acts which would be felonious. This is in accord with the general rule allowing examination of a witness or an accused into acts of misconduct which would directly affect veracity. *State v. Hougensen*, 91 Utah 351, 64 P.2d 229 (1936); *Wigmore on Evidence* (3rd ed.) §§ 981, 982; *Wharton's Criminal Evidence*, § 882.

An excellent and clear statement of the rule appears in *Military Justice Evidence*, Department of the Army Pamphlet 27-172 (1962), at page 420:²

"Any witness, including the accused, may be impeached by showing that he has committed an act of misconduct such as to affect his credibility. However, in those instances where the adverse party lacks competent evidence of conviction for such an act, the showing is limited to adducing the matter on cross-examination of the witness and independent evidence of the offense is *not* admissible, even though the witness denies committing the act. Whether or not the act affects credibility is to be tested by the same standards as apply in the case of prior convictions. As in the case of prior convictions, evidence of prior acts of misconduct of the accused may not be used, directly or indirectly, to support an inference of guilt."

In *McCormick on Evidence*, at page 87, it is stated:

"The English common law tradition of 'cross-examination to credit,' permits the counsel to inquire into

² Military courts, acting under the Uniform Code of Military Justice, follow the rules of evidence applicable in federal courts. *United States v. Slozes*, 1 U.S.C.M.A. 47, 1 C.M.R. 47 (1951); *United States v. Dupree*, 1 U.S.C.M.A. 665, 5 C.M.R. 93 (1952); 10 U.S.C. § 936.

the associations and personal history of the witness, including any particular misconduct which would tend to discredit his character, though not the subject of conviction for crime.”

See *State v. Sorge*, 301 N.Y. 198, 93 N.E.2d 637 (1950); *State v. Neal*, 222 N.C. 546, 23 S.E.2d 911 (1943).

Consequently, no error can be claimed.

Additionally, it is submitted that evidence of the appellant’s juvenile action was proper to rebut the inferences raised by the appellant in opening argument and direct examination.

On opening argument, the appellant’s past history was brought up. Counsel stated that since the appellant was charged with first degree murder “we are going to bring in a lot of evidence about [the appellant].” (Tr. 300). Further, the opening argument presented a picture of a boy from a broken home, being shuttled from place to place and school to school, indicating merely that the appellant was the unfortunate victim of circumstances who had himself never been in trouble.

When the appellant took the stand, he was questioned thoroughly concerning his past history of living with his natural parents, their separation, and his life with each parent and step-parent (Tr. 512–516). He was asked by his counsel if he had ever been convicted of a felony or served time in prison (Tr. 516). This itself was an injection of good character into the trial and gave the prosecution the right to rebut the inference. The defense having introduced evidence of good character, the prosecution could rebut it. Wigmore, *Evidence*, § 58, notes:

“After a defendant has attempted to show his good character in his own aid, *prosecution may in rebuttal* offer as evidence his bad character. The true reason

for this seems to be, not any relaxation of the principle just mentioned, *i.e.* not a permission to show the defendant's bad character, but a liberty to refute his claim that he has a good one. Otherwise a defendant, secure from refutation, would have too clear a license unscrupulously to impose a false character upon the tribunal."

The whole inference left with the jury after the appellant's direct testimony was that he had at best led an irregular life but had not violated the law.

Virtually the same issue was involved in *State v. Marinski*, 139 Ohio St. 559, 41 N.E.2d 387 (1942), except not as exaggerated as in this case where appellant directly introduced evidence of his good character. In *Marinski*, the defendant made a narration of how he had spent his previous life and the schools he had attended. He did not mention his juvenile difficulties and commitment to the state industrial school. On cross-examination, the prosecution was allowed to go into the defendant's juvenile involvements. The Ohio Supreme Court affirmed. It observed, as against a claim similar to that now urged:

"That this is a salutary statute properly designed to afford some measure of protection from the indiscretions of youth is beyond cavil. However, it is a vastly different matter to permit an interpretation that would enable a defendant to employ the statute for the purpose of deception and to accomplish a miscarriage of justice. After all, a trial before a judicial tribunal is primarily a truth-determining process, and if it in any sense loses its character as such, it becomes the veriest sort of a mockery. It must be remembered that it was this defendant himself who not only offered to tell but insisted upon narrating the story of his previous years. To place himself in a favorable light before the court and jury it was necessary for him to tell but part of

his history and conceal the remainder. This he did. When this challenge confronted the court and the prosecuting attorney, did this statute render them impotent in their duty to reveal the truth? The participating members of this court are unanimously of the opinion that it did not. The cross-examination was proper."

In *United States v. Cary*, 9 U.S.C.M.A. 348, 351, 26 C.M.R. 128, 131 (1958), Chief Judge Quinn of the United States Court of Military Appeals observed:

"In *United States v. Roark*, 8 USCMA 279, 24 CMR 89, we held that juvenile proceedings could not be used as evidence against an accused. Of course this does not mean that an accused can pervert the public policy that underlies the rule to protect himself against contradiction of his testimonial untruths."

Since appellant injected only a part truth into the trial and expressly opened up his character, the prosecution was well within bounds to cross-examine the appellant as to his juvenile misdeeds.

Finally, it is submitted that such an examination was not prejudicial. Section 77-42-1, Utah Code Annotated, 1953, provides:

"After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment."

Certainly, it cannot be said that this one minor incident in a long trial, where the facts indicated bizarre and questionable moral conduct of the appellant, resulted in prejudice. First, the appellant's conduct during the ride to

Evanston, Wyoming, with Engstrom, including the incident with the gun, his boasting about having killed previously, his solicitation of a homosexual act, his threat to shoot off the gas pump nozzles. In addition appellant's use of an alias and false statements to the police, along with the compelling evidence of the appellant's guilt, all militate against any claim of prejudicial error. *State v. Cox*, 74 Utah 149, 277 Pac. 972 (1929).

In *State v. Homolka*, 158 Kan. 22, 145 P.2d 156 (1944), the Kansas Supreme Court in a similar case ruled that any error that may have been committed in putting in a juvenile court record did not prejudice the accused.

In *People v. Maloney*, 92 Cal. App. 371, 268 Pac. 472 (1928), the appellant claimed error on the basis of the trial court's allowing evidence of a juvenile court conviction and commitment to a school. The court held no prejudice resulted that would warrant reversal.

In *People v. Goodwin*, 105 Cal. App. 122, 286 Pac. 1087 (1930), the court again ruled no prejudicial error could be claimed because of inquiry into juvenile offenses. It observed, following the *Maloney* case:

"In view of this decision we hold that the question and answer was not prejudicial to the defendant. The rule announced in the foregoing case gains added force here, since it appears from the transcript that the evidence of appellant's guilt was conclusive and permitted no doubt of the correctness of the verdict."

Certainly, the evidence in this case presents no basis upon which it could be claimed the appellant was prejudiced. Too many other factors of this case demonstrated the appellant's character and guilt to say that the minor incident of the juvenile record prejudiced the jury.

No basis for reversal on this point can be claimed.

POINT II

THE APPELLANT CANNOT CLAIM AS A BASIS FOR REVERSAL THAT THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON SECOND DEGREE MURDER BECAUSE THE EVIDENCE WAS FIRST DEGREE MURDER OR NOTHING.

The appellant contends that the trial court erred in instructing on second degree murder and that, consequently, reversal is in order. The appellant's position is that the State tried the case on the theory of the felony murder rule and that all the evidence offered against the accused showed that the crime occurred during the time the appellant was burglarizing the automobile of Betty Haarman while looking for pills. Thus, the appellant contends that the crime was committed under the State's theory during the course of a burglary which would support a conviction of first degree murder.

It is submitted that there is no merit to the appellant's position since the instruction on second degree murder would be more beneficial to the accused than he deserved, even assuming the appellant's position to be correct and, therefore, no prejudice could have resulted.

It seems to be the well settled rule that an accused cannot be prejudiced by an instruction on a lesser offense than first degree murder where the evidence would only support a conviction of first degree murder. In 26 Am. Jur., *Homicide*, § 563, it is stated:

“While there is some conflict on the question, the rule supported by the weight of authority seems to be that if the evidence demands or warrants a conviction of a higher degree of homicide than that found by the verdict, and there is either no evidence in support of acquittal or, if there is, it is not sufficient to warrant

or require acquittal, or is disbelieved by the jury, the defendant is not entitled to a reversal or a new trial on the ground that the court instructed on the lower degree of homicide, as to which there was no evidence, the theory being that he is not prejudiced thereby and cannot complain.

. . .

“Under statutes to the effect that a jury may find a defendant guilty of a lower degree of the crime charged in the indictment than that of which the evidence shows him to be guilty, and that a judgment based on such a finding is not illegal for lack of supporting evidence, it has been held in some jurisdictions that the giving of an instruction on second degree murder is not an error warranting a new trial for one convicted of murder in that degree, on evidence showing him to be guilty of murder in the first degree or nothing.”

In 21 A.L.R. 622, it is stated:

“Though the rights of a defendant who has been convicted of a lower degree of homicide than was warranted by the evidence are not definitely settled by the decisions, the rule in most jurisdictions appears to be that if the evidence demands a conviction of a higher degree of homicide, and does not warrant an acquittal, the defendant is not entitled to a new trial on the ground that, under an instruction so permitting, the jury found him guilty of a lower degree.”

This seems to be the weight in the great majority of jurisdictions. See also Annot., 27 A.L.R. 1097–1100. Thus, in *Baker v. State*, 154 Georgia 716, 115 S.E. 119, 122, it was stated:

“The justices are unanimously of the opinion that the law of voluntary manslaughter was not involved under the facts of the case, and that, where voluntary

manslaughter is not involved under the proof, an instruction thereon should not be given. They further agree, in accordance with a long line of decisions, that where the defendant was not convicted of voluntary manslaughter, and under the evidence voluntary manslaughter was not involved, any errors committed by the court in charging upon that subject are not cause for the grant of a new trial. The charge, however, was not erroneous as against the defendant, but was favorable to him."

In 102 A.L.R. 1026, the same rule is noted with eighteen states supporting the proposition. It is there stated:

"While there is some conflict on the question, the rule supported by the weight of authority seems to be that if the evidence demands or warrants a conviction of a higher degree of homicide than that found by the verdict, and there is either no evidence in support of acquittal, or, if there is, it is not sufficient to warrant or require acquittal, or is disbelieved by the jury, the defendant is not entitled to a reversal or a new trial on the ground either that the jury found him guilty of the lower degree of homicide, or that the court instructed on the lower degree of homicide, as to which there was no evidence, the theory being that he is not prejudiced thereby and cannot complain."

In *State v. Phinney*, 13 Ida. 307, 89 Pac. 634 (1907), the defendant was charged with murder in the first degree by injection of a deadly poison by use of a hypodermic needle. The jury returned a conviction for the crime of manslaughter. On appeal, it was argued that the trial court had erred in instructing on second degree murder and manslaughter. The court rejected the contention and stated:

"Some authorities have been called to our attention which at first blush would seem to hold to the contrary view; but a careful examination of them satisfies us

that upon principle but few, if any, of those cases are in conflict with the views above expressed. We are satisfied that the purpose and intent of the statutes and the reasons for the rule support the view we have here taken. We therefor conclude that, although the defendant was charged with the crime of murder perpetrated by means of poison, and that it was the duty of the court to instruct the jury as to the law in such cases, and the grade of offense that they might find defendant guilty of, still it was within the province of the jury to find the degree of the offense, and that, even though the evidence might fully disclose that the defendant was guilty of a higher degree than that found against him, still the verdict could not be disturbed for that reason. It is not an uncommon thing for a jury, out of sympathy, or what they conceive to be extenuating circumstances, to find a defendant guilty of a lower degree or grade of offense than that of which the evidence clearly convicts him; but the fact that they do so is not a ground of reversal of the verdict and judgment. *People v. Dunn*, 1 Idaho 77; *People v. Walter*, 1 Idaho, 387; *State v. Schieler*, 4 Idaho, 120, 37 Pac. 272; *State v. Hardy*, 4 Idaho, 478, 42 Pac. 507; *State v. Alcorn*, 7 Idaho, 612, 64 Pac. 1014, 97 Am. St. Rep. 252.

“We find no error that would require or justify a reversal of the judgment of conviction in this case.”

In *State v. Lindsey*, 19 Nev. 47, 5 Pac. 822 (1885), the Nevada Supreme Court had before it a case where the defendant was alleged to have committed the crime of murder by administering poison. The jury found the defendant guilty of murder in the second degree. The court, in rejecting a contention that the defendant was prejudiced, noted that a jury could compromise for whatever reason it saw fit and return a verdict of guilty to second degree murder. The court stated:

“The jury have the undoubted power to fix the crime in the second degree when it ought, under the law and the facts, to be fixed in the first. ‘We need not speculate about why it was so provided. It is sufficient that it is so written, and we cannot change, alter, or depart from it.’ *Lane v. Com.*, *supra*.

“Our attention has not been called to any case where a verdict of murder in the second degree has been set aside upon the ground that the testimony was such as to make the crime murder in the first degree. But, on the other hand, the direct question involved in this case has been decided adversely to appellant. *State v. Dowd*, 19 Conn. 387; *Lane v. Com.*, *supra*. In the latter case the court said:

“‘It has never yet been decided in Pennsylvania that a verdict of murder in the second degree [sic] might not be given in a case of murder by poison. That it may be given is as unquestionable as the power of the jury is under the act to give it, and impossible for the court to refuse it.’

“‘If the jury fix the crime at murder in the second degree, in a case where the law and the facts make it murder in the first degree, it is an error in favor of the prisoner, of which the law will not take any cognizance, and of which the prisoner ought not to complain.’

See also *State v. Wagner*, 78 Missouri 644, 47 Am. Rep. 131.

This court need go no further than its own decision in *State v. Kukis*, 65 Utah 362, 237 Pac. 476 (1925). The appellant there was charged with having committed the crime of first degree murder and was convicted of having committed murder in the second degree. It was argued on appeal that if defendant was guilty of any crime, it would be first degree murder. This court observed:

“A further contention is made that, if the defendant was guilty at all, he was guilty of first degree

murder, and hence the court committed error in stating and submitting to the jury the elements and offenses of second degree murder and of manslaughter, the defendant urging there is no evidence to support a verdict of second degree murder or of manslaughter. We do not see how the defendant can complain of that. If on a charge as here there is evidence to show murder in the first degree, then of necessity is there also evidence to show the lesser and necessarily included offenses of second degree murder and of manslaughter. First degree murder embraces all the elements and essentials of second degree, and consists of additional elements. We need not pause to point them out. The proposition is familiar alike to the bench and bar. We thus think it self-evident that, if on a charge such as here there is sufficient evidence to show the commission of the greater offense, then of necessity must there also be sufficient evidence to justify a conviction of any necessarily included lesser offense. At any rate, the defendant cannot be heard to complain because he was not found guilty of murder in the first degree instead of second degree, or because the jury was given an opportunity to find him guilty of the lesser, when they properly could have found him guilty of the greater offense."

Consequently, it is apparent that in the instant case, there is no basis to claim error. The evidence was clear to show that appellant killed Louis Garcia. By his own admission he shot him during the course of a burglary. Consequently, there is ample evidence to sustain the conviction of first degree murder. It cannot be said as a matter of law that the evidence is in any way insufficient. In fact, it is overwhelming and compelling. Under these circumstances, the appellant cannot claim that he was prejudiced because the jury saw fit out of caution, mercy, or some other reason to find him guilty of murder in the second degree nor can

he complain of the court's instruction since even were it erroneous, it did not prejudice him.

It is submitted, however, that the court did not err in instructing on second degree murder. The evidence disclosed that the appellant had been engaging in conduct likely to produce death or grievous bodily harm throughout the evening. He had pointed a loaded gun at his companion and pulled the trigger. He had threatened to shoot the nozzles off gasoline hoses and had displayed an erratic and violent behavior throughout the night. He admitted that he disliked Mexicans. The jury could well have found from the evidence that the appellant was highly intoxicated when he approached the automobile where Louis Garcia was sleeping and that because of his previous conduct, he shot Garcia without appreciating the full significance of his act and not premeditating the killing. This would be sufficient to show murder in the second degree. *State v. Russell*, 106 Utah 116, 145 P.2d 1003 (1944). Consequently, it cannot be said that the record in this case is so devoid of evidence as to make the instruction of the trial court on second degree murder error. In any event, it was clear that it was not prejudicial error.

POINT III

THE APPELLANT'S EXTRAJUDICIAL STATEMENTS ADMITTING HIS COMPLICITY IN THE CRIME WERE PROPERLY ADMITTED.

The appellant contends that the trial court erred in allowing the jury to consider his oral and written admissions.

At the outset the respondent submits the factual references in the appellant's brief are not an accurate portrayal of the record, but reflect a dedicated effort to contort the

evidence in a light most favorable to the defense. In reviewing the trial court's action, this court would be justified in finding error only if the evidence, when viewed in a light most favorable to the trial court's decision, demonstrated conclusively as a matter of law that the appellant's statements were involuntary. When so appraised, it is apparent that the argument of appellant on this point is specious at best.

The record discloses that sheriff's deputies, having a picture of Richard Engstrom, went to Salty's Bar in Salt Lake City to determine if anyone there knew a person named Lou who had been with Engstrom on the night of the killing (Tr. 117). The bartender indicated that he knew the appellant; and on July 9, 1963, sheriff's deputies went to Salty's Bar and asked the appellant, who was there, to accompany them to a lineup at the Salt Lake City Police Station (Tr. 191). They took the appellant to the lineup at about 12:45 a.m. on the 10th of July. At that time the appellant told the police his name was Clifford Lynn (Tr. 117). After the lineup he was taken to Davis County for an additional lineup at approximately 3:00 a.m. He was then told that he was under arrest (Tr. 198). The appellant was there advised that he was a suspect in a killing, that he could have a lawyer, and that he need not say anything but if he did, it could be used against him (Tr. 192). After the second lineup, he was interrogated by the deputies and again advised of his rights (Tr. 193). In addition, the appellant was told he could use the telephone (Tr. 193). The appellant was not handcuffed nor molested in any fashion. During the interrogation, the appellant gave the police a false alibi (Tr. 126). Thereafter he was taken back into the Davis County Jail and allowed to sleep (Tr. 193).

The appellant slept until about 9:00 a.m. on the morning of July 10th.

After awakening, the defendant was taken to the sheriff's office where he used the telephone to call Salty's Busy Bee Tavern (Tr. 194). After using the telephone, the appellant was told that the sheriff's deputies had determined his name to be Elmer Lewis Frayer (Tr. 195). The appellant said he had been drunk before but that he was now sober and would like to give the police a statement of the truth (Tr. 195). The appellant was again advised of his rights and encouraged to obtain a lawyer. Deputy Roxburgh testified (Tr. 196) :

“A. Well, prior, prior to we went through this again, we again told him and encouraged him to get hold of a lawyer, because of the seriousness of this charge. He was still willing to tell us the accountings of this particular evening, July 6th, and the early morning of July 7th.

Q. At any time was he denied the use of the telephone?

A. No. In fact, I think he made several calls that morning.”

The appellant again gave the officers an alibi which was false (Tr. 545).

Sheriff Hammon testified in corroboration of the testimony of the deputy sheriff as to the appellant's being fully advised of his rights (Tr. 201), and the use of the telephone (Tr. 202), which the appellant also admitted.

In the afternoon of the 10th of July, the defendant asked if he could see the sheriff (Tr. 203). He stated that he wanted to talk to the Sheriff and get the matter off his chest. The Sheriff testified (Tr. 203) :

“Yes. He told me he wanted to get this thing off his chest. He says it had been bothering him, and he says, ‘I’d like to talk to somebody about it.’ He says, ‘I’ve called my family, and,’ he says, ‘no one has come out, and I’d like to talk to you about it, if you will talk to me.’ He says, ‘I’ve got to talk to somebody, and tell them about it.’”

The appellant stated that he would like to give a statement to the Sheriff’s secretary (Tr. 204). Exhibit “M” was the statement appellant gave. The appellant was again advised of his various constitutional rights (Tr. 209). The appellant had apparently asked someone to obtain a lawyer for him and had talked to his sister (Tr. 206, 207). The sheriff told the appellant the truth never hurt anybody and that the appellant should tell the truth.” (Tr. 211). The appellant cried during his statement to the sheriff. The questions and answers were taken down verbatim (Tr. 210–212, Exhibit “M”).

The opening statement of the appellant’s counsel corroborated much of the sheriff’s testimony (Tr. 336).

The appellant’s testimony demonstrates the admissions made were purely voluntary.³ He testified (Tr. 542):

“On the way to the Davis County Sheriff’s Office, these two officers that you were riding with told you that you were a suspect in the killing out on the highway, and that this was why they were taking you up to Davis County; isn’t that right?”

A. Yes, sir.

Q. They told you that you had been identified in the lineup, didn’t they, at Salt Lake City?

A. Yes, sir.”

* * *

³ Contrary to appellant’s statement in his brief, the statement given in this case was an admission not a confession and no predicate for voluntariness was required. *State v. Karumai*, 101 Utah 592, 126 P.2d 1047 (1942).

“Q. Now, then, along in the afternoon of July the 10th, you said that you’d like to tell the Sheriff some more about this case; is that right?”

A. I don’t recall saying that.

Q. Well, not in those words. But you requested to talk to them some more about it; isn’t that right?

A. Yes, sir.”

* * *

“Well, now, isn’t it a fact that Sheriff Hammon, when he took your version of what happened on the third time that you talked with the authorities, gave you every leeway in the world to tell him about it? Isn’t that right?”

A. Yes, sir.

Q. And he didn’t say — he didn’t pressure you, he didn’t say, ‘Well, it was this way,’ or put words in your mouth, or anything.

A. No, sir.”

There was no evidence of threats or duress, long interrogation, failure to advise of constitutional rights, or absence of communication, which make for a coercive atmosphere.

In the instant case appellant was advised of his rights, a factor tending to support the finding of voluntariness. *State v. Ringo*, 14 U.2d 49, 377 P.2d 646 (1963); *State v. Karumai*, supra. Advice to procure counsel was given, and communication with relatives and friends was allowed. Thus, the circumstances in no way support a finding that appellant’s admissions should have been excluded as a matter of law. Indeed, the instruction to the jury requested by counsel was not of such a nature as to imply duress or coercion (R. 26). All appellant was told was to speak the truth.

A mere adjuration to speak the truth will not exclude a confession. *Sparf v. United States*, 156 U.S. 51 (1895). In the *Sparf* case, the court observed:

“... The import of Sodergren’s evidence was that when Hansen manifested a desire to speak to him on the subject of the killing, the latter said he did not wish to hear it, but ‘to keep it until the right time came and then tell the truth.’ But this was not offering to the prisoner an inducement to make a confession. Littledale, J., well observed in *Rex v. Court*, 7 Car. & P. 486, that telling a man to be sure to tell the truth is not advising him to confess anything of which he is really not guilty. See also *Queen v. Reeve*, L. R. 1 C. C. 362. Nothing said to Hansen prior to the confession was at all calculated to put him in fear or to excite any hope of his escaping punishment by telling what he knew or witnessed or did in reference to the killing.”

In *United States v. Colbert*, 2 U.S.C.M.A. 3, 6 C.M.R. 3 (1952), the court observed:

“We note, first, that in this record there is no evidence of interminable periods of questioning, no evidence of physical abuse, and no evidence of more subtle exertions of compulsion. There is, in short, nothing even smacking of ‘the third degree.’ A mere admonition to tell the truth could hardly vitiate a confession it might produce. *Sparf and Hansen v. United States*, 156 US 51, 54-56, 39 L ed 343, 15 S Ct 273.”

In *Wharton’s Criminal Evidence*, § 367 (12 ed.), it is observed:

“Adjurations unaccompanied by a threat or promise are not sufficient to render a confession involuntary. A mere adjuration to speak the truth does not vitiate a confession when neither threats nor promises are employed, and the fact that the appeal to speak the

truth is made by an officer to a party under arrest does not exclude the confession.

“A normal, innocent person ordinarily would not accuse himself falsely on a mere adjuration that it would be better to tell the truth, but each case must stand upon its special circumstances. The following statements, addressed to the accused, were held not to render the confession inadmissible as being obtained through threats: ‘Now remember, if you know the parties you had better tell me. I would not suffer for anyone else’; ‘Tell the truth about the whole matter, and keep nothing back’; ‘We have got you this time. We have traced you around until we are satisfied you have got the cow’; ‘The more lies told in such cases, the deeper one gets in the mud’; ‘I am satisfied that there are other receivers whom we have not discovered. I should like to have you make a clean breast of it’; ‘It is no use for you to deny the crime.’ Similarly, a confession made under the representation of the infamy or folly of a concealment, if without threats or promises, may be received.”

Although the appellant was in custody, he was allowed to communicate with his family and friends, allowed to sleep and was not subjected to prolonged interrogation. Custody itself does not constitute coercion and render a confession involuntary. *State v. Ringo*, supra; *Hopt v. Utah*, 110 U.S. 574; *People v. Kirkwood*, 5 Utah 124, 13 Pac. 234; *Wharton's Criminal Evidence*, § 366 (12 ed.); *Abbott, Criminal Trial Practice*, § 570 (4th ed.).

The United States Supreme Court has noted that the question to be determined in excluding a confession is whether the action of the agents of the government was “such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined. . . .” *Rogers v. Richmond*, 365 U.S. 534, 544 (1961). The circumstances

in the instant case show no overbearing action on the part of the Davis County Sheriff's Office and none of the activity which would warrant exclusion of the confession because of misconduct on the part of government officials. See Silving, *Essays on Criminal Procedure*, page 263 (1964).

A case very similar to the instant one is *Taylor v. State*, 209 A.2d 595 (Md. 1965), where the court held the confessions were admissible. See also *State v. Puchalski*, 211 A.2d 730 (N.J. 1965), and *Collins v. Beto*, 241 F. Supp. 170 (D.C. Tex. 1964).

Although the appellant in the instant case was only eighteen years of age, he was not inexperienced. He did not immediately respond to the police officers' request for the story but gave them two false alibis and even at the time of trial had failed to tell the police where he had actually thrown the weapon. Although he had only completed the ninth grade, he was familiar with things occurring in the community and did not appear to suffer from any lack of intelligence. On the contrary, he appeared to be more mature than other persons his same age. He frequented bars and was able to pass himself off as an adult. His previous experiences with juvenile authorities made it obvious that he was not intimidated by police authority. The facts of this case bear no resemblance to those facts in *Gallegos v. Colorado*, 370 U.S. 49 (1962), where the petitioner was a fourteen year old child and was in custody for five days, during which time he was interrogated and had no communication with a lawyer, parent or other friendly adult. The facts of the instant case clearly support the finding that the confession was voluntary. *Ashdown v. Utah*, 357 U.S. 426 (1958).

Taking each of the elements that go into determining the voluntariness of a confession, it is apparent that the appel-

lant's confession was voluntary and that the trial court committed no error in allowing the jury to consider it for what weight they would give it. First, there was no prolonged questioning; second, there were no threats; third, the accused was not unfamiliar with police activities and was allowed to communicate with friends and was admonished to obtain a lawyer during the time he was in custody; fourth, there was no coercion except his custody which was of an insignificant nature; fifth, no special techniques were used to induce the admission; and sixth, the accused was thoroughly advised of his rights. It is apparent that appellant made his admissions out of remorse and guilt, a very common occurrence engendered by the Christian ethic. Reik, *Compulsion to Confess*, Chap. II, p. 175 (Grove Press 1959).

The appellant contends that the fact that he was not taken before a magistrate subsequent to his arrest is of such a nature as to warrant the exclusion of his confession. The appellant makes an error in his brief when he states that the admissibility of a confession is to be determined by the same standard as applied in federal prosecutions. The case of *Malloy v. Hogan*, 378 U.S. 1 (1964), only went to the question of whether the Fifth Amendment to the United States Constitution was applicable against the states by the due process clause of the Fourteenth Amendment. It did not indicate that the same evidentiary standards in the receipt of confessions had to be followed by the states. The rule in *Mallory v. United States*, 354 U.S. 449 (1957), and *McNabb v. United States*, 318 U.S. 332 (1943), is only a rule of evidence applicable in federal courts and is not imposed against the states by virtue of the Constitution of the United States. *State v. Hart*, 15 U.2d 395, 393 P.2d 487 (1964); *State v. Gardner*, 119 Utah 579, 230 P.2d 559

(1951); *State v. Braasch*, 119 Utah 450, 229 P.2d 289 (1951). Further, the circumstances of this case do not show a flagrant disregard of the provisions of Section 77-13-17, Utah Code Annotated, 1953. The appellant's arrest was late in the evening of the 9th of July or early morning of the 10th of July. He was interrogated only slightly upon arrest and then allowed to sleep. His subsequent interrogation and the confession after his request to see the Sheriff were not unduly long after his arrest. In any event, the delay in taking the appellant before a magistrate would not affect his confession. In *State v. Hart*, supra, this court stated:

"Defendant's contention is without merit. This court has previously held that a confession, voluntarily given, is not rendered inadmissible because it was obtained prior to the time the accused was taken before a magistrate.

"We do not desire to indicate that there was either an unreasonable or an unnecessary delay here, but even if there had been, that would not render the confession inadmissible in the absence of any indication that such delay had some causative effect upon the giving of the confession."

Consequently, it cannot be said that the trial court erred in allowing the jury to consider the appellant's admissions for whatever weight the jury saw fit to give them.

CONCLUSION

The instant case was a long and laborious trial. There is no evidence that the appellant was in any way prejudiced by any action taken at the time of his trial. The reference to his juvenile convictions was unobjected to, was a minor event in an otherwise long case and was invited by the

appellant's injection of his own character into the trial. The contention with reference to instructions as to second degree murder cannot be sustained since the appellant was in no way prejudiced. Finally, the allegation that the confession should have been excluded as a matter of law is specious and wholly without substance.

It is apparent that the appellant committed a serious and dastardly crime and the jury properly found him guilty. There is no merit in this appeal. The court should affirm.

Respectfully submitted,

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