Nebraska Law Review

Volume 33 | Issue 3 Article 13

1954

Criminal Law — Homicide — Is a Purpose or an Intent an Indispensable Element of Murder in Nebraska?

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Criminal Law—Homicide—Is A Purpose or an Intent an Indispensible Element of Murder in Nebraska?

At common law every criminal homicide was considered either murder or manslaughter. There were no degrees of murder. Murder was the unlawful killing of another with "malice aforethought" and this malice could either be express or implied. Manslaughter, on the other hand, was the unlawful killing of another without malice.

In Nebraska there are two statutory degrees of murder. The first degree murder statute[1] provides that every person who "purposely and of deliberate and premeditated malice or in the perpetration of or

[1] Neb. Rev. Stat. § 28-401 (Cum. Supp. 1951).

attempt to perpetrate any rape, arson robbery or burglary . . . kill[s] another . . . shall be deemed guilty of murder in the first degree...." The second degree murder statute,[2] on the other hand, provides that every person who "purposely and maliciously, but without deliberation and premeditation, kill[s] another . . . shall be deemed guilty of murder in the second degree...."

All criminal homicide is considered one offense in Nebraska and the surrounding circumstances determine the degree of the offense, whether it be first degree murder, second degree murder, or manslaughter.[3] In some states manslaughter is considered a distinct offense rather than a degree of the crime of murder,[4] but the better view would seem to be that murder includes all degrees of felonious homicide.[5]

In order to determine whether a purpose or intent to kill is an indispensible element of murder in Nebraska, it is necessary to see just what is meant by "deliberate and premeditated malice."

A. Malice

"Malice" is usually defined in Nebraska as ". . . that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind."[6] This state of mind is necessary for a conviction of murder, although in certain instances malice is implied. As was suggested, malice can either be express or implied.

1. Express Malice

Murder of course can be committed with actual malice and such intent to kill may be shown by direct evidence, such as a voluntary confession or an admission. Express malice may also be shown by circumstantial evidence which will support a verdict of guilty if the jury believes beyond a reasonable doubt from the evidence that the accused intended to kill the victim.[7]

At common law, express malice was inferred from the fact that the accused committed the killing with no apparent provocation.[8] This was based upon the premise that the accused intended the natural and probable consequences of his act, but such a rule placed an almost

[2] Neb. Rev. Stat. § 28-402 (Cum. Supp 1951).

[3] State v. Huter, 145 Neb. 798, 18 N.W.2d 203 (1945).

[4] State v. Trent, 122 Ore. 444, 252 Pac. 975, rehearing denied, 122 Ore. 444, 259 Pac. 893 (1927); Folks v. State, 85 Fla. 238, 95 So. 619 (1923).

[5] See Perkins, The Law of Homicide, 36 J. Crim. L. & Criminology 443 (1946).

[6] Pembrook v. State, 117 Neb. 759, 222 N.W. 956 (1929); Cate v. Smith, 80 Neb. 611, 114 N.W. 942 (1908); McVey v. State, 57 Neb. 471, 77 N.W. 1111 (1899); Housh v. State, 43 Neb. 163, 61 N.W. 571 (1895).

[7] Hansen v. State, 121 Neb. 169, 236 N.W. 329 (1931).

[8] Wharton, Homicide § 94 (3d ed. 1907).

impossible burden upon the accused to prove that he had no intent to kill. This rule was generally stated as a presumption of law, but was contrary to the well known presumption that the accused is innocent until proven guilty beyond a reasonable doubt. The rule was repudiated in England in 1935,[9] but there is still authority for it in the United States today.[10]

In Nebraska it is said that the defendant in a criminal case may testify directly as to his intention if it is an element of the crime charged,[11] and a presumption that the accused intended the natural and probable consequences of his act is not implied except where death is the result of the use of a deadly weapon.

a. Inference of Intent to Kill where the Killing is Unexplained or where Death is the Result of the Use of a Deadly Weapon

In the case where the killing is unexplained or where death is the result of the use of a deadly weapon, an inference of specific intent to kill is drawn from the fact of the killing alone.[12] But there is conflict as to whether the inference still stands when there is direct evidence other than the testimony of the accused.[13] In Nebraska and some other jurisdictions there is no presumption of malice and intent to kill from the fact of the killing where there is other direct evidence.[14] In such a case, an inference of such intent is drawn from all the circumstances and facts surrounding the act. As was suggested, in Nebraska, if the killing alone is shown then the law is said to imply malice,[15] but there is authority to the effect that this inference is merely one of fact and the jury is not required to infer specific intent and malice.[16] Since the inference only raises a jury question as to the intent of the accused, then such inferences of intent do not conflict with the Nebraska

[9] Woolmington v. Director of Public Prosecution, [1935] A.C. 462.

[10] Wagner v. State, 183 Ark. 1153, 37 S.W.2d 86 (1931); Greer v. State, 159 Ga. 85, 125 S.E. 52 (1924); Commonwealth v. Bedrosian, 247 Mass. 573, 142 N.E. 778 (1924).

[11] Nichols v. State, 109 Neb. 335, 191 N.W. 333 (1922).

[12] Coates v. State, 29 Ala. 616, 199 So. 830 (1941); State v. Emery, 236 Iowa 60, 17 N.W.2d 854 (1945); Durr v. State, 175 Miss. 797, 168 So. 65 (1936); Riley v. State, 109 Miss. 286, 68 So. 250 (1915); State v. Jones, 86 S.C. 17, 67 S.E. 160 (1910).

[13] (Holding that inference remains) Taylor v. State, 201 Ind. 241, 167 N.E. 133 (1929); Patton v. Commonwealth, 235 Ky. 845, 32 S.W.2d 405 (1930); State v. Utley, 223 N.C. 39, 25 S.E.2d 195 (1943); State v. Capps, 134 N.C. 622, 46 S.E. 730 (1904).

[14] Veneziano v. State, 139 Neb. 526, 297 N.W. 924 (1941); Runyan v. State, 116 Neb. 191, 216 N.W. 656 (1927); Whitehead v. State, 115 Neb. 143, 212 N.W. 35 (1927); Flege v. State, 90 Neb. 390, 133 N.W. 431 (1911); Davis v. State, 90 Neb. 361, 133 N.W. 407 (1911); Lucas v. State, 78 Neb. 454, 111 N.W. 145 (1907); Simpson v. State, 31 Ala. App. 150, 13 So.2d 437 (1943); Erwin v. State, 29 Ohio St. 186 (1876).

[15] Supra note 14.

[16] Murphey v. State, 43 Neb. 34, 61 N.W. 491 (1894).

statutes, requiring that the killing be done on purpose, and the jury must still find beyond a reasonable doubt that the accused committed the killing on purpose.

A problem presented in a case where death is the result of the use of a deadly weapon is whether the court or the jury is the one to determine if the weapon is a deadly one and whether or not it was used in a deadly manner. In Nebraska, if the instrument used is one likely to produce death or great bodily harm, then it is a question for the court. If not, then it is a question for the jury; and this will depend upon the manner of the instrument's use. Even though the instrument may be deemed a deadly weapon as a matter of law, the jury must always determine whether it was used in a deadly manner.[17] Once it is determined that the instrument is a deadly weapon and death resulted from its use, then it is said that the accused is presumed to have intended the natural and probable consequences of his voluntary act.[18] But as was pointed out above, no such presumption flows from the use of a deadly weapon where eyewitnesses testify fully as to the facts and circumstances surrounding the act committed.[19]

b. Intent to Inflict Serious Bodily Harm, But not to Kill

A different situation arises, however, in a case where the accused kills another, intending only to inflict serious bodily harm and not to kill him. If for instance, the accused, being an expert shot, shoots at another and kills him, but intending only to wound him, can such an act ever constitute murder in Nebraska where the statutes require that the killing be done on purpose or intentionally?

Logically, the answer to this question would appear to be no. But if the only evidence of the lack of intent to kill is the defendant's testimony, than an inference will be drawn from the fact of the killing and it will be up to the jury to decide whether the defendant is telling the truth or not.[20] So even though the accused had no intent to kill and the Nebraska statutes require that such intent be shown, it is possible that the defendant could be convicted of murder, assuming of course that there was no excuse or justification for the killing.

Moreover, at common law an intent to inflict grevious bodily harm was treated as the equivalent of an intent to kill. It is possible, therefore, that the Nebraska Court might regard an intent to inflict serious

[17] Krchnavy v. State, 43 Neb. 337, 61 N.W. 628 (1895).

[18] Luster v. State, 148 Neb. 743, 29 N.W.2d 364 (1947); State v. McDaniels, 145 Neb. 261, 16 N.W.2d 164 (1944); Young v. State, 127 Neb. 719, 256 N.W. 908 (1934); Lillard v. State, 123 Neb. 838, 244 N.W. 640 (1932); Garofola v. State, 121 Neb. 850, 238 N.W. 755 (1931); Swartz v. State, 121 Neb. 696, 238 N.W. 312 (1931); Johnson v. State, 88 Neb. 565, 130 N.W. 282 (1911); Lambert v. State, 80 Neb. 562, 114 N.W. 775 (1908).

[19] Tvrz v. State, 154 Neb. 641, 48 N.W.2d 761 (1951).

[20] Sartz v. State, 121 Neb. 696, 238 N.W. 312 (1931).

bodily harm as sufficient even though the statutes use the word "purposely."

It might also be possible to sustain a conviction of murder, where the defendant intended to inflict serious bodily injury but did not intend to kill his victim, by us of the presumption that the defendant intended the natural and probable consequences of his voluntary act by using a deadly weapon.

It certainly seems in such a situation that a conviction of murder should be sustained, particularly when death is substantially certain to follow from such act, and that such consequences should be considered as though they were intended whether they were desired or not.

2. *Implied Malice*

In three types of cases the common law courts implied malice where the killing was unintentional. Malice was implied when the accused killed an officer while resisting lawful arrest, or where he killed another while perpetrating a felony, or where the accused killed someone while engaged in an act so dangerous as to indicate to the accused the existence of great peril to human life and safety.

a. Resisting Lawful Arrest

At common law an unintentional killing which was the result of an attempt to resist a lawful arrest was deemed to constitute murder.[21] This was based upon the premise that the accused determined that he would rather kill than be taken into custody. This rule is fictitious in that the killing actually may have been accidental.

In a study of the modern cases which support this rule, it is apparent that the accused would be guilty of murder on other grounds, namely, the use of a deadly weapon or force in such a manner as to create a situation which is dangerous to others without excuse or justification.[22] In determining in such a case whether the accused is guilty of murder, the test should not be the lawfulness or unlawfulness of the act which resulted in death but rather the element of human risk involved in resisting the lawful arrest.[23] Although the modern

[21] See Mackaley's Case, Cro Jac. 279, 79 Eng. Rep. 239 (1611); Yong's Case, 4 Co. Rep. 40a, 76 Eng. Rep. 984 (1587).

[22] See, for example, Glaze v. State, 156 Ga. 807, 120 S.E. 530 (1923); State v. Zeibert, 40 Iowa 169 (1874); Kennedy v. State, 107 Ind. 144, 6 N.E. 305 (1886); State v. Mowry, 37 Kan. 369, 15 Pac. 282 (1887); Sexson v. Commonwealth, 239 Ky. 177, 179, 39 S.W.2d 229, 230 (1933); State v. Albright, 144 Mo. 638, 46 S.W. 620 (1898); State v. Genese, 102 N.J.L. 34, 130 Atl. 642 (1925); Love v. State, 15 Okla. Crim. App. 429, 177 Pac. 387 (1919); Wilson v. State, 79 Tenn. 310 (1883); State v. Morgan, 22 Utah 162, 61 Pac. 527 (1900).

[23] Perkins, A Re-examination of Malice Aforethought, 43 Yale L.J. 563-566 (1934).

cases show other grounds to warrant a conviction of murder, there are only a few cases which expressly repudiate the rule.[24]

The law in Nebraska is unsettled on this point. The only case on the subject sets down the rule that a person may resist an unlawful arrest to the point of killing the person attempting to make the arrest if it is necessary to prevent such arrest,[25] but held that the arrest was lawful and the killing therefore not justified.

b. Felony-Murder Doctrine

It was said that under the common law a killing in the commission of a felony was murder.[26] This rule was attacked by England's Judge Stephen who argued that such a rule was not adequately supported by authority.[27] It was Stephen's view that "Instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be better to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death should be murder. . . ."[28]

The cases in the United States fall into several categories: (1) It is sufficient to warrant a conviction of murder if a killing takes place in the commission of any felony.[29] (2) If a killing occurs in the commission of certain dangerous felonies, usually arson, rape, robbery, and burglary, then it is automatically declared to be murder.[30] (3) Only when the commission of the felony itself involves an appreciable human risk then will a homicide during the commission of a felony constitute murder.[31] (4) Ohio apparently refuses to recognize the felony-murder doctrine and requires that a purpose or intent to kill be shown to war-

[24] Regina v. Porter, 12 Cox C.C. 444 (1873); State v. Weisengoff, 85 W.Va. 271, 101 S.E. 450 (1919). See Dickey, Culpable Homicides in Resisting Arrest, 18 Cornell L.Q. 373, 376-379 (1933).

[25] Simmerman v. State, 16 Neb. 615, 21 N.W. 387 (1884) (indicates Nebraska might follow the lawfulness or unlawfulness test).

[26] Foster, Crown Law 258-259 (2d ed. 1791); 4 Bl. Comm. *192, *200-*210; 1 Hawkins, Pleas of the Crown 86 (8th ed. 1824); 1 East, Pleas of the Crown 255-260 (1806).

[27] 3 Stephen, History of the Criminal Law of England 57-75 (1883).

[28] Regina v. Serve, 16 Cox C.C. 311 (1887).

[29] People v. De La Roe, 36 Cal. App.2d 287, 97 P.2d 836 (1939); Simpson v. Commonwealth, 293 Ky. 831, 170 S.W.2d 869 (1943); State v. Werner, 144 La. 380, 80 So. 596 (1919); Lovejoy v. State, 18 Okla. Cr. 335, 194 Pac. 1087 (1921).

[30] Washington v. State, 181 Ark. 1011, 28 S.W.2d 1055 (1930); Cole v. State, 192 Ind. 29, 134 N.E. 867 (1922); State v. Schnelt, 341 Mo. 241, 108 S.W.2d 377 (1937); State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932); State v. Reagin, 64 Mont. 481, 210 Pac. 86 (1922); State v. Greenleaf, 71 N.H. 606 54 Atl. 38 (1902); State v. Compo, 108 N.J.L. 499, 158 Atl. 541 (1932); State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); Commonwealth v. Bruno, 316 Pa. 394, 175 Atl. 518 (1934); State v. Whitfield, 129 Wash. 134, 224 Pac. 559 (1924); State v. Best, 44 Wyo. 383, 12 P.2d 1110 (1932).

[31] People v. Goldvarg, 346 Ill. 398, 178 N.E. 892 (1931); Williams v. Commonwealth, 258 Ky. 830, 81 S.W.2d 891 (1935); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924).

rant a conviction of murder.[32] (5) In New York all murder which is committed in the perpetration or attempt to perpetrate any felony is deemed murder in the first degree, but the doctrine is applied only in those situations where the felony is independent of the killing.[33]

The Nebraska cases fall under the second category, automatically making the killing a felony. The enumerated felonies under the Nebraska statute[34] are rape, arson, robbery, and burglary. The statute is interpreted as not requiring that the killing be done "purposely and of deliberate and premeditated malice" in order to constitute murder.[35] It is said that all the statute requires is that the killing be committed in the perpetration or attempt to perpetrate any of the enumerated felonies,[36] and it is not essential for a conviction of murder that the killing be one that would amount to murder rather than manslaughter in absence of the statute.[37]

However, one case in Nebraska would seem to qualify the felony-murder doctrine where it is said that the killing must be the natural, ordinary, and probable consequences of the act.[38] That was a case where a railroad watchman was killed while attempting to arrest three men whom he had discovered in the act of robbing a freight car. There was uncertainty as to which of the three men fired the fatal shot but the defendant contended that he had left the scene of the crime before the fatal shooting and that therefore the shooting did not take place at the time he was attempting to commit a felony. The defendant was found guilty of murder. The Nebraska Supreme Court said that "Where one shares with others in the burglarious intent and act, and killing results from it as one of its natural, ordinary, and probable consequences he will not be heard to say that he did not intend or share in it."

Since this qualification of the felony-murder doctrine has never been invoked in a case where the defendant committed the actual kill-

[32] Turk v. State, 48 Ohio App. 489, 194 N.E. 425 (1934), aff'd, 129 Ohio St. 245, 194 N.E. 453 (1935).

[33] People v. Woodley, 273 App. Div. 421, 78 N.Y.S.2d 284 (3d Dep't 1948); People v. Lazar, 271 N.Y. 27 2 N.E.2d 32 (1936); People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927); People v. Huter, 184 N.Y. 237, 77 N.E. 6 (1906).

[34] Neb. Rev. Stat. § 28-401 (Cum. Supp. 1951).

[35] MacAvoy v. State, 144 Neb. 827, 15 N.W.2d 45 (1944) (rape); Rogers v. State, 141 Neb. 6, 2 N.W.2d 529 (1942) (robbery); Dean v. State, 128 Neb. 466, 259 N.W. 175 (1935) (robbery); Swartz v. State, 118 Neb. 591, 225 N.W. 766 (1929) (robbery); South v. State, 111 Neb. 383, 196 N.W. 684 (1923) (robbery); Thompson v. State, 106 Neb. 395, 184 N.W. 68 (1921) (robbery); Keezer v. State, 90 Neb. 238, 133 N.W. 204 (1911) (robbery); Taylor v. State, 86 Neb. 795, 126 N.W. 753 (1910) (rape); Pumphrey v. State, 84 Neb. 636, 122 N.W. 19 (1909) (robbery); Rhea v. State, 63 Neb. 461, 88 N.W. 789 (1901) (robbery); Morgan v State, 51 Neb. 672, 71 N.W. 788 (1897) (rape).

[36] Supra note 35.

[37] Henry v. State, 51 Neb. 149, 70 N.W. 924 (1897).

[38] Romero v. State, 101 Neb. 650, 164 N.W. 554 (1917).

ing in the perpetration or attempt to perpetrate one of the enumerated felonies, it is submitted that the qualification was only intended to apply in a case where the defendant was a party to the attempted felony and had escaped before the killing or had not actually fired the fatal shot himself.

c. Negligent Homicide with Awareness of Great Peril to Life and Safety of Others

The difference between negligent homicide and intentional homicide is simply a matter of degree. If the conduct of the accused involves consequences substantially certain to follow then it is considered intentional conduct whether the accused desired such consequences or not. On the other hand, negligent homicide involves negligence of the highest degree which is often characterized as wantonness or recklessness and borders on intentional conduct. Despite Mr. Justice Holmes' opinion,[39] the extreme danger to human life must have been known to the defendant and it is not enough that a reasonable man would have known of the peril.[40]

At common law malice was implied where the conduct of the actor created such an extremely dangerous situation as to manifest a "depraved heart regardless of human life" even though the killing was unintentional. The acts of the killer were so extremely dangerous to human life and safety of others that it was implied that he intended to kill his victim, and it made no difference whether he desired such consequences or not.[41] This is the state of the law today except that courts do not indulge in the fiction of implying intent. It is said that such a reckless and wanton disregard of human life and safety, disregarding all consequences, is with malice aforethought even if there was no actual intent to kill or injure the victim. So on this basis a person has been held guilty of murder if, without justification, or excuse, he shoots into a crowd,[42] house,[43] train,[44] or automobile,[45] where per-

[39] Commonwealth v. Pierce, 138 Mass. 165, 52 Am. Rep. 264 (1884).

[40] Hyde v. State, 230 Ala. 243, 160 So. 237 (1935); State v. Massey, 20 Ala. App. 56, 100 So. 625 (1924); State v. Shepard, 171 Minn. 414, 214 N.W. 280 (1927); State v. Weltz, 155 Minn. 143, 193 N.W. 42 (1923); State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925).

[41] Mayes v People, 106 Ill. 306, 46 Am. Rep. 698 (1883) (statute repeating common law).

[42] Bailey v. State, 133 Ala. 155, 32 So. 57 (1901); Pool v. State, 87 Ga. 526, 13 S.E. 556 (1891); Smith v. State, 124 Ga. 213, 52 S.E 329 (1905); Brown v. Commonwealth, 13 Ky. L. Rep. 372, 17 S.W. 220 (1891); Haynes v. State, 88 Tex. Crim. Rep. 42, 224 S.W. 1100 (1920); State v. Young, 50 W. Va. 96, 40 S.E. 334 (1901).

[43] Washington v. State, 60 Ala. 10, 31 Am. Rep. (1877); People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924); State v. Capps, 134 N.C. 622, 46 S.E. 730 (1904); Russell v. State, 38 Tex. Crim. Rep. 590, 44 S.W. 159 (1898).

[44] Davis v. State, 85 Tex. Crim. Rep. 163, 211 S.W. 589 (1919); Banks v. State, 85 Tex. Crim. Rep. 165, 211 S.W. 217 (1919); Aiken v. State, 10 Tex. App. 610 (1881).

sons are known to be at the time. These are all cases where death is substantially certain to follow and such conduct therefore may be considered as intentional rather than negligent. In Nebraska, of course, such convictions could be sustained on the theory that the defendant intended the natural and probable consequences of his act from the use of a deadly weapon.[46]

Where the conduct of the accused involves an unreasonable risk of death or great bodily harm to others and where the degree of risk of death is so high as to indicate wanton indifferences to human life and safety accompanied by an awareness of such risk, then this conduct was sufficient at common law to constitute murder, regardless of intent. For example, if a person throws a heavy object off the roof of a building, not knowing that another person is standing below, and the object hits and kills that person then it was deemed to be murder.

Such evidence would not be sufficient for a conviction of murder in Nebraska in so far as the statutes provide that the killing must be done purposely. Furthermore, if the area below the building was not congested and the defendant had no reason to believe that a person was beneath him, then the consequences which followed the throwing of the heavy object off the roof were not substantially certain to follow and there is no basis for implying intent to kill. The highest degree of conviction that could be obtained would be one of manslaughter.

B. Premeditation and Deliberation

Frequently "deliberate and premediated malice" is made an essential element of first degree murder[47] and this is considered the distinction between first and second degree murder, both degrees requiring the killing be committed purposely and with malice.[48] "Deliberate" is defined as meaning maturely reflected,[49] or that the act is committed in a "cool state of blood."[50] "Premeditation," on the other hand, means "conceived beforehand"[51] for some length of time, however short.[52] The law fixes no particular length of time for premeditation and deliberation but each case is to be determined by the jury from the par-

[46] Wiley v. State, 19 Ariz. 346, 170 Pac. 869 (1918); Ex parte Finney, 21 Okla. Crim. Rep. 103, 205 Pac. 197 (1922); Davis v. State, 106 Tex. Crim. Rep. 300, 292 S.W. 220 (1927).

[47] Supra note 18.

[47] See, for example, Neb. Rev. Stat. § 28-401 (Cum. Supp. 1951).

[48] Vanderheiden v. State, 156 Neb. 735, 57 N.W.2d 761 (1953); Nanfito v. State, 136 Neb. 658, 287 N.W. 58 (1939).

[49] Pembrook v. State, 117 Neb. 759, 222 N.W. 956 (1929).

[50] State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938).

[51] Pembrook v. State, 117 Neb. 759, 222 N.W. 956 (1929).

[52] State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938).

ticular circumstances surrounding the act.[53] The time required may be of the shortest possible duration such as any moment before the act is committed,[54] or even at the moment the killing takes place.[55] But is this what the legislature had in mind when the statute was enacted? The natural meaning of the words implies that the malicious act must be one that is thought out over an appreciable length of time and it follows that premeditation and deliberation cannot take place at the moment of the killing. It is the deliberate, cold-blooded, planned killing that the legislature had in mind as being indispensible to a conviction of first degree murder. But of course one can ponder over the alternative of taking or sparing one's life, even before an intent to kill that person takes shape in the mind. So if the killing is one where premeditation and deliberation are essential to warrant a conviction of first degree murder then it must be shown by the evidence that the homicide was done purposely or intentionally;[56] that the intent to kill was maturely reflected or pondered over and weighed in the mind;[57] and that the thought of taking one's life was pondered over in the mind for an appreciable length of time before the act of killing was committed,[58] although it is not essential that this reflection take place after the intent was formed.[59]

CONCLUSION

It is apparent from the foregoing that in certain instances a specific intent to kill need not be shown to sustain a conviction of murder in Nebraska.

It is not necessary to show a specific intent to kill where only the killing itself is shown. In such a case an inference of intent is drawn from the fact of the killing alone. But if there is direct evidence of intent other than the testimony of the accused, the inference of intent is thrown out all together and under all circumstances it is left up to the jury to determine whether they believe beyond a reasonable doubt that the accused is guilty. Where death is the result of the use of a deadly weapon, the jury determines whether the instrument was used in a deadly manner, and if it is so found by the jury then the accused

[53] Parker v. State, 104 Neb. 12, 175 N.W. 677 (1919); Francis v. State, 104 Neb. 5, 175 N.W. 675 (1919); Savary v. State, 62 Neb. 166, 87 N.W. 34 (1901); Commonwealth v. Drum, 58 Pa. 9, 16 (1868).

[54] Savary v. State, 62 Neb. 166, 87 N.W. 34 (1901).

[55] Savary v. State, 62 Neb. 166, 87 N.W. 34 (1901).

[56] Luster v State, 148 Neb. 743, 29 N.W.2d 364 (1947); Nanfito v. State, 136 Neb. 658, 287 N.W. 58 (1939).

[57] Bostic v. United States, 94 F.2d 636 (D.C. Cir. 1937); People v. Clayton, 83 N.J.L. 673, 83 Atl. 173 (1912); State v. Arata, 56 Wash. 185, 125 Pac. 227 (1909).

[58] State v. Zdanowicz, 69 N.J.L. 619, 627, 55 Atl. 743, 746 (1903).

[59] People v. Russo, 133 Cal. App. 468, 24 P.2d 580 (1933).

is presumed to have intended the natural and probable consequences of his voluntary acts.

If death results in a case where there was an intent only to inflict serious bodily harm, then an inference of intent to kill might be raised if the killing alone is shown. Also it is possible that an intent to inflict grevious bodily harm might be treated as the equivalent of an intent to kill as it was at common law. Furthermore, if a deadly weapon is used, the presumption that the accused intended the natural and probable consequences of his act might be invoked to get around the statutory requirement of an intent to kill. In the case where death results while resisting a lawful arrest, it is quite possible that the accused could be convicted of murder if the court uses the test of the lawfulness or unlawfulness of the arrest. Even though the arrest is lawful, the killing may be accidental. The test should be the degree of risk to human life and safety involved in resisting such arrest and if the degree of risk is high then it can be said that death was substantially certain to follow from the use of a deadly weapon.

Regardless of intent to kill, it is murder in Nebraska to kill another while in the perpetration or attempt to perpetrate one of the four enumerated felonies, although it is possible that it will be required that the killing be the natural, ordinary, and probable consequence of the felony. If the conduct of the accused in killing another is such that the killing was substantially certain to follow then it can be deemed intentional conduct even though there was no desire to kill. But if that consequence was not substantially certain to follow from the act of the accused and the conduct of the accused only indicates wanton indifference to human life accompanied by an awareness of some risk of death, then there would be no premise on which to base an intent to kill, and it will be necessary to prove such intent as required by the statutes.

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