1971

State of Utah v. Thomas Devon Gee : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs. Case No. [illegible]

THOMAS DEVON GEE,
Defendant-Appellant.

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BRIEF OF APPELLANT

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Appeal from the Judgment of the [illegible]
of the Third Judicial [illegible]
in and for Salt Lake County, [illegible]
Honorable D. Frank Wil[illegible]

GLEN S. [illegible]
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Clerk

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,)

Plaintiff-Respondent,)

vs.) Case No. 12248

THOMAS DEVON GEE,)

Defendant-Appellant.)

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

The Defendant-Appellant, Thomas Devon Gee, appeals from his conviction of Murder in the First Degree in violation of Utah Code Ann. Sec. 76-30-1 (1953), on jury trial in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable D. Frank Wilkins, Judge, presiding, and the sentence of imprisonment at hard labor for life imposed thereon.

DISPOSITION IN THE LOWER COURT

The appellant was tried on a charge of first degree murder before a jury in the Third Judicial District Court, in and for Salt Lake County, Utah, with Judge D. Frank Wilkins presiding. The trial began June 19, 1970, and was concluded June 24, 1970; the jury returned a verdict of guilty as charged with recommendation of leniency. The appellant filed motions to dismiss, in arrest of judgment and for a new trial, along with supporting authorities and affidavits. Upon argument to the Court, all motions were denied. Appellant was sentenced to a term of life imprisonment and appeals from the verdict and judgment. A certificate of probable cause for appeal was signed by presiding Judge D. Frank Wilkins on July 20, 1970.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the judgment of the lower court and a dismissal of the action, or in the alternative, reversal and remand for further proceedings or for a new trial, with directions and instructions to the trial court.

STATEMENT OF FACTS

This appeal presents to the Court vital questions concerning the sufficiency of evidence, corroboration of accomplices, and constitutional due process of law. Therefore, it is necessary to set forth in some detail the material facts established by each witness in the court below.

The first portion of this statement sets forth the medical evidence concerning the nature and extent of the injuries sustained by the deceased, the nature of the condition causing his death, and the medical opinions concerning the possible causes of those injuries; and the material portions of the testimony tending to show a causal connection of the defendant with those injuries is set forth in the second portion.

Marilyn Peterson brought her son Craig into the emergency room of the hospital at about 10:00 p.m. on the evening of October 5, 1969. During the initial examination the doctors observed that the child was breathing on his own and had a heartbeat, but that he was not moving and not responsive; and that there were multi-

ple discreet bruises about the face, head, and lower back and legs. (R.240) The eyes were fixed and dialated. Mrs. Peterson stated upon her arrival at the emergency room that she had left the boy briefly in the care of her boyfriend who told her that he had fallen down the stairs with the child shortly after he noticed the boy having another seizure; that Craig had swallowed his tongue. (R. 295)

The bruises on the child's head along with the condition diagnosed as papilledema suggested the existence of intercranial pressure. Craig Peterson underwent surgery until about 3:00 a.m. of October 6, 1969, and the pressure on the brain was relieved as the excess blood was drained off. Craig was kept under continuous treatment and observation until his death during the early morning hours of the following day. The cause of death was due to subdural hematoma and brain injury attributed to traumatic injury of an unspecified nature and unknown origin. (R. 299, 309)

One of the examining physicians had remembered treating the child on several previous occasions and suspected that the injuries he saw were an indication of possible child abuse.

Law enforcement officers of the Salt Lake County Sheriff's Department arrived at the hospital shortly after 10:00 p.m. October 5, 1969, and conducted an investigation. On the morning of the child's death, the appellant was arrested and charged with first degree murder.

The State at trial relied on the theory that the evidence would show premeditation and deliberation, or in the alternative a depraved mind. (R. 106)

Dr. Edward F. Wilson was called on behalf of the State and testified that he had performed an autopsy on the deceased October 7, 1969. He was the assistant medical examiner for Utah and was a specialist in forensic pathology, which is the study of injury and disease as it relates to legal questions. His experience included approximately 1,300 autopsies to determine cause of death, and he had testified and been qualified in a number of courts as a medical expert.

He explained that subdural hematoma occurs when something strikes the head causing the brain to move at a little different rate than the skull and thus causing bleeding when the blood vessels connecting the brain to the skull

stretch and tear. (R. 310) He stated that in this case it was difficult to say whether the trauma was due to the head striking an immobile object, or whether it was struck by a movable object. The trauma, in his opinion was caused by a dull blow. Although there was some evidence of multiple blows, the hematoma could have come from many, or could have just come from one. (R. 310) His conclusions in this regard were essentially the same ones reached by the treating and examining physicians.

Dr. R. Chad Halversen and Dr. Theodore S. Roberts treated Craig's injuries shortly after he arrived in the emergency room of the University of Utah Medical Center. Both were employed there as residents in neurosurgery, and both were involved in the surgery described as burr holes, which relieved the pressure on the brain. (R. 244, 299) In similar terms these physicians described the nature of the hematoma, and discussed their observations of the head injuries. (R. 240-245) (R. 299-302) Dr. Roberts was not able to state factually one way or another as to whether the hematoma was due to a single blow or a succession of blows, although he recalled that the condition usually appears in children following a succession of blows(R.303)

The bruises about the scalp were indicitive of some force being applied to the head, but a hematoma can develop from a blow at any point; and the presence of the papilledema seemed to indicate that the brain had already been under pressure, at the time of the operation, for at least 24 hours.(R.299-300) The injuries on each side of the head appeared to be of recent origin and about the same age, but he was unable to state with certainty whether the hematoma or the swelling to the brain occurred first in time. The damage to the left side of the brain was caused by blows, while the damage to the right side was due to swelling and inflammation. Although these injuries could have been simultaneous, it appeared unlikely.(R. 302)

Dr. Halversen added that it would take a fair trauma to cause the hematoma, and suggested that from the location of the blood clot it was possible that the fatal blow could have come across the ear, striking the child behind the ear.(R. 251) Traumatic injury means forceful injury.(R. 256) He stated that one cannot really equate the force of the blow with the rupture of intercranial blood vessels.(R. 250) But he could not say with assurance which of several apparent blows caused the condition. He did describe, however, a linear bruise that

existed across the temple, the ear, and the left mastoid process, accompanied by surrounding swelling. The bruises on the ear itself were round types, and were not, in his opinion, caused by the same object, and possibly not even at the same time. In addition he noted that there was an abrasion in the middle of the back, oozing blood, that appeared to be more recent than the bruises on the backs of the legs.(R.255-256)

Dr. Halversen further stated that he was unable to ascertain the size of the object which had apparently come in contact with the child's head, nor did he think it was medically possible to do so. He could only say that the cause of death was intercranial injury due to traumatic injuries to the head.(R. 254)

Dr. Donald K.Nicholson had been admitted to the practice of medicine for two years, and was completing his last two years of internship with the University Medical Center's Department of Pediatrics, where he held the position of the second neuro resident, (R. 258) when he had occasion to come in contact with Craig Peterson. He was present in the emergency room on October 5th along with Dr. Halversen, and assisted in the examination at that time. (R. 275) He had

treated the child on several previous occasions and discussed the possibility that Craig was an abused child with Dr. Halversen during the course of the medical consultations.(R. 249, 254) This possibility was also discussed with the police, after the fact.

The complete medical records indicated that Craig Peterson had been seen at the outpatient clinic a number of times during the year 1969, but mostly for the usual or common problems of childhood. These included some sickness, a constant diaper rash, occasional running fever and an iron deficiency anemia. (R. 283) Dr. Nicholson first saw Craig on September 8th for a routine follow-up on the anemia problem, and noted nothing unusual at that time.(R.279)

Marilyn Peterson again brought Craig into the hospital on September 17th and Dr. Nicholson again treated the boy. He found an injury described as a very well demarcated circular burn...a deep second or possibly third degree... a nice clean burn.... there was no infection around it...and about 3 or 4 millimeters deep. (R. 259-260) He became suspicious because the burn was deep and because the mother could give him no good explanation as to how it occurred.

A second degree burn involves the outer layer of the skin and usually forms blisters, while a third degree burn is deeper and does not. He felt that the burn he saw was deep second or possibly third since he found no remnants of a blister and concluded that it was unlikely that the boy could have burned himself. (R. 259-262)

The demarcation, as well as the size and shape were similar to what he thought might be caused by an automobile cigarette lighter, and the cleanliness suggested that perhaps someone must have held something against the foot. He identified Exhibit #22 (cigarette lighter seized from defendant's car) as the kind of instrument that could cause such a clean circular burn--it appeared to be about the same size and shape. (R. 260)

Craig Peterson was hospitalized by Dr. Nicholson on September 26th after he was brought in for the treatment of several additional injuries, including blisters on the tops of the toes and bruises across the backs of the legs. (R. 262-269) Having treated the child so recently for another burn, the doctor became even more suspicious, and noted the fact in the hospital medical records.

Dr. Nicholson identified the color slide photographs depicting the blisters on the toes, the slides showing the bruises on the backs of the legs, and also the slide depicting the round burn, and discussed these pictures before the jury with reference to his observations made at the time of treatment. (R. 258)

He stated that he had arranged for these photographs because he had suspected abuse on the basis of his diagnosis and treatment of the round burn back on the 17th of September. (R. 263) He identified the bruises shown in Exhibits #4 and #9 as being similar to those he witnessed on Craig Peterson. The round burn was Exhibit #8, and the blistered toes were shown in Exhibit #3. In his opinion the blisters were most likely caused by hot water being applied to the tops of the toes. He recalled that he had examined Craig during the morning hours, probably between 9:30 a.m. and 11:00a.m...there were no blisters on the soles of the feet, and he didn't recall noticing any redness in that area either, or anything else unusual about the feet except for the prior round burn. (R. 266-270) He said that the blistered toes could be consistent with running hot water across them, as he

found no redness or blisters on the soles, and thought that water hot enough to cause the blisters on top should also have necessarily blistered the soles. (R. 266-270) Dr. Nicholson identified Exhibit #8 (the round burn), Exhibit #3 (blistered toes), Exhibit #4 (bruises on legs), and Exhibit #9 (leg bruises). These color slide photographs were shown to the jury during portions of the doctor's testimony by means of a projector and screen. Dr. Nicholson stated that these photographs were taken at the hospital after he suspected child abuse.

It was also on September 26th that Marilyn Peterson told Dr. Nicholson about Craig suffering another fit or breathing spell that morning, and she described his symptoms. Craig would hold his breath, pass out, turn blue and swallow his tongue. He had been having fits or tantrums in the past, but this was the worst one yet. Dr. Nicholson decided to keep the boy in the hospital for a few days for observation and that Craig was released about October 1st. The last time he saw Craig was when Craig was in the emergency room on the evening of October 5th and his testimony concerning the appearance of the child at that time was similar to that of the other doctors and included his identifica-

tion of Exhibit #1 and Exhibit #2. (R. 275)

This doctor expressed the opinion that a physician may have reason to suspect an abused child if there are repeated small injuries or even a single incident where the explanation offered by the person bringing the child in for treatment is very poor, non-existent or one which seems nearly inconceivable when compared to the observed injuries. (R. 277) Dr. Halverson generally agreed, although he described child abuse as involving multiple injuries of the kind not ordinarily sustained in day to day living, and noted that a child can be considered abused due to symptoms of neglect as well as by trauma, although usually traumatic injury is a part of it. (R. 252)

Dr. Wilson stated that a battered child involves a non-accidental physical injury to a minor of severe degree, occasionally resulting in fatality inflicted by the people responsible for the care of the child. (R. 214)

According to Dr. Nicholson, the combination of observed trauma along with the medical history is most significant, and he admitted that it is very difficult to explain abuse without a very clear and known medical history.

He admitted that during the preceding year he had seen over 600 children, had treated them, and was aware of only four or five cases of abuse, and these were based in large part on a known medical history. (R. 278)

He testified that when Marilyn brought Craig in on the 26th, she first told him that the toe blisters were probably caused by shoes which were too tight. After he questioned her more about it, she then told him that maybe the bath water was too warm that morning. She said that the child had been sick and holding his breath and swallowing his tongue and told him more about the onset of the seizures. (R. 291-294)

The only conversation he recalled that concerned the defendant was that he remembered her telling one time that her boy friend seemed to be pretty good to the child, but he couldn't recall any other statements. He noted these remarks in the medical records. (R. 293)

Dr. Nicholson testified on cross-examination that when he diagnosed the possible cause of the round burn, he was unaware that the child had been treated several days previously for it, and admitted that at that time he had not taken occasion to examine the complete medical

records. His opinion then was that the burn he saw could not possibly have been an older burn--if the child had stepped on something and then jumped off right away, there would possibly have been a first degree burn or possibly a blister. He answered that he would be unable to tell anything at all if he had seen a burn described as being dark, crusted over, and smaller--that it could be caused by stepping on a cigarette or something else hot--it was quite possible. But he saw a burn that was very round and clean. (R. 285-286)

Deputy Sheriff John W. Malmborg testified that he was the officer in charge of the investigation and examination of the premises located at 6450 South 13th East at about 3:00 a.m. on October 6, 1969. Deputy Gunnarson testified that Exhibit #10 was the diagram of the scene prepared at that time--that he took measurements. (R. 110) Deputy Hadfield testified that he was stationed in front of the house from 12:05 a.m. until 2:58 a.m. of the same morning, and that nobody went in or out until Marilyn and the other deputies arrived, when he left. (R. 202)

Deputy Malmborg identified Exhibits Nos. 12, 13, 14, 15, 16, 17, 18, and 19--photographs of the scene taken that same morning after

his arrival there around 3:00 a.m.(R. 122-23) He questioned Marilyn at the hospital, after he talked to the doctors, and questioned her again at the house, while other deputies were completing the photography.

Marilyn Peterson testified that earlier in the evening, around 7 o'clock, they arrived at his brother Allen's apartment where they met the defendant's mother and step-father, who helped them tow the defendant's old car from his father's house out to the house on 13th East. Craig was with Marilyn, asleep on the front seat of the defendant's car. (R. 147) When they got out to the house, she put Craig up in his crib, but did not undress him. They all talked for a while, and as they were leaving, she left to go to a nearby store for some more milk; she remembered that they pulled out of the driveway right behind her. (R. 149) Craig was wearing blue coveralls that night, and still had a bandage on one foot. (R. 148)

She related that she was at the store for about 15 minutes. When she returned home, she found the defendant standing on the back porch holding Craig--he had his hands under his arms and was holding him out at arms length; Craig was wearing only a T-shirt. (R. 150)

Craig was limp and unconscious, and there was a large scrape on his back. She said that the defendant told her that Craig had taken another convulsion, so she sent him down to the nearby fire station for the ambulance, while she took Craig back inside and tried to revive him. Two firemen and the ambulance came, and took her along with Craig to the hospital, arriving there around 10:00. (R. 150) She recalled that Dr. Nicholson was called to the emergency room.

When she returned to the house, along with officer Malmborg and a couple of deputies, she found Craig's clothes on the floor upstairs and a diaper on the kitchen floor. (R. 155) She testified that the defendant had never undressed Craig before. They asked her about the scrape on the back, and she told them that the defendant said "I guess he got that when I fell down the stairs with him." (R. 152-153)

October 5th was a Sunday, and Craig had been very quiet all that day. The defendant, Marilyn and Craig, had spent the afternoon finding things for the deer hunt, and had returned for dinner around 5 o'clock before leaving again to go over to his brother's apartment. (R. 144) Marilyn had had Craig home for the hospital about a week, she remembered, and had to hold him most of the time. (R. 200)

Marilyn testified that Craig had some round bruises about his ears, mainly in front of them, but said that they had been there for a couple of days prior to the 5th of October. She also identified Exhibits #1 and #2 as her little boy after the surgery. She noticed that there were some additional injuries depicted that weren't there before, including the surgeon's incisions. (R. 144) (R. 196) She pointed out some injury inside the ear, and said that Craig had never had any prior ear trouble.

She identified the slides depicting the toe blisters, and said that these occurred one morning in late September; Craig had been sick and had thrown up in the crib and made a mess, and the defendant took him down to clean him up, and shortly thereafter she heard him cry and went down herself to check the water and found that it was too hot for Craig when she put her hand in it. Although there were no burns then, the feet were really red, and they started to blister about 20 minutes later. (R. 139)

It was about a week before this that Craig got the bruises on the legs; the same day she moved out to 13th East with Margie she went to the store for a short time, leaving the defendant with Craig and Margie's kids, and returned to find Craig with a scrape on his head from the

stripping on the steps, and the next morning she discovered bruises she described as being "fairly large sized, wide, and fairly far apart. (R. 135-137) Marilyn testified that the defendant told her that ~~Craig~~ had been playing on the stairs with Margie's kid, and had fallen.

There was also the time in the middle of September when Craig hurt his mouth. He had been with the defendant while driving to a nearby gas station and back to Ed Webb's place; and that the defendant told them that a little boy darted into the road, and when he applied the brakes Craig hit the dashboard. There was a tooth loose and bleeding badly, so Ed pulled it out. (R. 139)

When she first saw the round burn it appeared to her as a "round blister, burn", and it appeared as shown in Exhibit #8 about a week later. It occurred on a Sunday during the middle of September, perhaps the 21st. She had it treated at the hospital that evening, cleaned and a bandage applied, and returned a few days later for further checking or treatment. Marilyn testified that while she was apartment hunting, with the defendant driving her around, she was gone from the car for about 10 minutes, at a gas station, early in the afternoon. (R. 129-132) She said the boy was subject to seizures and tantrums,

with the worst of these being on the morning of the blistered toes, and again on the evening of October 5th; she described the symptoms --he would start shaking, turn blue or black, shut his eyes, tighten up, hold his breath, and then swallow his tongue--and she had no idea of the cause. They were worse than the tantrums, and she was upset by them--several times she had to pry his tongue out of the mouth with a spoon. (R. 186-181) She said that she never hit the boy on the head, but admitted that once Margie told her not to paddle Craig so hard, but he had just wet all over a new couch. (R. 189)

Maxine Crowder described the round burn as having dry skin like a popped blister, crusty around the edges, and didn't look fresh that day when she first discovered it. She described Craig as a "good little boy--he never cried and never had a seizure", and that she used to take care of Craig quite a bit. (R. 203, 205-206)

Edward R. Webb testified that Craig had been with defendant at gas station, but nothing was wrong then; defendant fell behind on way back, and the last time he saw Craig, the child was standing up in the car. The route passed a school, and Craig's mouth was bloody, and he pulled a tooth out. (R.206-209)

Shirley Peterson, Craig's grandmother, said that she had him the Saturday before the round burn was discovered, and didn't notice anything, although she bathed him.(R. 315)

Margie Williams testified that she had known Marilyn for two years and they lived together at 13th South for a while (R. 317); she had been to Provo for a schizo personality which she couldn't describe; she was present when the toes were burned, and accompanied Marilyn to the hospital;(R. 319) (R. 327-28) said that on the night of the fatal injuries she was watching through the window of the kitchen and saw the defendant carry Craig down the stairs by his ears, after which, she just left. (R.325-326) She talked to some relatives and returned some of defendant's things but didn't make any statements exculpatory of him. (R. 330-332) She was recalled after defense motion to dismiss was denied, and added that she had a conversation with the defendant, and added some details respection the manner he held the ears. (R. 323-327)

The defense witnesses generally testified that on the evening of October 5th the defendant had been treating Craig Peterson very carefully; that they had some conversations with Margie Williams where she told them that Marilyn was

lying about things, and that she had to stop her from beating on Craig many times. (R. 336-337) She also admitted to these witnesses that the defendant had been very good to her kids, as well being good to Craig, and further, just wasn't the type.(R. 356) The defendant's uncle, Doyle Simmons, recalled finding some of the property on the vacant side of the duplex on 13th; he was present at conversations with Margie. Rita Andreason, defendant's mother testified that when they were all at Allen's on the 5th that the baby looked sick, feverish, not well, and that he was wearing a little cap; and that out at the house, she never saw such a filthy place; that Marilyn never took a thing off the baby; there was not even a sheet on the dirty mattress in the crib. (R. 348-356) The baby was unusually quiet, he didn't stir a bit. Elmer Andreason testified regarding the towing of the car and that the defendant handled the child very carefully, just before they left, around 9:00 p.m. after Marilyn asked him to take Craig for her. (R. 334) Bob Brewer, manager of the Uniroyal shop where defendant was employed, testified that during time in question defendant only missed a few hours of work, and gave the dates; and recalled that a woman picked him up after work. (R. 343-345) The defense rested. Officer Malmborg was called in rebuttal; read some admissions out of the statement taken from defendant. (R374)

POINT I

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTIONS TO DISMISS AND ALLOWED THE JURY TO CONSIDER FIRST DEGREE MURDER AS A POSSIBLE VERDICT WHEN THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUSTAIN A CONVICTION OF MURDER IN ANY DEGREE AS A MATTER OF LAW, THEREBY DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND EQUAL PROTECTION.

Utah Code Ann., § 76-30-1 (1953) defines murder as: "[T]he unlawful killing of a human being with malice aforethought." To qualify as murder, the statute requires not only a showing of malice, but also "aforethought." This simply means that the malice was thought out beforehand, or previously planned or designed or premeditated. State v. Roedl, 107 Utah 538 (1945); State v. Russell, 106 Utah 116 (1944). The design to kill or effect death must, of course, be formed prior to commission of the act in question. State v. Mastato Karnmai, 101 Utah 592 (1942).

Utah Code Ann., § 76-30-2 (1953) provides that the requisite malice, the wish to kill or do great bodily harm knowing its reasonable and natural consequences would be death, may be express or implied:

> It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Although all murder in Utah requires a showing of "malice aforethought," Utah Code Ann., § 76-30-3 (1953) provides two degrees for such killings:

> Every murder perpetrated by poison, lying in wait or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life; --is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.

Appellant submits that upon the basis of the evidence presented, a reasonable mind could not be convinced or persuaded beyond a reasonable doubt that the death of the decedent was caused by the wilful, deliberate, malicious

and premeditated actions of the accused, and that such evidence was insufficient to sustain a verdict of murder in the first degree on any theory thereof, and was also insufficient to sustain a verdict of murder in the second degree. In view of the evidence presented, the question should only have been submitted on the question of involuntary manslaughter. It was therefore error for the court in this case to have instructed the jury on the question of murder in any degree, where unsupported by any evidence introduced therein. State v. Condit, 101 Utah 558 (1942).

Clearly the evidence submitted in the instant case was insufficient to establish that the killing here was "wilful, deliberate, malicious and premeditated ...," as required by § 76-30-3. As this Court pointed out in State v. Thompson, 110 Utah 113 (1946), for this category of murder in the first degree:

> [T]here must be a planned, designed and previously thought out intention to kill the person killed after a deliberate or cool weighing and consideration of such plan .... Id. at 121.

The Court reiterated this point in State v. Trujillo, 117 Utah 237 (1950).

> Murder in the first degree has added to the ... state of mind [required of second degree murder] the elements of deliberation and premeditation--elements that imply a cool weighing and consideration of a means of accomplishing the results of those malicious desires. Id. at 633-34.

Also, in State v. Stenback, 78 Utah 350 (1931), the Court observed:

> To constitute a homicide murder in the first degree, there must be present in the mind of the accused not only an intention to take the life of a human being, but such intention must be characterized by premeditation and deliberation. The intention to do an act which is calculated to take the life of a human being is an element common to the crimes of voluntary manslaughter, murder in the second degree, and murder in the first degree. Which, if any, of the three crimes was committed in a given case depends on the state of mind under which the accused acted when the homicide was committed. Id. at 358-59.

Although admittedly, no definite or fixed period of time for premeditation or reflection need be shown, it is well established in the case of State v. Anselmo, 46 Utah 137 (1915), that:

> [S]ome space of time, however brief for premeditation, is necessary before the fatal shot is fired or the fatal blow is struck.... Id. at 156.

Even when considering all the evidence in the light most favorable to the verdict, there was nothing to show that the accused at any time contemplated, designed or planned the death of the deceased. The most that could have been established was that the accused had on a few prior occasions injured or possibly punished the deceased; that the deceased appeared to have injuries characteristic of the unfortunate, but medically recognized "child-abuse syndrome." To allow the jury to infer the premeditation and deliberation required by law for first degree murder from miscellaneous instances of child abuse would render meaningless the traditional distinction between first and second degree murder. Indeed, the fact that death occured some time after the fatal injury, in circumstances where the alleged acts were not interrupted, would appear to negate any fixed intent or design to effect the death of the deceased. If such acts were sufficient to show the requisite premeditation and deliberation, it would be difficult to envision any killing, however accidental or unexpected, where a case of first degree murder could not be made.

Appellant further submits that this was not a proper case of first degree murder "perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life ...," within the meaning of §76-30-3, and that it was error to instruct the jury accordingly. The obvious intention of the legislature in enacting this provision was to alleviate the necessity of any specific intention to kill, otherwise required of first degree murder, where potentially dangerous acts are directed against persons in general rather than against any particular individual. The variety of behavior towards which this particular provision was directed was correctly deliniated by this Court in State v. Russell, supra, wherein it was noted:

> This [provision] requires an act which is, at least potentially, dangerous to other persons and not directed against any one in particular. Such an act is more dastardly than where only one person can be endangered, even though only one is affected thereby. No doubt this was considered in making this [type of action] murder in the first degree without a specific intention to kill. This division is distinguished from ...[other sections of the statute] which require a specific intention to kill a particular person, whereas here, no intention to kill

is required, though an intention to kill persons generally may exist .... Id. at 129.

This construction was cited with approval in State v. Thompson, supra, where death resulted from an indiscriminate firing of a weapon into a room known to contain several occupants. Also, in the recent case of State v. Gillian, 23 Utah 2d 372 (1970), Ellett, J., in his dissenting opinion (for other reasons) suggested the applicability of this portion of § 76-30-3 to a situation where one would throw a bomb into crowded bleachers. See 40 C.J.S., Homicide § 31.

Clearly, this was not the situation in the instant case. Here, the evidence is undisputed that the appellant's acts were directed toward and endangered only the life of the deceased and not people generally and indiscriminately. Therefore, the trial court erred in submitting this question to the jury.

Appellant further maintains that the evidence presented could not properly support a verdict of second degree murder, and that it was error to have instructed the jury on this point. Although Utah Code Ann., § 76-30-3 (1953) adopts the common law definition of

murder as second degree murder (where not made first degree murder therein), § 76-30-1 still requires a showing of "malice aforethought" as an essential element to all murder. No evidence in the case at bar was introduced from which it could be inferred that the appellant acted maliciously, or that any such malice, if so established, was "aforethought" or previously planned, designed or premeditated.

POINT II

THE TRIAL COURT ERRED BY ADMITTING COLORED PHOTOGRAPHS OF THE DECEASED CHILD INTO EVIDENCE WHERE THE PREJUDICIAL EFFECTS DUE TO THE GRUESOME AND INFLAMMATORY NATURE OF THOSE PHOTOGRAPHS FAR OUTWEIGHED ANY POSSIBLE PROBATIVE VALUE WITH RESPECT TO THE MATERIAL FACTS IN ISSUE AND THEREBY DEPRIVED APPELLANT OF A FAIR TRIAL.

During the course of the trial, the State introduced into evidence a considerable number of enlarged color photographs in support of expert medical testimony. These photographs were discussed and examined by the jury with reference both to earlier injuries sustained by the deceased child at times prior to his death, and with respect to certain injuries causing death.

Appellant submits that the introduction of this evidence served no legitimate purpose in the trial and that the principal effect of such photographs was to arouse the passion of the jury and inflame them against the appellant because of the horror of the crime. Several expert witnesses testified as to the nature and extent of certain non-fatal injuries suffered by the deceased child prior to his death, and competent medical testimony was taken to

establish that the child died of head injuries resulting in a "subdural hematoma." The oral testimony of the lay and medical witnesses was entirely adequate to establish these facts, and the cause of death and existence of prior minor injuries to the deceased child were not seriously disputed by the defense.

In view of the above, the admission into evidence of the extremely gruesome and horrid colored photographs was needlessly repetitious of largely uncontradicted oral testimony. The slight probative value, if any, of such photographs was clearly outweighed by their obvious inflammatory nature in prejudicing the jury against the appellant.

Although the admission of such evidence is initially within the sound discretion of the trial court, this Court, speaking through Callister, J., in State v. Poe, 21 Utah 2d 113 (1968), held it reversable error to admit such evidence where its inflammatory nature exceeded any probative value with respect to a fact in issue. In the words of the Court:

> All the material which could conceivably have been adduced from a viewing of the slides had been established by the uncontradicted lay and medical testimony. The

only purpose served was to inflame and arouse the jury. Id. at 117.

The Court in Poe found the admission of such evidence so prejudicial to the rights of the accused as even to forego the necessity of timely objection at trial.

This Court's holding in Poe applies to the instant case. As in Poe, colored photographs were taken from an autopsy of the deceased child. Also, colored photographs were admitted detailing prior injuries to the deceased, the relevancy of such injuries being highly conjectural. The deceased being a twenty-month old child, the admission of such evidence served only to further heighten and accentuate the already emotionally charged atmosphere to which the jury was subjected. Similar to Poe, the actual cause of death, i.e., "subdural hematoma" resulting from head injuries, was never seriously challenged by the defense.

Subsequent decisions appear to have slightly modified the thrust of Poe. E.g., State v. Jackson, 22 Utah 2d 408 (1969); State v. Renzo, 21 Utah 2d 205 (1968). In these cases, the Court allowed such evidence to show the depravity and viciousness of the assault. However,

depravity and viciousness were not properly at issue in the case at bar. Although Utah Code Ann., § 76-30-3 (1953) includes "any act greatly dangerous to the lives of others and evidencing a 'depraved mind,' regardless of human life...," as murder in the first degree, this provision was obviously intended by the legislature to include only such wanton and reckless acts as bombings or firing a weapon into a crowd, where the requisite special intent required of murder in the first degree is not manifestly present. Nor was viciousness an issue at trial. Viciousness, as such, is not an element of first degree murder, or of a lesser offense.

Many of the pictures admitted in evidence went much further than simply depicting the direct consequences of the injuries sustained, and did little more than portray the gory procedures of the pathologist. In so doing, the natural tendency was to emphasize and exaggerate the extent of such injuries beyond their normal proportions.

In view of the above considerations, the probative value of such evidence was minute in comparison to their propensity to inflame and prejudice the jury against the appellant.

They should have been excluded; their admission in this case constitutes reversible error.

POINT III

THE STATE WITNESSES MARILYN PETERSON AND MARGIE WILLIAMS WERE AS A MATTER OF LAW AND IN FACT ACCOMPLICES WHOSE TESTIMONY REQUIRES INDEPENDENT CORROBORATION AND THE TRIAL COURT ERRED IN FAILING TO SO INSTRUCT THE JURY, AND BY ITS DENIAL OF APPELLANT'S MOTION TO DISMISS.

An accomplice is any person who could have been charged along with the defendant as a principal in the crime. State v. Davie, 121 U. 184 (1952). According to Utah Code Ann., § 76-1-44 (1953) this would include:

> All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission or, not being present, have advised and encouraged its commission ... are principals in any crime so committed.

Under this definition, it would seem clear that Marilyn Peterson, mother of the deceased child, together with Margie Williams, an inhabitant of the Peterson home, were both accomplices to the several alleged acts of abuse inflicted upon the deceased child, and contributed to his death. The mother herself testified as to her actual presence in the home, and at other places when the several injuries were suffered by the deceased child. She further testified that

the child was almost continuously in her care, save for the few instances where he was entrusted to the care of others. The mother moreover admitted to having been restrained from beating the deceased so severely on at least one occasion by witness Margie Williams. Were she not an active participant in inflicting abuses upon the child, her presence and acquiesence would certainly suggest her support and encouragement. That she was criminally corrupt through such an involvement, and thus an accomplice, cannot be doubted. State v. Bowman, 92 Utah 540 (1937); and State v. Wade, 66 Utah 267 (1925). The same can be said of witness Margie Williams, whose presence along with her close familiarity with the deceased and the abuse inflicted upon him, would indicate a similar involvement and culpability. This was certainly such a situation as described by the California District Court of Appeals in People v. Ortiz, 25 Cal. Rptr. 327 (1962), wherein it observed:

> One who is present and is aware of the acts of the perpetrator of a crime and either by acts of encouragement or warning or by gestures aids or encourages the commission of the crime is an aider and abetter and may be charged as a principal. Id. at 333.

The Indiana Supreme Court in the case of Cotton v. State, 211 N.E. 2d 158 (1965) similarly noted:

> Even if there were not active participation in the commission of the crime, failure to oppose it at the time, companionship with others engaged therein, and a course of conduct before and after the offense are such circumstances as may be considered in determining whether aiding or abetting may be inferred. Id. at 161.

Where such acts and conduct on the part of the witnesses are found, it is for the court, as a matter of law, to instruct the jury as to whether the witness is an accomplice to the crime. State v. Coroles, 74 Utah 94 (1929); see generally, 2 Wharton, Criminal Evidence, § 443 et seq (12th ed. 1955) Moreover, such failures of the trial court, where they appear on the record, have frequently been corrected by reviewing tribunals, even where no formal objection was taken thereto. See People v. Mitchell, 166 P.2d 10 (Calif. 1946); and Gregg v. Groesbeck, 11 Utah 310 (1895). See also, State v. Clauson, 6 Utah 2d 160 (1957).

Under Utah law, the testimony of an accomplice requires independent corroboration. Utah Code Ann., § 77-31-18 (1953) directs:

> A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in and of itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof ....

This Court has made it clear in the case of accomplices, that under this statutory provision there must be some independent corroborating evidence implicating the defendant in the offense, and that such evidence must do more than cast a grave suspicion. State v. Erwin, 101 Utah 365 (1941). See also, State v. Bruner, 106 Utah 49 (1944); State v. Gardner, 83 Utah 145 (1933); and State v. Laris, 78 Utah 183 (1931). In the absence of such corroborating evidence, it is the duty of the court to direct a verdict for the defendant. State v. Somers, 97 Utah 132 (1939).

This was the situation in the instant case. Absent the testimony of accomplices Marilyn Peterson and Margie Williams, there remained not so much as a grave suspicion to connect the appellant to the injuries and death of the deceased child. The extensive medical testimony relates to the nature of the decedent's injuries

and the cause of his death was certainly not of any substantive character as would connect the defendant with the commission of the crime charged or identify him as the guilty person. State v. Coroles, supra. 2 Wharton, Criminal Evidence, § 468. This medical testimony shows not even "the commission of ... [any] offense or the circumstances thereof" and in no way is inconsistent with accidental death. Utah Code Ann. § 77-31-18 (1955)

POINT IV

THE CONVICTION OF THE APPELLANT WAS UNCONSTITUTIONAL UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION FOR THE REASON THAT THE JURY DISCUSSED APPELLANT'S FAILURE TO TESTIFY AND CONSIDERED HIS SILENCE AS EVIDENCE OF HIS GUILT, AND THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL WHICH WAS BASED ON THE MISCONDUCT OF THE JURY.

The United States Constitution insures that "No person ... shall be compelled in a criminal case to be a witness against himself." U.S. Const., amend. V. See also, Utah Const. art. 1, § 12. This important constitutional safeguard has been extended to state proceedings via the Fourteenth Amendment in the case of Malloy v. Hogan, 368 U.S. 1 (1964). Further protecting this right, the United States Supreme Court, in Griffin v. California, 380 U.S. 609 (1965), held that the state could not make this privilege of silence "costly" and that it would be error for the court or the prosecution, in a jury case, to comment upon the failure of the accused to take the stand in his own behalf.

Similarly, appellant submits that where the jury, in its deliberations, weights appellant's exercise of this constitutional right against him, as it clearly did in the case at bar, that such misconduct amounts to such prejudice as

would warrant a new trial. Concerning this misconduct, Mrs. Donna J. Johnson, a member of the jury, testified (R. 456-61) in support of her affidavit (R. 92), in part, as follows:

* * * *

Q (by Mr. Russell) How much of the discussion in the jury room was concerned strictly with [defendant's] failure to testify?

A Well, I would say quite a bit...was centered on why he wasn't allowed to testify...

* * *

THE COURT: Was it the basis for their verdict?

THE WITNESS: Yes, I believe it was.

THE COURT: You stated before...that in your opinion the other evidence still showed his guilt;.... In other words, were the other facts considered in this case along with the Defendant's failure to take the stand, or was the verdict based on just his failure to take the stand?

THE WITNESS: Well, it wasn't based on that alone.

* * *

Q (by Mr. Russell) If I could ask....had discussion of his failure to testify not been a significant part of the deliberations, would you have concurred in the verdict of first degree murder?

A No, I wouldn't have.

Appellant's motion for a new trial, based on jury misconduct as well as other error discussed heretofore, was, upon further argument, denied.

In such instances as presented here, the jury, by its own misconduct effectively undermines all the constitutional protections accorded the defendant in any criminal proceeding, and thereby denied him a fair and impartial trial.

Although this Court does not appear to have had occasion to pass on this specific type of misconduct involving a violation of Fifth Amendment rights, several jurisdictions have been quick to correct such injustice where it arose. In the early case of State v. Rambo, 69 Kan. 777, 77 P. 563 (1904), also a murder case, the Kansas Supreme Court found that the jury's consideration of defendant's failure to testify would be so prejudicial as to vitiate the verdict and require a new trial. The Kansas Court was of the further opinion that this type of misconduct was tantamount to a consideration by the jury of extraneous facts not in evidence, and under such circumstances, a juror's testimony would be admissible to impeach the verdict. Likewise, in Carrol v. State, 50 Tex. Crim. 485, 98 S.W. 859 (1906), the Texas Court of Criminal Appeals ordered a reversal where it appeared that the jury considered the defendant's failure to testify. See also, State v. Hockett, 172 Kan. 1 238 P. 2d 539 (1952); DeLaRosa v. State, 167

Tex. Crim. 23, 317 S.W. 2d 544 (1958); and Low v. State, 156 Tex. Crim. 34, 238 S.W. 2d 769 (1961). These cases make clear, admittedly, that bare allusion to the fact of defendant's failure to testify will not be sufficient for reversal. See Leal v. State, 169 Tex. Crim. 222, 332 S.W. 2d 729 (1959); Clark v. State, 398 S.W. 2d 763 (Tex. 1966); and State v. Hillstrom, 46 Utah 341 (1915). This was not the situation with the case at bar, as here, the jury appears to have given substantial weight to the appellant's failure to testify.

The long prevailing view, in this jurisdiction and others, has been that a juror cannot by affidavit or otherwise, impeach his own verdict. See State v. Rivenburgh, 11 Utah 2d 95 (1960); and State v. Priestly, 97 Utah 158 (1939). The policy here, quite obviously, is to preserve the secrecy and integrity of jury deliberations, protect individual jurors from undue harassment, and add some finality to such proceedings. See State v. Athorn, 46 N.J. 247, 216 A. 2d 368 (1966). This rule notwithstanding, the courts have readily recognized that no inflexible rule can be laid down here, as cases arise where the plainest principles of justice demand that a new trial be directed on a proper showing of

jury misconduct. In maintaining this delicate balance, several exceptions have long been observed. See Hathaway v. Marx, 21 Utah 2d 33 (1968). For example, this Court and others have shown little hesitancy in striking down verdicts based upon chance or compromise, or where based on extraneous facts not in evidence, or where the jury acts in clear disregard of the court's instructions. See, e.g., State v. Athorn, supra. Appellant submits that where the jury chooses to ignore the instructions of the court and acts in violation of appellant's right to remain silent, and suffer no prejudice thereby, then an examination of the jury's deliberations becomes even more compelling.

Furthermore, Utah has by statute specifically enumerated those types of jury misconduct which necessarily warrant a new trial. In these instances, the statute expressly provides for impeachment of the verdict by affidavits. Utah Code Ann., § 77-38-3 (1953). Among the statutory grounds warranting a new trial are the following:

> ....
> (3) [A]ny [jury] misconduct by which a fair and due consideration of the cause may be prevented.

(4) When the verdict has been determined ... by any means other than a fair expression of opinion on the part of all the jurors.

(5) When the court has misdirected the jury as a matter of law, or has erred in the decision of any question of law arising during the course of the trial, or has done or allowed any action in the cause prejudicial to the substantial rights of the defendant.

(6) When the verdict ... is contrary to law or the evidence.

The foregoing legislative exceptions to the rule that jurors cannot impeach their own verdict, reasonably construed, easily subsume that type of misconduct complained of in the case at bar, i.e., an adverse consideration of appellant's right to remain silent. In fact, it is difficult to imagine any other jury misconduct more in point. Surely such misconduct would have been prevented had the jury taken a "fair and due consideration of the cause." Further, where the jury in reaching its verdict considers defendant's failure to testify as a factor against him, such a verdict would certainly not be considered the product of "a fair expression of opinion on the part of all the jurors," and would be "prejudicial to the substantive rights

of the defendant." In any event, the type of jury misconduct found in the instant case, in clear disregard of the court's instructions -- as opposed to a mere misunderstanding -- is without doubt, "contrary to law ... [and admissible] evidence." See Youngkin v. Maurer, 74 Ariz. 67, 243 P. 2d 780 (1952); and State v. Rosenberg, 84 Utah 402 (1934). The proscriptions found in subsections (3), (4), (5), and (6) of § 77-38-3 are indeed very broad in their sweep and clearly encompass that variety of misconduct which transgresses a defendant's Fifth Amendment rights. Furthermore, being essentially remedial in nature, these provisions are entitled to a liberal construction by the Court.

In the early case of State v. Morgan, 23 Utah 212 (1901), this Court, through Baskin, J., had occasion to construe the predecessor to § 77-38-3. Revised Statutes, § 4952 (1898). In that case, also involving first degree murder, this Court made it clear that jury misconduct in falsely answering to voir dire examina- was so prejudicial to the rights of the accused as to require a new trial. The Court declared:

> The cases are numerous which hold that the misconduct by one or more of the jury which might have been prejudicial to the accused raises a presumption, especially in a

capital case, that the accused has been prejudiced thereby and vitiates the verdict unless the prosecution shows beyond a reasonable doubt that the prisoner has received no injury by reason thereof. Id. at 226 (emphasis added).

The Court in Morgan suggested that the misconduct there complained of would easily come within the meaning of subsections (3) and (4) of § 77-38-3. The Court further found that even if the above mentioned legislative provisions for a new trial were not applicable, that the Utah Const., art. 1, § 12, required protection against such jury misconduct. In the words of the Court:

> In the absence of any legislative remedy for such wrongs, the courts will resort to the common law if it affords a remedy and if it does not, then the courts, by virtue of their inherent powers, and their duty in criminal cases to guard the rights of persons will, if possible, devise new remedies, as has been done from a very remote period of time, by equity courts, to meet new conditions and supply remedies for wrongs, when none already existed. Morgan at 228.

Appellant maintains that the jury's misconduct in the instant case, in considering his failure to testify against himself, is no less prejudicial to his right to a fair trial than would be the case, as in Morgan, where individ-

ual jurors had misrepresented their preconceived opinions of guilt on voir dire examination. The prejudice to the appellant is even greater in the case at bar, involving as it does, not only a violation of his rights under the Utah Const., art. 1, § 12, but also an obvious denial of his Fifth Amendment right under the Federal Constitution to remain silent and suffer no penalty therefrom. Further, the affidavit and testimony of Mrs. Johnson in the case at bar establishes that at least one juror clearly disregarded the instructions of the court. Under the Morgan rationale, this would raise the presumption of prejudice to appellant which must then be dispelled, if possible, by the State.

The instructions given by the court to the jury are "the law of the case," and although the jury may have the power to disregard the court's admonitions, it never has the right to do so. See, e.g., McDonald v. Peters, 128 Mont. 241, 272 P. 2d 730 (1954). C.f., People v. Ward, 381 Mich. 624, 166 N.W. 2d 451 (1969). In such circumstances, it will be the duty of the trial court to correct such abuses by granting a new trial, to which appellant, under the provisions of Utah Code Ann., § 77-38-3 (1953) is entitled. Robinson v. Herinson, 17 Utah 2d 261 (1965); and Jorgensen v. Gonzales, 14 Utah 2d 330 (1963).

POINT V

THAT THE CUMULATIVE EFFECT OF THE FORGOING ASSIGNED ERRORS DEPRIVED THE APPELLANT OF A FAIR TRIAL

Appellant submits that each of the forgoing errors assigned presents adequate grounds upon which this Court could reverse and order a new trial. Should this Court find, however, that no single issue, by itself, particularly in capital cases, "to scrutinize with care the propriety of all aspects of the preceedings." State v. St. Clair, 3 Utah 2d 230 (1955). And in so doing:

> [I]f there is a reasonable liklihood that in the absence of such errors a different verdict might have been rendered, a new trial should be granted. Id. at 244.

It was early recognized by this Court that there may be several errors in a trial, and each error may not independently be sufficiently prejudical to warrant a reversal, but when each is viewed in conjunction with the others, the cumulative effect will amount to the denial of a fair trial. This position was established in State v. Vasquez, 101 Utah 444 (1942), and later reaffirmed by this Court in State v. St. Clair, supra, wherein it was said:

> It is recognized that a combination of errors which, when singly considered might be thought insufficient to warrant a reversal, might in their cumulative effect do so. Id. at 243.

An examination of the record in the instant case reveals that the forgoing errors, when cumulatively considered, prevented the appellant from receiving a fair trial.

The obvious misconduct of the jury in considering appellant's failure to testify against him amounted to a violation of appellant's Fifth Amendment right to remain silent, as well as his right to a trial by an "impartial jury" graranteed by the Utah Constitution, art. 1 § 12, and clearly entitles him to a new trial.

Even more prejudical, however, was the insufficiency of the evidence introduced at trial to sustain a charge of murder in the first degree, of for that matter, any degree of murder. When the error of discretion in allowing the admission of gruesome and inflammatory photographs of the deceased child into evidence, over objection, is considered in conjunction with the error created by allowing evidence adduced through the uncorroborated testimony of accomplices to be considered by the jury without the necessary and required

instructions, the cumulative effect of these errors deprived appellant of a fair trial.

CONCLUSION

The appellant respectfully contends that the conviction of murder in the first degree should be set aside. Defense motions for dismissal and for a new trial were improperly denied. The prejudicial effect of the failure of adequate instructions regarding accomplices along with the inflammatory and gruesome photographic evidence is clearly reversible error. The conduct of the jury falls so far short of constitutional standards as to per se require reversal and remand for a new trial.

The judgment should be reversed and the appellant discharged, or in the alternative, the judgment should be reversed and remanded with appropriate and adequate directions to the trial Court.

Respectfully submitted,
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