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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
9 - 1962
Clerk, Supreme Court, Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

DARRELL DEVERE POULSON,
Defendant and Appellant.

Case No. 9656

BRIEF OF APPELLANT

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9 Am. Jur., Burglary, §§ 26, 49 12
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American Law Institute, Model Penal Code,
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E. De Grazia, *The Distinction of Being Mad,*
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Guttmacher and Weihofen, *Psychiatry and the Law*
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M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718
(1843) 22
Roche, *Criminality and Mental Illness—Two Faces of the Same Coin,* 22 U. OF CHI. L. REV. 320.. 26
Royal Commission on Capital Punishment,
Report 110-111 (1953) 26, 27
Sobeloff, *From M'Naghten to Durham, and Beyond A Discussion of Insanity and the Criminal Law,*
41 A.B.A.J. 793 27
Taylor, PARTIAL INSANITY AS AFFECTING THE DEGREE OF CRIME—A COMMENTARY ON FISHER V. U.S., 34 Calif.
L. Rev. 625 (1946) 16, 17
The Report of the American Bar Foundation,
THE MENTALLY DISABLED AND
THE LAW, 1961, pp. 355-7 16
Weihofen, MENTAL DISORDER AS A CRIMINAL OFFENSE, P. 176 (1954) 16
Weihofen, PARTIAL INSANITY AND CRIMINAL INTENT, 24 Ill. L. Rev. 505 16
Weihofen, THE URGE TO PUNISH, p. 60
et seq. (1956) 22

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Weihofen and Overholser, MENTAL DISORDER AFFECTING THE DEGREE OF CRIME, 56 Yale L.J. 959, 962, 978 .... 16, 19, 22
White, INSANITY IN THE CLIMINAL LAW (1923), p. 633) 18
Zilboorg, *A Step Toward Enlightened Justice,* 22 U. OF CHI. L. REV. 331 26

AUTHORITIES CITED

Hooks v. State, 145 Tenn. 43, 389 S.W. 529 11
Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262, 4 S.Ct. 202 20
People v. Beal, 116 Cal. App. 2d 475, 254 P. 2d 100 30
People v. Goshen, 51 Cal. 2d 716, 336 P. 2d 492 16
People v. Hoffman, 399 Ill. 57, 77 N.E. 2d 195 30
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Roberts v. State, 136 Tex. Ap. 138, 124 S.W. 2d 128 11
Simpson v. State, 81 Fla. 292, 87 So. 920 (1921) .. 11
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State v. Pike (1870) 49 N.H. 399, 6 Am. Rep. 533.. 26
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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

DARRELL DEVERE POULSON,
Defendant and Appellant.

Case No. 9656

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The defendant and appellant will be referred to as defendant. The plaintiff and respondent will be referred to as the State. References to the record will be designated "R.", and references to the separate transcript will be designated "T."

A complaint was filed on September 20, 1961, charging the defendant with the crime of murder in the

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first degree. The preliminary hearing was held October 3, 1961, and defendant was bound over to the Fourth Judicial District Court in and for Utah County, State of Utah (R. 3, 4). On October 27, 1961, a Notice of Proposed Defense of Insanity was filed, and a plea of not guilty was entered (R. 13). The case was tried before the Honorable R. L. Tuckett commencing on the 11th day of December, 1961. A verdict finding the defendant guilty of murder in the first degree was returned on December 14, 1961 (R. 107). No recommendation of leniency was made by the jury. Thereafter, an appeal was taken to this Court from the judgment of the District Court in denying the defendant's Motion for a New Trial (R. 117).

Counsel for the defendant at the trial were Phillip V. Christenson, Esquire, and M. Dayle Jeffs, Esquire, both of whom were appointed by the Court. Counsel on appeal did not participate in the trial of the proceedings or the subsequent motion for new trial.

STATEMENT OF FACTS

The testimonial evidence offered by the State consists principally and materially of the following: Mr. Darlo Sawyer, a resident of American Fork, Utah, testified that he sought the services of Karen Mechling to watch his children on the evening of September 16, 1961 (T. 191); that he saw her for the last time at 7:30 p.m. that evening (T. 192); that he returned to his

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residence at 2:30 a.m., on the morning of the 17th, and found a caulking gun in a chair and noticed "four or five" drops of blood on the floor (T. 193); and, that the following morning Karen Mechling's body was found in a vacant lot adjacent to the Sawyer residence (T. 196-7).

Medical evidence offered by Guy A. Richards, M.D., tended to establish that the victim had been dead for several hours at the time of his examination shortly after 7:00 a.m., on the morning of September 17, 1962, but could not fix the time of death (T. 226-229).

An autopsy was performed by Wilford H. LeCheminant, M.D., who testified, in substance, that lesions were present on the victim's head, face, hands, fingers, shoulders and legs (T. 232-3); that the vaginal area was torn (T. 233); that there was a skull fracture (T. 234); that "there were several lesions that could in themselves account for the death * * * ;" that the skull fracture "could account for her death" (T. 235)"; that "less than five minutes" elapsed between the blow to the cranium and the time of death; that semen was present in the vagina (T. 237-8).

A statement of the defendant was received in evidence (T. 253) as Exhibit 15. In substance, the defendant admitted entering the home, striking the girl and subsequently having relations with her.

The defendant's case consisted of evidence tending to establish the defense of insanity, as presented by his plea. Deputy Utah County Sheriff, Art Harold Child,

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testified that on the Saturday evening, prior to the offense, that he had questioned the defendant in connection with an earlier attack upon another girl with a piece of iron (T. 288-301). The defendant admitted striking at the girl while she was riding a bicycle, but that he was frightened away by a man who witnessed the attack. The witness then related the following statement by the defendant: "He told me that when he would get this feeling [a desire for sexual relations] he would usually go window peeking and build this up to a certain pitch, and after he had built himself up to a certain pitch, he sometimes would have to attack the girl or have relations with the girl and he didn't think there was any better way other than this way" (T. 294-5). The offense charged in the instant case was committed the same evening that the defendant was questioned and then released by Deputy Sheriff Child.

Mr. Lynn Hanks, Principal of the Springville Junior High School, testified on behalf of the defendant, as follows: That he was the custodian of the elementary school records of the defendant; that Defendant's Exhibit 21 was the permanent student record of defendant for the 5th, 6th, 7th, and 8th, grades, reflecting his attendance and marks (T. 314-5).

Mr. A. LeRoy Erickson, Principal of the Grant Elementary School which was attended by the defendant, identified Defendant's Exhibit 23, a 6th grade report of defendant's intellectual, physical, emotional, aesthetic, social and reverent behavior (T. 319-327).

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The former Chief Probation Officer of the Third District Juvenile Court, Mr. Roy Passey, identified Defendant's Exhibit 24 as a card from the files of the probation office pertaining to the defendant and describing, *inter alia*, "mauling over women on street" on December 8, 1954, and "sexual attack on half sister" on April 27, 1955, the latter resulting in his commitment to the American Fork Training School by the District Court. The Court refused to admit into evidence Defendant's Exhibit 27 for identification, which purported to be an Order of Commitment to the Utah State Training School, and related pleadings.

Vernon F. Huston, M.D., Superintendent and Medical Director of the Utah State Training School at American Fork, identified Defendant's Exhibit 28, a history of the defendant's confinement at the institution (T. 338-9). The exhibit is a summary of incidents at the institution relating to the defendant, including the date of commitment, June 22, 1955, and the date of discharge, August 8, 1958. Dr. Huston advised that a vasectomy operation was performed on the defendant on August 7, 1957, to sterilize him (T. 340).

Mark K. Allen, professor of psychology at Brigham Young University and clinical consultant for the Utah State Training School testified that he conducted two psychological examinations on the defendant in 1955 and 1956 (T. 353-4); and that at the time of said examinations the defendant "was a mentally deficient person with some personality difficulties along with it" (T. 354).

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Ija Korner, Chief of the section of Psychology and Associate Professor of Psychiatry in the Medical School of the University of Utah, testified as follows: That he examined the defendant in November, 1961, with respect to his "mental capacities" (T. 363); that using the verbal part of the Wechsler Bellvue Test the defendant had an I.Q. of 67, "which would put him in what you would call the feeble-minded range" (T. 364); that "I came to the opinion that it [finding with respect to the defendant] could be explained * * * that mental illness is very frequently in specific cases of this kind, namely, from very early childhood on * * * " (T. 365); that between 30 and 40 percent of all individuals who are at the present time in institutions and held to be feeble-minded, actually are not feeble-minded, but are mentally ill" (T. 366), that "In my opinion the feeble mindedness is related to a condition of mental illness (T. 367); that his mental illness is illustrated by the following testimony:

> "Knowledge is usually used to help us in dealing with problems. Intelligence is used to help us deal with problems. Of course, it means that we are capable of using the intelligence. And from the testing, and I would like to stress the fact I am functioning as a psychologist, basing my opinion on tests from the test data I have, the impression—it is my opinion that the little, the little the defendant has in terms of intelligence is useless when he is under the impact of an emotional strain, under any kind of emotional impact. In such situation we are capable of kind of holding our emotions back, or kind of post-

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> poning them, or talking to ourselves. In such instances the Mr. Poulson has nothing available to help him stem whatever he is in. He resembles at that time a human being without a head, without a brain. He would not be much different from an animal in such instances. He has not got the use of these faculties in such a situation." (T. 368);

that the defendant, "once launched, launched on an impulse, whatever it is on, something which stirs him up, once launched upon that he has no built-in mechanism in his machine, so to speak, which can stop him from completing the act. * * * in him there is very little difference between thinking, talking, and doing. * * * I don't think he knows whether he thinks something, whether he does it, or whether he has talked about it" (T. 373); and, on redirect examination, that the defendant's response to the Rorschach Test was "very deviant statistically speaking" (T. 399).

In rebuttal the State introduced the testimony of Mr. Dennis I. Greenwood, a psychologist at the Utah State Hospital, who characterized the defendant as a "mild" mental deficient (T. 413). Carl Kivler, M.D., a medical physician in charge of the mentally retarded unit at the Utah State Hospital, testified that he had examined the defendant on several occasions (T. 420); that he diagnosed the defendant as "mentally retarded in a degree as mild" (T. 421); that the defendant "knew the difference between right and wrong" at the time of the offense (T. 423); that he "understood the nature and the consequences of his act" (T. 423); that he

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found no evidence of psychosis (T. 424); that the defendant "has an unrestrained sexual drive" and is "sane" (T. 428). On cross examination Dr. Kivler agreed that a person could be "mentally ill" without having "delusions" (T. 430-1).

Louis G. Moench, M.D., a Salt Lake City psychiatrist, having examined the defendant prior to trial, testified as a rebuttal witness that the defendant was "mildly mentally retarded" (T(. 435); that he is suffering from no psychosis (T. 436); that the defendant, on the night of the incident had "an understanding of the difference between right and wrong" (T. 437); and in response to a hypothetical question posed by the prosecutor, that the defendant had control of his impulses on the night of the offense (T. 438).

ARGUMENT

POINT I

THE INSTRUCTIONS OF THE TRIAL COURT TO THE JURY WERE ERRONEOUS AND PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE DEFENDANT IN THAT THE JURY WAS CHARGED THAT IT MUST EITHER FIND THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE OR ACQUIT THE DEFENDANT.

Among its instructions to the jury, the trial court charged as follows:

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> "No. 15: Although there are two degrees of murder, the evidence in this case is such that either the defendant is innocent of the charges of murder, or he is guilty of murder in the first degree" (T. 445).

It is submitted that the foregoing instruction did not properly reflect the alternatives which the jury should have been given by virtue of the evidence presented at the trial. This instruction followed a charge to the jury that "the defendant has raised the issue of his sanity at the time of the alleged offense" (T. 443).

Other material instructions bearing upon this issue were in relation to the elements of "felony murder," as follows:

> "No. 4: The essential elements of the crime of murder in the first degree as charged in the information are as follows:
>
> (1) That the defendant, Darrell Devere Poulson, killed Karen Mechling on or about the 17th day of September, 1961, at Utah County, Utah.
>
> (2) That the killing of Karen Mechling was committed in the perpetration of the crime of rape or burglary by the defendant.
>
> (3) That the said killing was felonious.
>
> (4) That the said Karen Mechling died within a year and a day after the cause of death was administered.
>
> If you believe that the evidence establishes each and all of the above elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the

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evidence has failed to establish beyond a reasonable doubt one or more of said elements, then you should find the defendant not guilty.

No. 5: Murder is the unlawful killing of a human being with malice aforethought.

No. 6: Murder which is committed in the perpetration of, or attempt to perpetrate, a rape or burglary is murder in the first degree.

No. 7: Rape insofar as its definition applies to the facts in this case is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, when the female is under the age of thirteen years. Likewise, it is rape when the act of sexual intercourse is accomplished with a female, not the wife of the perpetrator, when she is at the time unconscious of the nature of the act, and this is known to the accused.

The offense of rape is a felony.

No. 8: The statutes of this States provide that any person who forceably breaks and enters, or who without force enters an open door, window, or other aperature of any house, room, apartment or tenement with intent to commit larceny or any felony is guilty of burglary. One who enters a place such as those mentioned above with the specific intent to commit larcency or any other felony is guilty of burglary, regardless of whether the intent is thereafter carried out.

No. 9: The word "felonious" as used in these instructions means performing an act with an evil heart or purpose, or acting with a deliberate intention to commit a crime" (T. 441-3).

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A. FAILURE TO INSTRUCT THE JURY THAT THE MENTAL CONDITION OF THE DEFENDANT AT THE TIME OF THE ALLEGED OFFENSE MAY AFFECT HIS ABILITY TO ENTERTAIN A SPECIFIC INTENT ESSENTIAL TO THE CRIME CHARGED CONSTITUTES MATERIAL AND SUBSTANTIAL PREJUDICE TO THE RIGHTS OF DEFENDANT.

Significantly, the jury was presented with two alternative choices in order to find the defendant guilty of murder in the first degree. According to the instructions the jury could convict, as charged, provided they found that the killing was "committed in a perpetration of or attempt to perpetrate, a rape *or* burglary . . . " (T. 442; italics supplied). Moreover, the jury was instructed to find that the "killing was felonious" (T. 442), the word "felonious" being defined as "performing an act with an evil heart or purpose, or acting with deliberate intention to commit a crime."

Burglary is likewise given a complete definition, with particular emphasis upon the "specific intent" essential to that crime.

That burglary requires a specific intent is well established (Roberts v. State, 136 Tex. Ap. 138, 124 S.W. 2d 128; Hooks v. State, 145 Tenn. 43, 389 S.W. 529). As stated in *Simpson v. State,* 81 Fla. 292, 87 So. 920 (1921), " . . . The mere breaking and entering a dwelling house is not a fact from which may be in-

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ferred that the accused intended to commit rape or murder," the court concluding there must be a specific intent (See 9 Am. Jur., Burglary §§ 26, 49).

B. THE POSTURE OF THE EVIDENCE BEARING UPON THE MENTAL CONDITION OF THE DEFENDANT AT THE TIME OF THE OFFENSE IS SUCH AS TO REQUIRE THAT THE JURY BE INSTRUCTED THAT IT MUST FIND BEYOND A REASONABLE DOUBT THAT THE MENTAL CONDITION OF THE DEFENDANT DID NOT AFFECT HIS ABILITY TO ENTERTAIN A SPECIFIC INTENT TO COMMIT THE CRIME CHARGED.

The evidence bearing upon the mental condition of the defendant at the time of the alleged offense, assuming it not to be sufficient to excuse the defendant from culpability altogether, is of sufficient posture to present to the jury an issue as to whether the defendant could entertain a specific intent to commit the crime charged. This evidence would require the court to instruct the jury on lesser included offenses not involving a specific intent, or not involving the state of mind and intention essential to first degree murder.

The evidence presented on behalf of the defendant bears primarily upon the issue of sanity or mental condition. That the killing occurred in the manner described by the prosecution cannot be denied, and no

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issue is made here upon that score. Substantial evidence of mental impairment was offered by the defense, and it is worthwhile to summarize the picture presented. The testimony reflects that the defendant had an I.Q. of 67, "which would put him in what you would call the feeble-minded range" (T. 364); "that mental illness is very frequently in specific cases of this kind, namely, from very early childhood on . . . " (T. 365); that "feeble-mindedness is related to a condition of mental illness" (T. 367); that the defendant's response to the Rorschach Test was "very deviant statistically speaking" (T. 399); that the defendant "was a mentally deficient person with some personality difficulties along with it" (T. 364); that the defendant was confined to Utah State Training School at American Fork, and that a vasectomy operation was performed on the defendant on August 7, 1957, to sterilize him (T. 340); that the defendant's juvenile court record reflected a history of "mauling over women on street," and a "sexual attack on half sister" (Defendant Exhibit 24); that on the very evening of the commission of the principal offense the defendant had been questioned by a deputy county sheriff in connection with an earlier attack upon another girl with a piece of iron (T. 288-301); and, according to an expert witness on behalf of the defendant, "once launched, launched on an impulse, whatever it is on, something which stirs him up, once launched upon that he has no built-in mechanism in his machine, so to speak, which can stop him from completing the act. . . . In him there is very little differ-

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ence between thinking, talking, and doing. . . . I don't think he knows whether he thinks something, whether he does it ,or whether he has talked about it" (T. 373). The prosecution witnesses characterized the defendant as a "mild" mental deficient (T. 413) ; that the defendant "has an unrestrained sexual drive" and that a person could be "mentally ill" without having "illusions" (T. 430-1).

It is submitted that the evidence bearing upon mental condition, including feeble-mindedness could affect the ability of defendant to entertain the specific intent essential to the crime of burglary ("specific intent to commit larceny or any other felony"), or "felonious" killing. We are not unmindful of those Utah decisions which assert the general proposition that where a killing takes place in the perpetration of a felony it is "murder in the first degree and can be nothing else" (State v. Condit, 101 Utah 558, 125 P.2d 801; see also State v. Mewhinney, 43 Utah 135, 134 Pac. 362, and State v. Oblizala, 60 Utah 47, 205 Pac. 739). These cases are distinguishable as no issue of mental condition was presented for consideration.

The Supreme Court of Utah in two notable decisions has formulated the view that a mental condition falling short of "legal insanity" may impair the mind of the accused sufficiently to warrant the jury in finding that he could not entertain the intent essential to the greater crime, and thus the degree of the crime must be reduced to that offense which does not involve a

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specific intent (State v. Green (August 27, 1931), 6 P.2d 177; State v. Anselmo, 46 Utah 137, 148 Pac. 1071). These cases are land-mark decisions and are frequently given considerable attention by jurists and others interested in the development of the relationship between crime and mental responsibility. In the *Green* case, this Honorable Court made the following observation:

> "While an accused is not entirely relieved from the responsibility for the commission of a crime on account of insanity unless the insanity be of such a nature and degree that he did know the nature or quality of his acts, or that he did not know the act was wrong, or that his mind was so impaired by the deed that he was unable to control his act, nevertheless a mental disease falling short of these effects may, *where a particular intent is a necessary element of a higher degree of a crime, have the effect of reducing the degree of such crime.*" (Italics supplied.)

The *Anselmo* case involved a first degree murder conviction, where evidence that the defendant was an epileptic and had been drinking heavily caused our Supreme Court to reverse upon the following rationale:

> "While the jury found his condition in that respect was not such as to affect his mental capacity to relieve him from responsibility, yet it may have been such as to affect his mental capacity to cruelly deliberate and premeditate on his acts . . . While one's mental condition may not excuse the act, it may nevertheless affect the degree of guilt" (P. 145).

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Admittedly, the *Green* and *Anselmo* decisions concern themselves with other than felony murder cases, but the enunciated principle expressed is no less applicable to *all* offenses involving a specific intent as an essential element. It is of interest to note that approximately half of the nation's courts have adopted the partial responsibility doctrine urging the concept that a defendant may suffer from such a mental disturbance that, while not excusing entirely, it will reduce the grade of the offense (See The Report of the American Bar Foundation, THE MENTALLY DISABLED AND THE LAW, 1961, pp. 355-7; Weihofen, PARTIAL INSANITY AND CRIMINAL INTENT, 24 Ill. L. Rev. 505; Weihofen and Overholser, MENTAL DISORDER AFFECTING THE DEGREE OF CRIME, 56 Yale L. J. 959). The cases treating with the doctrine predominately have involved the reduction of first degree murder to second degree murder, but the underlying rationale would be "applicable to any crime calling for some 'specific intent' on the part of the accused . . . " (The Report of the American Bar Foundation, MENTALLY DISABLED AND THE LAW, *supra,* at 355; See also People v. Goshen, 51 Cal. 2d 716, 336 P. 2d 492; Weihofen, MENTAL DISORDER AS A CRIMINAL OFFENSE, P. 176 (1954)).

The principle urged here, and previously applied by this Court, does not *reduce* the responsibility for the greater crime, but implies *full* responsibility for the lesser crime (See Taylor, PARTIAL INSANITY

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AS AFFECTING THE DEGREE OF CRIME—A COMMENTARY ON FISHER V. U. S., 34 Calif. L. Rev. 625 (1946)).

In the New Jersey trial upon a felony murder charge the trial judge instructed that the accused should be acquitted of the charge if the jury found he was mentally incapable of forming an intent to commit the robbery out of which the killing arose (State v. Bunk, 4 N.J. 461, 73 A.2d 249).

C. FAILURE OF THE TRIAL COURT TO INSTRUCT UPON LESSER INCLUDED OFFENSES OF THE CRIME OF MURDER IN THE FIRST DEGREE WAS PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE DEFENDANT.

Of course, where the evidence does not raise an issue of a lesser included offense the trial court need not give such instruction, but where there are different degrees of culpable homicide, depending upon the intent of the accused at the time of the slaying, it is the duty of the court to instruct the jury upon appropriate lesser included offenses (State v. Mewhinney, *supra*) and this duty devolves upon the trial court whether or not such lesser included offense instruction is expressly requested (26 Am. Jur., Homicide, § 554).

In the instant case, and because of the bearing that the defendant's mental condition reasonably could have upon the intent required for the principal offense,

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murder in the second degree should have been presented to the jury as a possible alternative finding. It was altogether possible that the jury reached the result it did, though satisfied that the defendant suffered from some form of mental impairment which contributed to the commission of the crime but not having been properly instructed as to the degrees of responsibility failed to take such impairment into consideration (See generally in this regard, White, INSANITY IN THE CRIMINAL LAW (1923), p. 633)).

Failure to instruct upon unpremeditated murder as a lesser included offense of a felony murder has been held to be error (People v. Koerber, 244 N.Y. 147, 155 N.E. 79). In the *Koerber* case, the New York Court of Appeals stated:

> "His own evidence on the point need not be accepted as true even if uncontradicted. We may doubt whether the evidence of intoxication adduced by this defendant would carry sufficient weight with an intelligent jury to affect its verdict. It presented, however, a serious question, affecting a substantial right, which should not have been withheld from the consideration of the triers of fact. We cannot say that, with proper instruction, 'but one decision and that adverse to the defendant could reasonably have been reached.' When the alternative presented was conviction of murder in the first degree or acquittal, a conscientious jury would scarcely bring itself to a verdict of not guilty in this case. If they had been instructed that other verdicts were permissible, they might or might not have found the defendant guilty of a lesser degree of felo-

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> nious homicide. We therefore cannot overlook the failure of the court to give proper instruction, as we might if we could reach the conclusion that there was a lack of sufficient evidence to go to the jury that defendant was, in the only relevant sense, too drunk to form the specific intent for committing robbery" (p. 82-3).

It makes no logical difference whether intoxication or mental condition impair the ability to form the specific intent (See Weihofen and Overholser, MENTAL DISORDER AFFECTING THE DEGREE OF A CRIME, *supra*, who make the following observation at page 962: "If the mental state requisite to a given crime is absent, the crime has not been committed. To what cause the absence of such mental state is to be attributed would seem immaterial. Intoxication is not a circumstance that excites any sympathy. Unless involuntary, it is no defense to criminal liability. Nevertheless, if it is proved that a defendant charged with a deliberate and premeditated killing was too drunk at the time to deliberate and premeditate, he cannot be convicted of first degree murder; he must be convicted, if at all, of some lesser degree of homicide, not because we countenance drunkenness as a mitigating circumstance, but because he did not commit the more serious crime").

Where the facts reasonably raise an issue as to an element of the greater offense, and even when the greater offense involves the prosecution under statutes which declare that killing a human while engaged in

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the perpetration of enumerated felonies shall be murder in the first degree, the court cannot usurp the right of the jury to consider a lesser offense by an imperative or binding instruction as was given here (26 Am. Jur., Homicide, § 555, citing Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262, 4 S.Ct. 202).

In *State v. Stenbach* (September 21, 1931), 2 P.2d 1050, 79 A.L.R. 878, the Supreme Court of Utah concluded in a homicide case where intoxication was involved that " . . . the ability to form a particular or specific intent may be lacking and yet there may be sufficient mental capacity to form an intention to do an act which results in death."

When all of the competent evidence is viewed in a light most favorable to the prosecution, mental responsibility, as it bears upon the specific intent essential to the crime charged, remains as a paramount issue of fact which should have been presented to the jury. The failure to give a reasonable alternative to the jury must be construed as substantial and material error.

POINT II

THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY THAT IT COULD ACQUIT THE DEFENDANT IF THEY FOUND THAT AT THE TIME OF THE OFFENSE THE DEFENDANT WAS SUFFERING FROM A DISEASED OR DEFECTIVE

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MENTAL CONDITION, AND THAT THE KILLING WAS A PRODUCT OF SUCH MENTAL ABNORMALITY CONSTITUTED ERROR AND WAS PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE ACCUSED.

After advising the jury that the issue of "insanity" had been raised by the defendant, and that they could acquit him if his sanity was not proven beyond a reasonable doubt, the court defined the term "insane" as follows:

> "The term 'insane' as used in these instructions means such a perverted and deranged condition of a person's mental faculties as to render him either incapable of distinguishing between right and wrong, or incapable of knowing the nature of the act he is committing; and where he is conscious of the nature of the act he is committing and able to distinguish between right and wrong and knows that the act is wrong, yet his will, that is, the governing power of his mind, has been so completely destroyed that his actions are not subject to it, but are beyond his control.
>
> "Temporary insanity, as well as insanity of longer duration, is recognized by the law.
>
> "A mere lack of moral restraints leading to a surrender to criminal thoughts and actions is not in legal contemplation sufficient to find a person insane" (T. 444).

Defense counsel excepted to the failure of the court to give the following instruction (T. 480):

> "If you believe beyond a reasonable doubt that the Defendant killed Karen Mechling, but

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if you believe that at the time he was insane, in that he was suffering from a diseased or defective mental condition, and that the killing was a product of such mental abnormality, then it is your duty to acquit him of the crime charged" (R. 62).

It has been suggested, and reasonably so, that when the doctrine of "partial responsibility" is applied, that the historical test of insanity as a complete defense, i.e., the right and wrong test (M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843)), and the irresistable impulse test (State v. Green, *supra*) must be supplanted (see Weihofen and Overholser, MENTAL DISORDER AFFECTING THE DEGREE OF A CRIME, *supra*, at p. 978).

The instant case presents to our court a perfect opportunity to reexamine the law of Utah as it relates to mental disorder and criminal responsibility. The quoted instruction, *supra*, is a *pot pourri* of language which would confuse and mislead an intelligent jury. The hardship it works is manifest here, where an obviously deranged, ill and feeble-minded defendant must meet his Maker because the jury had no adequate, humane and lawful gauge to guide its determination. Nothing can be added here by placing upon the scale the vast plethora of decisions, legal articles and psychiatric papers which place the *M'Naghten* rule in disrepute (see Weihofen, THE URGE TO PUNISH, p. 60, *et seq*. (1956)).

The *M'Naghten* rule has been criticized princi-

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pally for the reason that it places emphasis only upon the "cognitive" ability of the accused, ignoring the effect of the mental condition upon his "volition". Two recent developments have been illuminating in this area of mental responsibility, and give us hope that the courts will depart from the historic test and adopt a more realistic view. In *United States v. Durham* (D.C. Cir., 1954), 214 F. 2d 852, the court repudiated both the "right-and-wrong" and "irresistible impulse" tests, in favor of the "product" rule. Critical of both tests, Judge Bazelon observed:

> "We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted."

The court thereafter formulated the test that it deemed more responsive to modern concepts of psychiatry and the law, concluding:

> "Whenever there is 'some evidence' that the accused suffered from a diseased or defective mental condition at the time the unlawful act was committed, the trial court must provide the jury with guides for determining whether the accused can be held criminally responsible. We do not,

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and indeed could not formulate an instruction which would be either appropriate or binding in all cases. But under the rule now announced, any instruction should in some way convey to the jury the sense and substance of the following: If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. *If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity.* Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case." (Italics supplied).

The other recent development which has given impetus to an enlightened approach to the relationship between mental condition and criminal responsibility is the Model Penal Code which has been so carefully drafted by the American Law Institute. The following provision is intended to replace the tests used in the instant case:

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" Aperson is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of law" (American Law Institute, Model Penal Code, Tentative Draft No. 4, Sec. 4.01 (1955)).

By either test it is apparent that a substantial improvement has been worked upon the law, as words such as "right," "wrong," "knowing," and "irresistible impulse" have been discarded. Indeed, as recently as 1958, our Supreme Court has been obliged to squirm through the semantic maze of distinguishing "or" and "and" (State v. Kirkham, 7 Utah 2d 108, 319 P. 2d 859).

In the case at bar, the jury could acquit if they could find that the defendant could not distinguish between "right and wrong." No endeavor is made to supply a definition of "wrong," and the jury is left to indulge its own imagination as to the concept. Both the views advocated in *Durham* and in the Model Code supply much simpler tests. *Durham* would ask the jury if the crime was the "product" of a mental disease or defect, whereas the Model Code would abandon the word "wrong" and substitute "criminality." The jury here might well have asked itself, "What does the judge mean by 'wrong,' does it mean "morally wrong," or "contrary to law," or both?" The instruction requested by defense counsel would place all of these ambiguities at rest, and give to the jury an adequate and modern test to guide its determinations.

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For 90 years New Hampshire has rejected the right-and-wrong test, adopting instead the view that the question of the existence of insanity as a total defense presents a question to the jury not resolvable by any particular test (State v. Pike (1870) 49 N.H. 399, 6 Am. Rep. 533; State v. Jones (1870) 50 N.H. 369, 9 Am. Rep. 242). In 1953, an English Royal Commission on Capital Punishment recommended abandoning the M'Naghten rule in favor of a rule which would permit the jury to determine whether at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he could not be held responsible. The Commission reported:

> "The gravamen of the charge against the M'Naghten Rules is that they are not in harmony with modern medical science, which, as we have seen, is reluctant to divide the mind into separate compartments—the intellect, the emotions and the will—but looks at it as a whole and considers that insanity distorts and impairs the action of the mind as a whole."

As a practical matter, *Durham* and the New Hampshire rule releases the expert witness from the straight-jacket which confines his testimony to matters relevant to "right-and-wrong." For a collection of authorities approving this approach see Roche, *Criminality and Mental Illness-Two Faces of the Same Coin,* 22 U. OF CHI. L. REV. 320; Zilboorg, *A Step Toward Enlightened Justice,* 22 U. OF CHI. L. REV. 331; Guttmacher, *The Psychiatrist as an Expert Wit-*

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ness, 22 U. OF CHI. L. REV. 325; E. De Grazia, *The Distinction of Being Mad,* 22 U. OF CHI. L. REV. 339; Guttmacher and Weihofen, ***Psychiatry and the Law*** (1952); Sobeloff, ***From M'Naghten to Durham, and Beyond—A Discussion of Insanity and the Criminal Law,*** 41 A.B.A.J. 793; and collected law review articles and notes in Annotation, 45 A.L.R. 2d 1447, at 1463.

It is hoped that our courts can be released from the mire of confusion which prompts so many different instructions. The trial court in the instant case reflects a sincere desire to ride every horse in the field of mental responsibility, and the result is that none is thoroughly presented nor correctly handled. To remove from the consideration of the jury the right-and-wrong test would enable it to consider all of the evidence reflecting upon the defendant's mental condition at the time of the act, including evidence of feeble-mindedness, and emotional and character disorders. Moreover, the absence of apparent impulsive conduct would not preclude the jury from drawing legal "insanity" from an act which given the appearance of being "coolly and carefully prepared" (Royal Commission on Capital Punishment, *supra,* Report 110-111 (1953)).

POINT III

THE ARGUMENT OF THE PROSECUTOR WAS PREJUDICIAL TO THE SUBSTAN-

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TIAL RIGHTS OF THE DEFENDANT IN THAT IT WAS HIGHLY IMPROPER AND WAS CALCULATED TO INFLAME THE MINDS OF THE JURY.

The summation of the prosecution's case was presented by all three prosecuting attorneys. The first of these arguments was presented by an assistant District Attorney who resided in the same town as the victim. The following remarks were made by Mr. Ivins:

> "Therefore, I feel it would be of no value to you as jurors for me to talk to you about guilt or innocence, because this fact has been established and admitted by the defendant, himself. The District Attorney's Office, County Attorney's Office, the Sheriff's Office have never throughout the course of preparing this case or trying it ever had any doubts that we had the right defendant; we were trying the right man" (T. 451).

* * * *

> "I personally, perhaps, have become more emotionallly involved in this matter than some of my colleagues. The offense, itself, was committed within a few blocks of my home in American Fork. I was acquainted with many of the participants. I have become acquainted with the family since the incident occurred. I know the horrible impact that the incident had on the citizenry of American Fork. I know how they reacted in horror and sadness, and I know how my own children come from from school emotionally disturbed and upset because of this hideous horrible thing that had happened. And you can't explain to a child why it happens; it's impossible

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to explain. For that reason, perhaps, I am closer to the emotional involvement of this thing than many others who are present here" (T. 452-3).

* * * *

"Of course, the person who was the victim of this terrible deed is not present; is unable to be present. Not only did this young girl—not only was she deprived of her right to live out a full and complete life by the horrible act of this defendant, but she was—her body was subjected to the indignities of an autopsy. The memory of this girl has been considered tainted by the horrible deed and act that was done. The family has been subjected to humiliation and indignities beyond expression because of the publicity which has been nation-wide, which has been given to this crime. Never will we know the heartbreak and sadness that has been caused to the family by this horrible deed that was perpetrated by Mr. Poulson. For no reason, a senseless act for one purpose only, to satisfy his own lust, to kill a 11 year old girl. There is no more horrible deed could have been committed against society than the one that Mr. Poulson committed; no more horrible deed than—that I can even conjecture, think of, because of the attack upon an innocent 11 year old girl. It is horrible to contemplate" (T. 453).

It is submitted that the foregoing portions of counsel's argument were highly inflammatory and prejudicial to defendant. This argument endeavors to suggest that the case would not have been prosecuted unless the "District Attorney's Office, County Attorney's Office, the Sheriff's Office" were satisfied that

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the defendant was guilty. This implies a belief based upon the judgment of the respective offices, rather than the evidence produced at the trial, that the defendant was guilty. Such conduct is manifestly prejudical to the defendant (People v. Beal, 116 Cal. App. 2d 475, 254 P. 2d 100; People v. Hoffman, 399 Ill. 57, 77 N.E. 2d 195; State v. Susan, 152 Wash. 365, 278 P. 149).

A fair and impartial analysis of the evidence could hardly embrace references by counsel to his personal familiarity with the facts of the killing, nor gratuitous suggestions that his own children were "emotionally disturbed and upset because of this hideous, horrible thing that had happened." Such an argument is grossly improper and could only have been intended to excite the prejudices and passions of the jury against the defendant.

The remarks of the prosecutor are all the more prejudicial in the light of the crime itself, which was especially abhorrent, and would easily produce the result intended by counsel. The remarks would tend to detract the minds of the jury from the evidence, supplanting therefor the base appeal for prejudice and passion (State v. Goodwin (Mo., 1919) 217 S.W. 264).

In their totality, the prosecutors' statements were clearly intended to frighten the jury into a conclusion consistent with its finding. Under these circumstances, the argument is highly prejudicial and constitutes reversible error. That counsel for the defendant failed to interpose an objection to the argument does not con-

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stitute a waiver of this improper conduct, especially where the life of the defendant is at stake. See Annotation, 50 A.L.R. 2d 766.

CONCLUSION

It is respectfully concluded that the trial court committed error of a nature that was prejudicial to the substantial rights of the defendant. The instruction to the jury confining the alternative findings to guilty of murder in the first degree or not guilty wholly failed to present the proper alternative lesser included offenses where the issue of mental responsibility was so dominant.

The instructions themselves relating to "insanity" were ambiguous and confusing serving as no useful guide to appraise the evidence bearing upon the mental condition of the defendant.

Finally, the argument of the prosecutor was grossly improper, bringing into the trial matters far beyond the competent and admissible evidence. The argument was an appeal to prejudice, emotion and passion, was in extremely poor taste, and had the desired effect of encouraging the finding of guilty.

No greater responsibility rests upon the shoulders of a trial court than to insure to a defendant on trial for his life a fair and impartial consideration of all the evidence, and where the punishment imposed cannot be undone, it behooves the court to resolve all disputed

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issues of law in favor of the defendant. The gravity of capital punishment has an important bearing where mental responsibility is the predominant issue, and to send to death a young man with a mental age half his physical age, and having real and substantial evidence of mental disease and derangement, is to walk blindly against the enlightened body of modern law which gives meaning and import to such a condition. To ignore the effect of such a condition upon the intent essential to the principal offense, is to refuse to keep step with the development of well-reasoned law.

Accordingly, we respectfully urge that this Honorable Court reverse the finding of guilty and direct a new trial.

Respectfully submitted,

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