



2-1-1955

# Criminal Law -- Premeditation and Deliberation -- Jury Instructions -- Brutality of the Killing as Affecting

William C. Brewer Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

William C. Brewer Jr., *Criminal Law -- Premeditation and Deliberation -- Jury Instructions -- Brutality of the Killing as Affecting*, 33 N.C. L. REV. 267 (1955).

Available at: <http://scholarship.law.unc.edu/nclr/vol33/iss2/9>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

not restricted in its application to members of that race. Its protection is also available "when the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification."<sup>80</sup>

CHARLES KIVETT.

### Criminal Law—Premeditation and Deliberation—Jury Instructions—Brutality of the Killing as Affecting

It is proper in North Carolina in a first degree murder trial for the question of the defendant's premeditation and deliberation to go to the jury with the instructions that the jury may use the conduct of the accused before and after the crime, along with other attendant circumstances, in deciding whether the elements of premeditation and deliberation were present.<sup>1</sup> Our court has held to be admissible as evidence of the defendant's premeditation and deliberation: absence of quarrels between the accused and the deceased,<sup>2</sup> previous threats,<sup>3</sup> preparations made for the crime,<sup>4</sup> absence of provocation,<sup>5</sup> declarations made by the accused,<sup>6</sup> and subsequent acts of the accused,<sup>7</sup> other than flight.<sup>8</sup>

But there is some uncertainty in the holdings of the court as to the exact circumstances in which the jury should consider the subsequent acts of the accused in determining premeditation and deliberation. This uncertainty arises when cases approving an unqualified in-

<sup>80</sup> *Hernandez v. Texas*, 74 Sup. Ct. 667, 670 (1954).

<sup>1</sup> *State v. Lamn*, 232 N. C. 402, 61 S. E. 2d 188 (1950); *State v. Chavis*, 231 N. C. 307, 56 S. E. 2d 678 (1949); *State v. Harris*, 223 N. C. 697, 38 S. E. 2d 29 (1943); *State v. Evans*, 198 N. C. 82, 150 S. E. 678 (1929).

<sup>2</sup> *State v. Watson*, 222 N. C. 672, 24 S. E. 2d 540 (1943); *State v. Baity*, 180 N. C. 722, 105 S. E. 149 (1920). It is interesting to note that while the absence of quarrels between the accused and the deceased has been held to be evidence from which the jury could infer premeditation and deliberation, the presence of quarrels between the accused and the deceased has only been held by our court to be evidence from which the jury may infer malice and ill-feeling.

<sup>3</sup> *State v. Hawkins*, 214 N. C. 326, 199 S. E. 284 (1938); *State v. Bowner*, 214 N. C. 249, 199 S. E. 31 (1938); *State v. Payne*, 213 N. C. 719, 197 S. E. 573 (1938); *State v. Grainger*, 157 N. C. 628, 73 S. E. 149 (1911).

<sup>4</sup> *State v. Baity*, 180 N. C. 722, 105 S. E. 200 (1920); *State v. Daniels*, 164 N. C. 464, 79 S. E. 953 (1913).

<sup>5</sup> *State v. Stewart*, 226 N. C. 299, 38 S. E. 2d 29 (1946); *State v. Cain*, 178 N. C. 724, 100 S. E. 884 (1919).

<sup>6</sup> *State v. Johnson*, 172 N. C. 920, 90 S. E. 426 (1916).

<sup>7</sup> *State v. Westmoreland*, 181 N. C. 590, 107 S. E. 438 (1921).

<sup>8</sup> *State v. Blanks*, 230 N. C. 501, 53 S. E. 2d 452 (1949); *State v. Evans*, 198 N. C. 82, 50 S. E. 2d 678 (1929); *State v. Steele*, 190 N. C. 506, 130 S. E. 308 (1925). The reason for not holding flight as evidence from which the jury might infer premeditation and deliberation is that flight from a crime might just as easily result from a fear of guilty circumstances as from a guilty conscience.

struction to the jury that they may consider evidence of the defendant's conduct before and after the crime in determining premeditation and deliberation,<sup>9</sup> are contrasted with the case of *State v. Westmoreland*,<sup>10</sup> which would seem to require a qualification of the instructions. In that case the court considered in detail the effect of subsequent acts of the accused. The court cited authority which it noted might indicate, depending on the circumstances of the case, that any unseemly conduct toward the corpse of the person slain, any indignity offered it by the slayer, or the concealment of the body might be evidence of express malice and of premeditation and deliberation in the killing. A close examination of the only North Carolina case<sup>11</sup> cited in this authority reveals that the court was saying that these acts of the accused should be considered in determining malice, and that it did not consider the issue of premeditation and deliberation. It was the conclusion of the *Westmoreland* case that the better rule is that acts subsequent to the crime should be considered in determining whether there was premeditation and deliberation only when those acts were of the type which show a preconceived plan,<sup>12</sup> which continues to completion after the commission of the crime. The court felt that this should be the criterion used by the jury in inferring premeditation and deliberation from the subsequent acts of the accused. So the present position of the North Carolina Supreme Court is probably that subsequent acts of the accused should be considered to determine premeditation and deliberation only when the subsequent acts of the accused are in furtherance of an obviously preconceived plan on the part of the accused to take the life of the deceased.

This is further accentuated by those cases holding that acts by the accused subsequent to the crime are evidence only of the general guilt of the accused as opposed to the specific elements of premeditation and deliberation.<sup>13</sup> Against this background, the court is now allowing the question of the defendant's premeditation and deliberation to go to the jury with the unqualified instruction that they may use the defendant's conduct after the crime in determining premeditation and

<sup>9</sup> *State v. Lamn*, 232 N. C. 402, 61 S. E. 2d 188 (1950); *State v. Chavis*, 231 N. C. 307, 56 S. E. 2d 678 (1949); *State v. Harris*, 223 N. C. 697, 38 S. E. 2d 29 (1943); *State v. Evans*, 198 N. C. 82, 150 S. E. 678 (1929).

<sup>10</sup> 181 N. C. 590, 107 S. E. 438 (1921).

<sup>11</sup> *State v. Robertson*, 166 N. C. 356, 81 S. E. 689 (1914).

<sup>12</sup> In the *Westmoreland* case, the defendant, immediately after the killing began to dispose of the body of the deceased. He secretly concealed it in an old well, and his attempt to dispose of it was accompanied with such precision and certainty that it was obvious that it was a part of his preconceived plan to kill the deceased. His actions after the killing were only in completion of this preconceived plan.

<sup>13</sup> *State v. Steele*, 190 N. C. 506, 130 S. E. 308 (1925); *State v. Atwood*, 176 N. C. 704, 97 S. E. 12 (1918).

deliberation.<sup>14</sup> This is probably being understood by juries to mean that the conduct after the crime may be considered in finding premeditation and deliberation of the defendant without considering whether this conduct is a part of the preconceived plan of the defendant to take the life of the deceased. This seems to be contrary to the previous holdings of the court that these subsequent acts of the defendant are to be considered only a evidence of guilt generally, and not of premeditation and deliberation.

In further examining the wide discretion of the jury in considering the circumstances of the crime in its determination of premeditation and deliberation, it becomes obvious that the discretion is the same if the killing is done methodically without violence, as when it is accomplished in a brutal and ferocious manner. However, in a case of the latter type, should the jury be allowed to infer premeditation and deliberation from the brutal manner of the killing alone?

While this question has not been directly decided by the North Carolina Supreme Court, it has said in *State v. Stanley*,<sup>15</sup> "The vicious, ferocious, and brutal manner of the slaying by two slashes of the razor which almost decapitated the victim engenders an inference of premeditation and deliberation distinct from the presumption of second degree murder by the intentional use of a deadly weapon and merged therein." The other evidences of premeditation and deliberation in this case were strong and no doubt conclusive. However, the court's language on the aspect of brutality may show a tendency to misconstrue the early cases in such a manner as to destroy the conventional distinction between malice and premeditation and deliberation.<sup>16</sup> Simi-

<sup>14</sup> *State v. Lamn*, 232 N. C. 402, 61 S. E. 2d 188 (1950); *State v. Chavis*, 231 N. C. 307, 56 S. E. 2d 678 (1949); *State v. Harris*, 233 N. C. 697, 38 S. E. 2d 29 (1943); *State v. Evans*, 198 N. C. 82, 150 S. E. 678 (1929).

<sup>15</sup> 227 N. C. 650, 654, 44 S. E. 2d 196, 199 (1947); *accord*, *State v. Bynum*, 175 N. C. 777, 782, 95 S. E. 101, 103 (1918), where this language was used: "There was an absence of any altercation or quarrel which might point to a killing without malice and without a deliberate intent to kill. The manner of the killing, cutting the throat from ear to ear, the beating up of the head and the breaking in of the nose would indicate or at least was evidence from which the jury could infer that the killing was not merely from malice which would make it murder in the second degree but was a deliberate intent to kill in order to conceal this crime or his intent to commit crime against the person of the victim. These were matters for the jury." The evidence here would have heavily favored a verdict of first degree murder occurring in an attempt to commit rape.

<sup>16</sup> Under the common law the court several times held that the brutality of the killing would permit an inference of malice. *State v. Hill*, 20 N. C. 629 (1839); *State v. Chavis*, 80 N. C. 364 (1879); *State v. Boon*, 82 N. C. 879, 19 S. E. 705 (1894). Under statutory murder, however, the court was to determine whether all the evidence which allowed a permissible inference of malice at common law would permit the additional inference of premeditation and deliberation. Despite the language of the *Stanley* case, 227 N. C. 650, 654, 44 S. E. 2d 196, 199 (1947), it is believed that in the cases there relied on the court has fallen more in line with the common law cases and held brutality

larly, the court has allowed the brutality of the killing to affect its disposition on the question of legal provocation.<sup>17</sup>

Definitions of premeditation and deliberation as expounded by the court have varied little. To premeditate is to think beforehand, the length of time being immaterial; to deliberate is to form an intention to kill, which intent is executed in a cool state of blood in furtherance of a fixed design to accomplish the unlawful purpose of taking the life of another.<sup>18</sup> Deliberation connotes weighing the thought of the killing with some semblance of reason, if only for a brief moment. Ferocity and brutality in a killing do not logically seem to result in an inference of premeditation and deliberation, since it does not seem that the killing would be more deliberately and coolly executed because it was accomplished in a brutal and vicious manner. Psychologically, extreme violence usually suggests thoughtlessness, passion, and even insanity, and while psychological tests may not always be applied to the realm of the law, they may have much significance here.<sup>19</sup>

of the killing as an inference of malice rather than premeditation and deliberation. In *State v. Hunt*, 134 N. C. 684, 47 S. E. 49 (1904), the court held that the brutality of the crime would be attributed to a malicious disposition. In *State v. Robertson*, 166 N. C. 356, 81 S. E. 189 (1914), the court cited the common law case of *State v. Jarratt*, 23 N. C. 76 (1840), in saying that the manner of the killing was evidence of express malice. In *State v. Bynum*, 175 N. C. 777, 95 S. E. 101 (1918), the court again considered the brutality of the killing. It held that the brutality of the killing was evidence from which the jury could infer premeditation and deliberation, but it is believed that the jury considered that the brutality of the killing was done to cover up the crime of rape or an assault with intent to commit rape on the deceased, and that the brutal manner of the killing was to be considered in that aspect in determining premeditation and deliberation in the case. Thus, in an examination of the traditional use of drawing an inference of malice from the manner of the killing, it is uncertain whether the court would actually want to draw an inference of premeditation and deliberation from the brutal manner of the killing standing alone, although the dictum in the *Stanley* case does seem to support such a conclusion.

<sup>17</sup>In at least two cases the North Carolina Supreme Court has left the impression that there can be no provocation sufficient to justify a killing in a brutal manner, and that when there is such a killing that there can be no such thing as a sufficient legal provocation. In *State v. Hunt*, 134 N. C. 684, 689, 47 S. E. 49, 51 (1904), the court's language was that when the killing is done in a brutal and ferocious manner it "will be attributed to a malicious disposition and not to a provocation." *Accord*, *State v. Bynum*, 175 N. C. 777, 782, 95 S. E. 101, 103 (1918), where the court used these words: "There could hardly have been any provocation to cause the beating up of a woman and cutting her throat from ear to ear but the deliberate intent to kill." *Quaere* as to whether the brutality of a killing should entirely negative a legal provocation, though the possibility of a provocation sufficient to justify such a brutal killing might seem remote.

<sup>18</sup>*State v. Lamn*, 232 N. C. 402, 61 S. E. 2d 188 (1950); *State v. Wise*, 225 N. C. 746, 36 S. E. 2d 230 (1945); *State v. French*, 225 N. C. 276, 34 S. E. 2d 157 (1945); *State v. Hawkins*, 214 N. C. 326, 199 S. E. 284 (1938); *State v. Payne*, 213 N. C. 719, 197 S. E. 573 (1938); *State v. Evans*, 198 N. C. 82, 150 S. E. 678 (1929).

<sup>19</sup>Premeditation and deliberation are mental elements connected with thought. Since, of necessity, they must be determined by circumstances, if the circumstances suggest absence of thought they could be helpful in determining the mental attitude of the accused.

Before the Act of 1893,<sup>20</sup> which divided the crime of murder into first and second degree, malice was presumed from the fact of the killing, and the killing having been shown, the offense was murder unless the contrary appeared from circumstances of justification, alleviation, or excuse. Such a killing was the present equivalent, in effect, of murder in the first degree.<sup>21</sup> With the enactment of the statute, the elements of premeditation and deliberation were added to malice to constitute the elements of the crime of first degree murder.<sup>22</sup> As the court differentiated between these two degrees and the elements necessary to establish them, it allowed an inference of malice from such general states of mind as hate, spite, and a general design to effect harm, or to take life without just cause,<sup>23</sup> while proof of premeditation and deliberation same to require some evidence of thought.<sup>24</sup> Therefore, in examining the elements that constitute first degree and second degree murder it would seem to be more logical to make the legal effect of brutality in a killing a permissible inference of malice rather than of premeditation and deliberation.

This is not meant to intimate that the circumstances surrounding the killing should not be used to determine the presence of the elements of premeditation and deliberation, but that the brutality and viciousness of the actual killing would not be a true test of the mental attitude of the killer. A circle might be drawn around the time of the killing at a point which did not take from the jury consideration of the circumstances leading up to and after the killing. Within this circle the jury should be instructed concerning permissible consideration of the bru-

<sup>20</sup> N. C. PUB. LAWS, 1893, cc. 85, 281; Now codified as N. C. GEN. STAT. § 14-17 (1953).

<sup>21</sup> *State v. Hicks*, 125 N. C. 636, 34 S. E. 247 (1899); *State v. Johnson*, 48 N. C. 266 (1855).

<sup>22</sup> N. C. GEN. STAT. § 14-17 (1953).

<sup>23</sup> *State v. Benson*, 183 N. C. 795, 799, 111 S. E. 869, 871 (1922), Chief Justice Stacy, speaking for the court said: "Malice is not only hatred, ill-will or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause or justification. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the killing with a deadly weapon." *Accord*, *State v. Williams*, 185 N. C. 643, 666, 116 S. E. 570, 582 (1923): "Malice may arise from personal ill-will or grudge, but it may also be said to exist (in a legal sense) wherever there has been a wrongful or intentional killing of another, without lawful excuse or mitigating circumstances. This is implied or legal malice."

<sup>24</sup> *State v. Lamm*, 232 N. C. 402, 61 S. E. 2d 188 (1950); *State v. Chavis*, 231 N. C. 307, 56 S. E. 2d 678 (1949); *State v. Brown*, 218 N. C. 415, 11 S. E. 2d 321 (1940); *State v. Hawkins*, 214 N. C. 326, 199 S. E. 284 (1938); *State v. Bowser*, 214 N. C. 249, 199 S. E. 31 (1938); *State v. Payne*, 213 N. C. 719, 197 S. E. 573 (1938). Some of the cases have held that if the circumstances show a formed design to take life, this is murder in the first degree. However, this formed design to take life must have in it the elements of premeditation and deliberation to comply with the statutory requirements. See *State v. Stewart*, 226 N. C. 299, 38 S. E. 2d 29 (1946).

tality of the killing in determining premeditation and deliberation, to prevent confusing those elements with malice.

North Carolina and other jurisdictions are in accord in sending the issue of the premeditation and deliberation of the defendant to the jury with the instruction to consider all attendant circumstances of the crime.<sup>25</sup> Some jurisdictions seem to lean toward an attitude which would allow the brutality of the killing alone to be evidence from which the jury could infer premeditation and deliberation.<sup>26</sup> Though no trend can be shown, primarily because the courts have not considered whether premeditation and deliberation could be inferred from the brutality of the killing alone, there is a probability that they are allowing the traditional differences between malice and premeditation and deliberation to be confused, by not instructing the jury specifically on the legal effect of a killing accomplished in a brutal manner.

In determining the presence of premeditation and deliberation, it is generally true that there are several factors involved, with the jury weighing all of them at the same time. What weight they give to each factor is not ascertainable. Of course, the brutal manner of a killing cannot be entirely disregarded where a jury is attempting to determine the elements of premeditation and deliberation. It probably always plays an uninvited role since a brutal manner of killing will naturally have more effect on the emotions of the jurors than the situations in which this element is lacking. Nor would it be advisable to minimize those aspects of brutality and atrocity that might really aid in determining whether premeditation and deliberation were present. This situation might occur where there was an extension of brutality into such a period of time that it bordered on torture, or where the circumstances of brutality and atrocity which lead up to the crime are such as obviously indicate plan or design. However, evidences of brutality in the actual killing would ordinarily seem to be no evidence of premeditation and deliberation.

A ghastly murder makes objective determination of the facts difficult under any circumstances. The aim of the court is to have the jury consider the circumstances of the case in its most reasonable and thoughtful state of mind. With this in view the trial judge may, in his discretion, refuse to allow the jury to see horrible and ghastly photo-

<sup>25</sup> *Bramlett v. State*, 202 Ark. 1165, 156 S. W. 2d 226 (1941); *Craig v. State*, 205 Ark. 1100, 172 S. W. 2d 256 (1943); *Robinson v. State*, 69 Fla. 521, 68 So. 649 (1915); *State v. Cox*, 128 N. J. L. 108, 23 A. 2d 555 (1942); *State v. Leakey*, 44 Mont. 354, 120 Pac. 234 (1911); *State v. Fitch*, 65 Nev. 668, 200 P. 2d 991 (1948); *State v. Davis*, 6 Wash. 2d 696, 108 P. 2d 641 (1941).

<sup>26</sup> *Craig v. State*, 205 Ark. 1100, 172 S. W. 2d 356 (1943); *People v. Sanducci*, 195 N. Y. 361, 88 N. E. 385 (1909); *Commonwealth v. Gelfi*, 282 Pa. 434, 128 Atl. 77 (1925). *But cf.* *People v. Heslen*, 27 Cal. 520, 163 P. 2d 21 (1945); *State v. Porello*, 33 N. E. 2d 23 (Ohio 1940).

graphs of the crime if no purpose would be served other than to excite the emotions of the jury.<sup>27</sup> As a parallel to this commendable limitation on the use of photographs, it would be desirable to limit the permissible inference which can be drawn from the brutality of the killing to malice rather than premeditation and deliberation, with the exceptions stated previously. When the fact of brutality is brought to the attention of the jury without specific instructions concerning its consideration, the jury is left with absolute freedom to give whatever weight, emotional or otherwise, to the brutal manner of the killing. Thus, it is very possible that the brutality connected with the actual killing is affecting the juries of North Carolina, as well as other jurisdictions, in a very persuasive manner on the issue of the premeditation and deliberation of the accused. Such reasoning could be very injurious to justice in a particular case, and it would appear that the dicta of the North Carolina Supreme Court would tend to condone such a result, if reached.<sup>28</sup>

The law should deal with the shrewd, the calm, the butcher, and the madman in the same manner. By no other procedure can it truly adhere to those rules of reason which we call our law. The trial judge can, with more discriminatory instructions, better guide the jury in rendering a verdict which is not tainted with uncertainty as to the true state of the law, and that is more in accordance with legally sanctioned interpretations of premeditation and deliberation. By so doing he will aid in limiting the use by the jury of emotions which have arisen because of the brutal manner of the killing.

WILLIAM C. BREWER, JR.

#### **Evidence—Hearsay—Admissibility of Evidence of Speeding Violations Obtained by Use of Radar**

Increasing use of the electronic speed meter, or "whammy"<sup>1</sup> as it is more generally known, by law enforcing agencies in an effort to

<sup>27</sup> STANSBURY, NORTH CAROLINA EVIDENCE, § 118 (1947).

<sup>28</sup> State v. Stanley, 227 N. C. 650, 654, 44 S. E. 2d 196, 199 (1947).

<sup>1</sup>The electronic radar speed meter, or "whammy" as it is generally known, is one of the latest mechanisms by which state and local officials are combating highway speed violations. The operation of the instrument requires the use of two automobiles placed approximately one-quarter of a mile apart along a highway. Each automobile is equipped with a radio so that the radar-patrol car team is able to communicate with one another. One automobile contains a radar transmitter, receiver, and recording dial. The transmitter casts an electronic beam across the highway and when a vehicle passes through the beam, energy is reflected to the receiver, converted into "miles per hour," recorded on a tape, and indicated on a dial. If the speed is excessive, the "interceptor car," or other member of the team, is contacted by radio, given the speed and description of the automobile, and the violator is arrested by the interceptor. See the discussion in *People v. Offerman*, 204 Misc. 769, 125 N. Y. S. 2d 179 (Sup. Ct. 1953).