25. In other words, the defendant is unable to or lacks the ability to evaluate the possible

consequences of a normal act of violence, is not that right, Doctor?

26. And, Doctor, then when the accused is ~~threatened~~ faced with a threat of danger, <u>though real or unreal</u>, he does not have the capacity to delay <u>even momentarily</u> by reflection and judgment, the action upon the impulse, is that right?

27. Then, Doctor, although under ordinary day-to-day circumstances, he is able to use some usual judgment, isit not true that the <u>diseased mind</u>, which you have testified to, possessed by the defendant, makes it impossible, when <u>extra ordinary stress occurs</u>, for him to hesitate, even momentarily, to take action without reflection or judgment, is that right, Doctor?

28. In other words, when <u>extra ordinary stress occurs</u>, confronting the defendant, <u>real or imaginary</u>, due to his diseased mind, he immediately "short circuits" from impulse to action, is not that right, Doctor?

29. And when confronted by such <u>extraordinary danger, real or imaginary</u>, due to his <u>diseased mind</u>, he is unable, <u>even momentarily</u>, to use the usual judgment he possessed to permit the time delay necessary to reflect, before action,

is not that right, Doctor?

30. Now, Doctor, based upon your testimony heretofore given, do you have an opinion as to whether the diseased mind of defendant you have described, impairs his capacity to use what knowledge he may have to distinguish right from wrong?

31. Explain.

32. Now, Doctor, is the diseased mind of the defendant as you have described, such that the defendant is unable to adapt himself to the reality of modern society with which he is in contact?

33. Is or is not, Doctor, the defendant able to feel the normal emotions like his fellow human beings? Due to his diseased mind?

34. Explain.

35. Doctor, does or does not the diseased mind of defendant prevent him from appreciating the feelings of others?

36. Doctor, does or does not the diseased mind of defendant prevent his appreciating the value of human life?

40. Now, Doctor, from what you have testified to heretofore, do you have an opinion as to whether the diseased mind of the defendant was discernable befors the acts of killing alleged to have happened, occurred?

41. Explain.

42. Now, Doctor, was the disposition to react explosively due to the diseased mind of defendant, discernable before the alleged acts or killing occurred, from your opinion on basis of what you have testified to? Explain.

29-007. Challenges for cause; how tried. All challenges for cause shall be tried by the court, on the oath of the person challenged, or on other evidence, and such challenge shall be made before the jury is sworn, and not afterward.

FOOTNOTE:

All challenges for cause are decided by court. Rakes v. State, 158 Neb. 55, 62 N.W. 2d 273.

In impaneling a jury, all challenges for cause are tried to the court. Lee v. State, 147 Neb. 333, 23 N.W.2d 316.

If cause of challenge is denied by juror on voir dire after accused's peremptory challenges are exhausted, accused has right to have issue tried and witnesses examined. Trobough v. State, 119 Neb. 128, 227 N.W. 443.

Decision of trial judge being based on consideration of all facts developed during examination, including appearance and actions of juror, will not be reversed unless clearly wrong. Bemis v. City of Omaha, 81 Neb. 352, 116 N.W. 31; Ward v. State, 58 Neb. 719, 79 N.W. 725.

Evidence relating to challenges to jurors cannot be considered unless settled and allowed by bill of exceptions. West v. State, 63 Neb. 257, 88 N.W. 503.

clem

PLAUSIBLE QUESTIONS

Do you, Doctor, have an opinion based upon your testimony heretofore given, as to whether the defendant, at the time he killed Robert Jensen on January 28, 1958, near Bennet, Nebraska, was mentally capable of deliberating and premeditating the act he committed?

What is it?

_____ as to whether the killing of Robert Jensen, by the defendant on the night of January 28, 1958, near Bennet, Nebraska, was the result of an intention in which, deliberate and premeditated malice was present?

What is it?

_____, as to wether, at the time defendant killed Robert Jensen on the night of January 28,1958, was mentally capable of deliberately forming and meditating upon an intent to take Robert Jensen's life?

What is it?

Do you, Doctor, have an opinion based upon your testimony heretofore given, as to whether the defendant,

at the time he killed Robert Jensen on January 28, 1958, near Bennet, Nebraska, was mentally capable of formulating and entertaining a felonious intent to commit robbery? No Premeditation

What is that opinion?

Doctor, do you have an opinion based upon your testimony heretofore given, as to whether the defendant, at the time he killed Robert Jensen on January 28, 1958, near Bennet, Nebraska, "as to whether or not he, the defendant, was conscious that he was doing what he ought not to do"?

Now, Doctor, do you have an opinion based upon your testimony heretofore given, as to whether the defendant, at the time he killed Robert Jensen, on January 28, 1958, near Bennet, Nebraska, "whether or not he, the defendant, had a sufficient degree of reason to know that he was doing an act that ~~was wrong.~~"? OUGHT NOT TO DO NO

What is that opinion?

Now, Doctor, based upon your education, your training as a Psychiatrist, your experience in the practice of Psychiatry for a number of years, as you have testified to, let us assume: That during

the time from January 21, 1958, to and including January 29, 1958, the defendant herein shot and killed 9 persons; and that at least 4 persons out of the 9, including Robert Jensen, were either shot or stabbed from the back. Then, let us assume further: That at least 3 of the women in the killings were either left or found with their backs up, and one of them was found with indications that the body had been ravished from behind. Do you have an opinion, as to whether these assumed facts have any bearing upon whether the defendant was suffering from a diseased mind or delusion at the time he shot Robert Jensen in the back region of the right side of his head?

What is that opinion? Explain.

Now, Doctor, based upon the qualifications you have given this Court and jury, in your testimony hwre, let us assume that the defendant herein, from January 21, 1958, to and including January 29, 1958, killed 9 persons, including Robert Jensen,and that he either shot or stabbed from the back in at least 4 of the incidents, including Robert Jensen; and let us assume further: That the defendant without qualification, states that he "all these people he killed", he did so in self defense, and he unequivocally states that he

believes he killed in self defense. Do you, Doctor, have an opinion on whether the defendant, based on these assumed facts, was suffering from a diseased mind or delusion on January 28, 1958, when he killed Robert Jensen?

What is that opinion? Explain.

Now, Doctor, based upon your testimony heretofore given by you, assume that prior to December 1, 1957, the defendant, as many persons, mostly his relatives, have insistently testified that the defendant exhibited cheerfulness, gaiety, and happiness, most of the time and then that they saw him after December 1, 1957, and after January 21, 1958, including the week in which the Bartlett family bodies were lying in state in the back yard at 924 Belmont Street, he still expressed cheerfulness, gaiety, and happiness and was no different than he was before the alleged murders were committed; do you have an opinion, Doctor, as to whether this indicates lack of remorse or sorrow for the terrible acts he had committed?

Is the Jurnal required to show first

Doctor, based upon your testimony heretofore given, do you have an opinion as to whether or not the defendant, at the time he killed Robert Jensen, due to the mental disease you testify he possessed, had the power of controlling his actions? At the time he killed Robert Jensen?

What is it?

Doctor, based upon your testimony heretofore given, do you have an opinion as to whether the defendant, at the moment he killed Robert Jensen, due to his mental disease, was or was not deprived of the capacity to have knowledge of the nature and quality of his act?

What is that opinion?

The memory of details is not the knowledge of the nature and quality of the act, is it, Doctor?

An insane delusion is never the result of reasoning or reflection, is it, Doctor?

A man may reason himself and be reasoned by others into absurd opinions, and he may be persuaded into impracticable schemes and ideas but he cannot be reasoned into insanity or insane delusions, can he, Doctor?

Now, Doctor, based upon your testimony heretofore given, assume that these areincidents in evidence which reveal that defendant did not want to plead insanity as a defense in this case but states that he believes he killed Robert Jensen in self defense and he continually asserts that he is not insane, is not that a prime proof that he is suffering with a diseased mind or was harboring a delusion of persecution when he killed Robert Jensen, in your opinion?

The delusion youhave testified to that defendant possessed at the time he killed Robert Jensen, is based upon a false premise that he was being attacked by the deceased, is not that true, Doctor, in your opinion?

Based upon the evidence in the record in this Case, the defendant stated to the effect that he, the defendant, was always getting "dirty looks"; would you, Doctor, say that was also an indication or a symptom of the defendant's diseased mind? Explain, Doctor.

The evidence, Doctor, shows that the defendant was hesitant about receiving favors or gifts from people. Is this tendency on part of defendant, a significant symptom revealing the defendant's diseased mind? Explain, Doctor.

Now, the evidence shows that the defendant testified that he had his first fight on the second day he went to school and that the frequency ofhis fights increased progressively, until that, in his last year in school, he had a fight every day. Does that tendency on the part of the defendant indicate or reveal another symptom of the disease the defendant was suffering from, Doctor? Explain, Doctor.

The evidence reveals that the defendant had frequent fights with members of his family, including fights with his own father, to such an extent thathe left home shortly before the incident involved in this case. Does that add further to the symptoms of the mental disease from which the defendant is suffering, Doctor? Explain it.

The evidence shows that the defendant was prone to tell disordered stories, including such as: owning a chrome plated motor, which did not exist; and of having a pregnant wife, when he was not married; and that his aunt was dead although said aunt was alive. Do these incidents indicate symptoms of a diseased mentality on the part of the defendant, Doctor? Explain it.

The fact which is in evidence is that the defendant laughed at a friend's mother's funeral. Would that be a symptom of a diseased or defective mind, Doctor?

Explain, Doctor.

Now, Doctor, there is evidence in the record which indicates that the defendant, during the period from the date of January 21st to and including January 29, 1958, has admitted the commission of at least 35 crimes; would this, Doctor, indicate that the defendant was not conscious that he was doing what he ought not to do?

The evidence shows, Doctor, that the defendant has given 4 different confessions and 4 different versions concerning the same incidents on his killing spree. Now, Doctor, does not that, in itself,

indicate insanity?

Explain it.

BE SURE TO BRING THE FOLLOWING TO DOCTOR'S ATTENTION

1. THE CONFESSION FROM DOUGLAS, WYOMING.

2. HIS WRITING ON THE WALL.

3. WRITING NOTES TO LAW OFFICERS.

4. MULTIPLE CONFESSIONS.

5. CONFUSION OF EVENTS IN HIS STATEMENTS, WITH CONFUSED SPELLING OF INDIVIDUAL WORDS AND WORD GROUPING.

VOIR DIRE

I. STATEMENT AS TO PARTIES:

II. INTERROGATIONS:

A. Foundation:

1. Residence

2. Age

3 Vocation

4. Married

5. Family

6. Length of Residence

7. Religion

B. Party relationship:

1. Know the accused?

2. Know any of the attorneys involved in this case?

3. Ever heard of this case?

4. Do you know any of the Doctors? Dr. Stein, Dr. Coats, and Dr. Munson.

5. Do you know any of the following:

(Here, read names of relatives of deceased person - SEE PAGES 4,5 and 6 of DIAGRAM OF CASE)

C. General Questions:

1. You understand that by preponderance of evidence, we merely mean the weight of evidence?

2. Is there anything in your mind at the present time that would influence you to bring back a verdict for the State?

3. Is there anything in your mind now that would prevent you from bringing back a verdict for the accused?

4. You understand that what we want is a jury of men and women who are fair and open-minded, and who base their decision on the testimony and evidence as adduced in Court, and the instructions from the Court entirely, and not from what you learn?

5. You will follow the law and enforce it as given in the instructions even though it, the law, is contrary to your own ideas on the subject, and contrary to what your conception of what the law should be, would you?

6. It is the duty of all citizens to abide by the law. We do not make the laws, but the laws are made for us by our Representatives in the Legislature. It is, therefore, our duty to follow the law even though we feel that the law should be contrary to what one believes. If accepted as a juror, you will not hesitate to follow the law as given to you by His Honor in the instructions, will you?

   Even though your ideas of the law are entirely different from that given in the instructions, will you?

7. You, we are sure, believe that every man is entitled to a fair trial before his peers; you, the jury that is, also know that that is the law here in Nebraska and you are ones who will abide by that law in your decision here, isn't that true?

8. You realize, do you not, that that is what we defense lawyers are here for, to uphold that noble tradition of a fair trial?

9. You would be the last to consider otherwise, isn't that so?

10. And you will go right along with the Court and we lawyers and see to it, as far as you possibly can, that the accused is treated fairly and gets a fair trial as far as you are concerned, will you?

11. That is all we or anyone else can ask, Mr. (or Mrs. or Miss) _____.

"DO'S and DON'TS"

D. 1. Don't pick a person who has been on a jury before.

2. Pick southern continentals where you want verdict for the underdog.

3. Pick Nordics for law and safeguards.

4. Exclude ex-public officials.

5. Exclude insurance adjusters.

6. Exclude social workers.

7. Include women for defense in criminal cases because of emotional control.

8. Don't pick men who have had law or medical training.

9. Don't challenge because of ignorance or race.

10. Use simple terms in speech; plain, simple and humble.

11. Your manner: judge your prospects; be tactful.

12. Avoid professional jurors.

13. Excuse jurors by going to next juror first.

14. Challenge the juror by addressing the Court.

15. Challenge as follows:

P-1			D-1		D-4
		P-2		D-2	P-3

16. Challenge juror before tender is good practice.

17. Do not question <u>all jurors</u> in detail.

18. Be a gentlemen; excuse yourself; be fair in attitude; ingratiate yourself.

19. Have Instructions handy to quote from them, if necessary.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA ,
Plaintiff,
vs.
CHARLES STARKWEATHER,
Defendant.

INSTRUCTION
REQUESTED BY DEFENDANT
NO._____

You are instructed, if from a consideration of all the evidence you are not satisfied beyond a reasonable doubt that at the time he shot the deceased the defendant had sufficient mental capacity to distinguish between right and wrong in respect to the particular act charged and to know and realize that the act he was about to commit was wrong because of defective powers of mind and reason, then the defendant would not be criminally responsible for his act and it would be your duty to acquit him entirely of the charges made against him.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. CHARLES STARKWEATHER, Defendant.	)	INSTRUCTION REQUESTED BY DEFENDANT NO._____

You are instructed that the defendant in this case interposes the defense of insanity. Such a defense is a legal and proper one; one recognized by the law, and the evidence relating thereto should be viewed by the jury and weighed the same as any other evidence should be which tended to establish any other defense known to and recognized by the law.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,)
)
Plaintiff,)
)
vs.)
)
CHARLES STARKWEATHER,)
)
Defendant.)

INSTRUCTION
REQUESTED BY DEFENDANT
NO. _____

You are instructed that in order to constitute a crime a man must have intelligence and capacity eno ugh to have a criminal intent and purpose, and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental powers; or if through the over-whelming power of mental disease or degeneracy his intellectual power is obliterated, he is not responsible for criminal acts.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,)
)
Plaintiff,)
)
vs.)
)
CHARLES STARKWEATHER,)
)
Defendant.)

INSTRUCTION
REQUESTED BY DEFENDANT
NO. _____

The defendant in this case has interposed the defense of insanity. Such defense is one recognized by law, and the evidence relating thereto should be considered by the jury and weighed the same as any other evidence.

The law presumes that every person is sane and it is not necessary for the State to introduce evidence of sanity in the first instance. When, however, any evidence has been introduced tending to prove the insanity of the accused, the burden is then upon the State to establish the fact of the accused's sanity by evidence beyond a reasonable doubt. Neither insanity nor uncontrollable impulse is a defense unless it renders defendant incapable of knowing the nature and quality of his act or of distinguishing between right and wrong with respect to the act committed. In other words, a person may be suffering from some form of insanity or impairment of the mind, yet if he has the mental capacity to understand the nature and quality of his act, and to distinguish between right and wrong with respect to it, he is criminally responsible for his act. In this case, if from all the evidence you are convinced beyond a reasonable doubt that the defendant committed the crime charged and at the time of the commission of the alleged crime was of sufficient mental capacity to understand the nature and quality of his act and was of such mental capacity as to distinguish between right and wrong with respect to it, the defendant would be legally responsible for his acts, although you might find that at that time he was suffering from some degree of insanity or impairment of mind.

If from all the evidence or lack of evidence in this case a

reasonable doubt is raised in your minds as to the sanity of the defendant at the time of the commission of the crime charged, as such sanity is defined herein, it is your duty to find the defendant not guilty on the ground of insanity.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,)
)
Plaintiff,)
) INSTRUCTION
vs.) REQUESTED BY DEFENDANT
) NO._____
CHARLES STARKWEATHER,)
)
Defendant.)
- - - - - - - - - - - - - - - - - -

You are further instructed that in determining the weight to be given to the alleged confession of the accused you are to take into consideration all of the circumstances under which it was made, including the age, mental condition, physical condition, intelligence or lack of intelligence, character, disposition and experience of the accused, the fact that he was under arrest and in confinement in the State Penitentiary at the time when the confession is alleged to have been made, the statements, threats, or promises, made to him at the time, the treatment he received, and all other attending circumstances.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,)
)
Plaintiff,)
) INSTRUCTION
vs.) REQUESTED BY DEFENDANT
) NO._____
CHARLES STARKWEATHER,)
)
Defendant.)
- - - - - - - - - - - - - - - - - -

You are further instructed that it is incumbent upon the State to prove beyond a reasonable doubt by testimony other than the alleged confession or admission of the accused, that the crime charged in the information in this case was committed and in the event that the State has failed to prove beyond a reasonable doubt by testimony other than the alleged confession or admission of the accused that the crime charged in the information was committed then your verdict should be for the defendant.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

vs.

CHARLES STARKWEATHER,

Defendant.

DOC. 9 PAGE 205.

DIAGRAM OF CASE

PARTIES:

1. Plaintiff - State of Nebraska, represented by the County Attorney, ELMER M. SCHEELE, and DALE FAHRNBRUCH, ET AL.

2. Defendant - Charles Starkweather, a Minor, aged 19 years, 3025 "N" Street, Lincoln, Nebraska, represented by T. C. GAUGHAN and WILLIAM F. MATSCHULLAT.

STATEMENT OF THE CASE:

In substance, we are trying a case for First Degree murder in an incident that took place under the following conditions, on or about January 28, 1958, in the vicinity of Bennet, Nebraska; a murder as alleged to have taken place in which the defendant is alleged to have committed against one ROBERT WILLIAM JENSEN while in the perpetration of robbery; the information is set out as follows:

"Be it remembered that Elmer M. Scheele, County Attorney, in and for Lancaster County and the Third Judicial District of the State of Nebraska, who prosecutes in the name and by the authority of the State of Nebraska, comes here in person, into Court at this January term, A.D., 1958,thereof, and for the State of Nebraska, gives the Court to understand the following:

COUNT I

Charles R. Starkweather, late of the County aforesaid,

on or about the 27th day of January A.D., 1958, in the County of Lancaster, in the State, aforesaid, then and there being, did unlawfully, feloniously, purposely, and of his own deliberate and premeditated malice, kill Robert William Jensen, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the State of Nebraska.

COUNT II

"Did unlawfully, feloniously, and purposely in the perpetration of a robbery, kill Robert William Jensen contrary to the form of Statutes in wuch cases made and provided, and against the peace and dignity of the State of Nebraska.

ELMER M. SCHEELE,
County Attorney."

* * * * * * * * *

This case must be considered with a group of other incidents preceding and following the Jensen case. The entire case must be considered from the incidents that took place on or about December 1, 1957, at 1535 Cornhusker Highway, Lincoln, Nebraska, in which the person of Robert Colvert was murdered at the Crest Filling Station by what is apparently and alleged to be the same defendant who was involved in the Jensen case.

Secondly: In the case of an incident that took place on what is alleged to be the 21st day of January, 1958, at 924 Belmont Avenue, Lincoln, Nebraska; that we refer to as the BARTLETT INCIDENT in which one Marion Bartlett, Velda Bartlett, and Betty Bartlett were alleged to have been murdered by the same person who is the defendant in this case.

Thirdly: The MEYER INCIDENT is that of the alleged murder of one August Meyer at or near Bennet, Nebraska, on or about January 28, 1958, by the defendant in this case.

Fourth: The JENSEN-KING INCIDENT, the alleged murder of Robert William Jensen and one Carrol King, near Bennet, Nebraska, on the evening of January 28, 1958.

Fifth: The WARD INCIDENT is that of the alleged murder

by the defendant in this case, of one Lauer Ward, Mrs. Lauer Ward, and one Lillian Fencil, the housekeeper, at 2843 South 24th Street, Lincoln, Nebraska, on the date of January 29, 1958.

Sixth: The COLLISON INCIDENT is the alleged murder of one Merle Collison in the vicinity of Douglas, Wyoming, on or about January 30, 1958.

RELATIVES:

1. The Colvert Family:

Mrs. Charlotte Colvert & Daughter,
3240 North 66th Street,
Lincoln, Nebraska.

2. The Bartlett Family:

Loren Bartlett, son, Lincoln, Nebraska; Harry Bartlett, son, Los Angeles, California; Wilber Bartlett, son, Los Angeles, California; Lloyd Bartlett, son, Los Angeles, California; Dora Bartlett, mother, Lincoln, Nebraska; Mrs. Faye Tucker, sister, Lincoln, Nebraska; Mrs. Mary Bowers, sister, Lincoln, Nebraska.

The Fugate Family:

Mrs. Barbara Von Busch, Daughter, Lincoln, Nebraska;
Caril Ann Fugate, Daughter, Lincoln, Nebraska;
Mrs. Nellie Dupes, sister, Lincoln, Nebraska;
Mrs. B. F. Campbell, Sister, Lincoln, Nebraska;
Mrs. Anna Morser, Sister, Lincoln, Nebraska;
Howard Street, Brother, Lincoln, Nebraska;
Frank Street, Brother, Lincoln, Nebraska; Mrs. Pansy Street, Mother, Lincoln, Nebraska.

3. The Meyer Family:

Louis Meyer, Brother, Bennet, Nebraska; Mrs. Clara Jones, Sister, Bennet, Nebraska; Mrs. Mary David, Sister, Nebraska City; and Mrs. Charles Stortz, Sister, Lincoln, Nebraska.

4. The Robert Jensen Family:

Dewey Jensen, Brother, Bennet, Nebraska; Mrs. Lucille Bratt, Grandmother, Bennet, Nebraska; Mrs. Bessie Jensen, Grandmother, Bennet, Nebraska; Mrs. Cora Beavers, Great-Grandmother, Bennet, Nebraska; Mrs. Gertrude Kuse, Great-Grandmother, Bennet, Nebraska; and Robert Jensen, Sr., Father, Bennet, Nebraska.

5. The Carrol King Family:

Mabel King, Mother, Bennet, Nebraska; Warren King, Brother, Bennet, Nebraska; Mrs. LaVerne L. Stolte, Sister, Lincoln, Nebraska; M. L. King, Grandfather, Bennet, Nebraska.

6. The Ward Family:

Michael Ward, Son, Lincoln, Nebraska; Mrs. Phil Sidles, Sister of Mrs. Ward, Lincoln, Nebraska; Mrs. Gilbert Reynolds, Sister of Mrs. Ward, Grand Island, Nebraska; Mrs. R. A. Skoglund, Sister of Mrs. Ward, Red Wing, Minnesota; and Carl W. Olson, Brother of Mrs. Ward, Lincoln, Nebraska.

Michael Ward, Son, Lincoln, Nebraska; and Dr. W. Paul Ward, Brother of Mr. Ward, Detroit, Michigan.

7. Lillian Fencil Family:

Mr. & Mrs. Rudolf Finch, parents, Wahoo, Nebraska; Mrs. Marie Vajgrt, Sister, Loyal, Wisconsin; Mrs. Hattie Kubit, Sister, Wahoo, Nebraska; and Bohmer Fencil, Brother, Wahoo, Nebraska.

8. The Collison Family:

Mrs. Merle Collison, wife, and Minor Children, Great Falls, Montana.

WITNESSES FOR THE PROSECUTION:

Merle Karnopp
Joseph Carroll
E. H. Masters
E. R. Henninger
Robert J. Stein
Elmer Shamberg
Harold Smith
Vernon Byler
Gerald Tesch
Leslie Hasson
William Johnson
Everett Rudisil
Robert Jensen
Winston Flowers
Robeet Anderson
Delton Zieman
William Romer
Earl Heflin
Robert Ainslie
William Dixon
Larry Middaugh
James Coyner
Maynard Behrends
Joseph Sprinkle
J. W. Owens
Elmer Bloem
Everett Broening
Howard Genuchi
Hubert Becham

Thomas Becham
Patrick Boldt
Ivan Baker
Vernon O'Neal
Leo Schwenke
Homer Tate
Mrs. Homer Tate
Dr. E. D. Zeman
Paul Douglas
Gertrude Karnopp
Caril Ann Fugate
Joseph Bovey
John Greenholtz
Steve Warrick
Charles Downey
Louis Meyer
Warren King
Ernest Q. Hunt
Dennis Nelson
Dr. John McGreer
Dr. B. A. Finkle
Ernest Stolz
Sheryl Holloway
Lyle Jewett
Marvin Krueger
Mrs. Howard Bell
FBI Laboratory Technicians
Marvin L. Nolte
Lester Schmidt

WITNESSES FOR THE DEFENSE:

Dr. John Steinman, Lincoln, Nebraska
Dr. John OhHerne, Kansas City, Missouri
Dr. Greenbaum, Kansas City, Missouri

Guy Starkweather, 3025 "N" Street, Lincoln, Nebraska
Helen Starkweather, 3025 "N" Street, Lincoln, Nebraska
Rodney Starkweather, 1019 Nance Street, Lincoln, Nebraska
Bobby Starkweather, 3025 "N" Street, Lincoln, Nebraska
David Starkweather, 3025 "N" Street, Lincoln, Nebraska
Greg Starkweather, 3025 "N" Street, Lincoln, Nebraska

Elsie Neal, 2109 South 12th Street, Lincoln, Nebraska
Clarence Neal, 2109 South 12th Street, Lincoln, Nebraska

Marjorie Cave, 5550 Judson Street, Lincoln, Nebraska
Gerald Neal, 705 North 23rd Street, Lincoln, Nebraska
John Neal, 705 North 23rd Street, Lincoln, Nebraska
Harry Niederhouse, 2740 South 12th Street, Lincoln, Nebraska
John Nedge, Lincoln, Nebraska
Ron Grantski, 2303 South 10th Street, Lincoln, Nebraska
Jack Grantski, 2303 South 10th Street, Lincoln, Nebraska
George M. Glanz, 1241 Furnas Street, Lincoln, Nebraska
Don Gilham, 4335 Witherbee Street, Lincoln, Nebraska
Mrs. Rodney Starkweather, 1019 Nance Street, Lincoln, Nebraska
Harvey Griggs, 1179 Furnas Street, Lincoln, Nebraska
Frank McKay, Lincoln, Nebraska, Mgr. Watson Brothers
Mrs. Harvey Griggs, 1179 Furnas Street, Lincoln, Nebraska

Dr. Leonard Fitch, Lincoln, Nebraska

Charles R. Starkweather, Lincoln, Nebraska

Janet Smith, 1971 Sewell, Lincoln, Nebraska
Mrs. Ruth Place, 1600 "C" Street, Lincoln, Nebraska
Mrs. Althea Neal, 705 North 23rd Street, Lincoln, Nebraska
Mrs. May Hawley, 425 North 10th Street, Lincoln, Nebraska
Duane Grantski, Lincoln, Nebraska

Vivian Buess, 537 South 22nd Street, Apt.#8, Lincoln, Nebraska
Sonny Von Busch, 3745 North 12th Street, Lincoln, Nebraska

Witnesses for the Defense, continued:

STATEMENT OF THE LAW:

The defense in the case will be that of insanity. And in Nebraska, the general rule is substantially as follows:

INSANITY AS DEFENSE

The defense of insanity is proper if during the commission of the crime, the accused is unable to know the difference between right and wrong, as to the specific act committed.

DISEASED MIND

Evidence concerning a diseased or defective mind may be taken into consideration by the jury in showing the presence or the lack of malice of forethought, purpose, deliberation, or premeditation, of a crime as to the mitigation of the penalty.

If the act is committed while the accused is suffering from a diseased or defective mind, the question should go to the jury as to the mitigation of the penalty for the commission of the act.

BURDEN OF PROOF

A man is considered sane unless otherwise proven. The burden of proof of insanity is upon the defense until the defense has submitted some or any evidence as to the sanity of the accused and then the burden is on the State to prove beyond a reasonable doubt by a preponderance of the evidence, that the accused is sane.

PICTURES

The question as to admissibility of pictures is left up to the discretion of the Court. Where the pictures can prove some point in dispute, then said pictures shall go to the jury.

On the other hand, if the admission of the pictures would be inflammatory or prejudicial and not tend to prove a point one way or the other, then the pictures are not admissible.

Objects, such as clothing, knives, instruments, or other things that are found at the scene of the crime that is committed, are admissible when they are used for the purpose of helping the jury decide as to what happened. On the other hand, if these specified objects are of no value in assistance for the deliberation of the jury, then they are not admissible.

Opinions of experts, such as psychologists, psychiatrists, and other medical experts may be considered as, like manner, other witnesses by the jury in its determination as to the guilt or innocence of the accused or as to the penalty to be recommended by the jury. On the other hand, the opinion of experts may be rebutted by lay witnesses when they are properly qualified. This means that the testimony of experts is not conclusive and the jury may take into consideration the testimony of the lay witnesses in its deliberation as to the sanity of the accused.

EXPERTS

It is not mandatory that the jury follow the educated opinions of medical experts.

In the above brief statement, the law in Nebraska applicable to the issues involved in this case, are further extended in a brief that has been written for the purpose of this trial. Therefore, the statements hereinabove just completed, are not only brief but if taken in its specific points, may be qualified by a more extensive reiteration in the extended brief that is appended hereto.

SELF DEFENSE

S U M M A R Y

OF

DEFENSE WITNESSES

* * * * *

DR. JOHN STEINMAN, Lincoln, Nebraska:

As expert witness, this party will testify in regard to his examination and observation of accused.

I. Lay foundation as to witness qualifications.

II. Describe what he did in his examination of accused.

III. Detailed questions as to particular points revealed by Doctor's testimony at the trial.

IV. Presentation of the Hypothetical Questions as formulated by defense counsel during progress of trial.

Notice space for items that arise during trial of all witnesses for purpose of questioning doctor and for reference in drafting hypothetical questions.

DR. JOHN OhHERNE, Kansas City, Missouri:

As expert witness, this party will testify in regard to his examination and observation of accused.

I. Lay foundation as to witness qualifications.

II. Describe what he did in his examination of accused.

III. Detailed questions as to particular points revealed by Doctor's testimony at the trial.

IV. Presentation of the Hypothetical Questions as formulated by defense counsel during progress of trial.

Notice space for items that arise during trial of all witnesses for purpose of questioning doctor and for reference in drafting hypothetical questions.

DR. GREENBAUM, Kansas City, Missouri:

As expert witness this party will testify in regard to his examination and observation of the accused.

I. Lay foundation as to witness qualifications.

II. Describe what he did in his examination of accused.

III. Detailed questions as to particular points revealed by Doctor's testimony at the trial.

IV. Presentation of the Hypothetical Questions as formulated by defense counsel during progress of trial.

Notice space for items that arise during trial of all witnesses for purpose of questioning doctor and for reference in drafting hypothetical questions.

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DR. LEONARD FITCH, Lincoln, Nebraska:

As expert witness, this party will testify in regard to his examination and observation of accused.

I. Lay foundation as to witness qualifications.

II. Describe what he did in his examination of accused.

III. Detailed questions as to particular points revealed by Doctor's testimony at the trial.

IV. Presentation of the Hypothetical Questions as formulated by defense counsel during progress of trial.

Notice space for items that arise during trial of all witnesses for purpose of questioning doctor and for reference in drafting hypothetical questions.

GUY STARKWEATHER:

This witness will be questioned as to family background and as to accused's accidents and subsequent behavior. Include family history of moving and Charles school career.

POINTS TO COVER IN GENERAL:

I. Describe observation of accused after accident of January, 1957.

II. What other accidents did accused have?

III. Father's association with accused including dispute just before accused left home.

IV. Tell jury why he was obstructing defense preparation of case. Include:

1. Attitude toward plea of insanity.
2. Failure to cooperate with counsel.
3. Instructing accused to follow witness as to tactics rather than counsel.
4. Instructing family to refrain from attending conferences with counsel.
5. Advising relatives not to testify, i.e. Mrs. Clarence Neal, etc.
6. Criticising police, court and counsel to public.
7. Holding press conferences to pervent counsel from proceeding according to law based upon Constitutional rights.

MRS. HELEN STARKWEATHER:

Will testify as to family background including her working in lieu of husband's failure to work. Family moving often; school history of accused.

I. Describe accused's behavior.

II. Her opinion as to accused's capacity to commit acts in issue.

RODNEY STARKWEATHER:

Will testify that accused, his brother, all along, during the past, possessed a quirk of the mind; to be able to tell wild stories of unreality that he, Charles Starkweather, believed to be the gospel truth. He affirms the testimony of Robert Von Busch. FOR EXAMPLE:

I. The car without a motor.

II. That he recounted many imaginary incidents and was convinced they were true.

ALSO: Witness should testify as to accused's family background in support of items covered by his father and mother and additional items as follows:

I. Accused propensity to fight with members of family, including witness and schoolmates. Describe in detail.

II. Explain loan of gun to accused.

III. Explain why he was interested in finding information at Bartletts including bodies.

ROBERT VON BUSCH:

Witness will testify as to Charles' last 6 years, while he, Von Busch, wss his pal and sort of "big brother" and confidant of the accused.

I. That Charles narrated amazing stories of unreality and believed them to be true.

1. a. Motorless car incident.
   b. Dead Aunt hallucination.

2. Would ape other ideas and was easily influenced and reacted to Von Busch's instructions.

3. Picked fights and would blame others on grounds of self defense:

   a. Tom Duane fight.
   b. Jim Sievers fight.
   c. Kicked out of Irving - fight.

4. He would have fits of frenzy:

   a. Fists through car windows.

5. Mixed up dates:

   a. Tried to date Caril with his brother, Bobby.

6. Never gave anyone anything.

7. Cruel; laughed at Bob's mother's funeral and at others pains.

JANET SMITH, 1971 Sewell:

This witness, a school psychologist, will testify as to tests given accused in school and her findings. She is from the School Board and will testify as to Charles scholastic and behavior history.

MRS. RUTH PLACE, 1600 "C" St:

This witness should testify as to her observation of accused in her school, Junior High, where she was principal.

Mrs. Elsie Neal, 2109 South 12th St:

This witness should testify as to family history of accused; accused's after school visits to her house.

1. Include visits and descriptions of accused's acts during week of alleged Bartlett murders.

2. Mrs. Bartlett's glasses on Friday, January 24, 1958.

3. Guy Starkweather's admonition as to talking to defense counsel and items covered.

    a. Charles' accident.
    b. Charles' visits during week of January 21, 1958.

CLARENCE NEAL, 2109 South 12th St.:

This witness should testify as to what he observed of Charles at his house. (Will be meager)

MRS. MARJORIE CAVE (Guy's half sister)5550 Judson:

Testify as to family history. (A reluctant witness) (Her husband is Gerald Cave).

ALTHEA NEAL, 705 North 23rd Street:

This witness is a Grand step-mother. Family history and Charles' attitude. (A reluctant witness)

JOHN NEAL, 705 North 23rd Street:

This witness is the Grand step-father. Family history and accused's attitude.

I. Was at Elsie Neal's during week of January 21, 1958.

II. Charles' headaches.

MRS. RODNEY STARKWEATHER, 1019 Nance Street:

(A reluctant witness)

DUANE GRANTSKI , Lincoln, Nebraska

Supervises fellow employees of accused at Western Newspaper Union. Will testify as to accident record January, 1957.

JOHN NEDGE, Lincoln, Nebraska:

Employer. Testing as to capacity of accused to understand the work.

I. Described Charles as "weak minded" to Reporter.

HARRY NIEDERHAUS, 2740 South 12th Street:

Employer of accused.

MRS. HARVEY GRIGGS, 1179 Furnas Street:

This witness lives in the home north of Bartletts where accused parked car and keys, and disposed of gun. (Daughter of the witness - Name?)

FRANK McKAY, Lincoln, Nebraska:

Official of Watson Brothers who received phone call relative to Marion Bartlett's work.

DR. LEONARD FITCH, Lincoln, Nebraska:

Fitted accused with glasses in July, 1954.

MRS. MAY HAWLEY, 425 North 10th Street:

This witness is accused's landlady during last few months while accused was at liberty.

I. Back in rent.
II. Accused's activities at the witness's residence.

RON GRANTSKI, 2303 South 10th Street:

Witness is a pal of Charles and boy friend of LaVeta.

JACK GRANTSKI, 2303 South 10th Street:

Witness is a pal of Charles.

JIM SIEVERS, Roca, Nebraska:

Witness was attacked by Charles and will describe the fight.

I. Accused attacked from the back.

BOBBY STARKWEATHER, 3025 "N" Street:

When the foundation is laid, the jury will be swayed.

POSSIBLE WITNESSES:

1. Police records - car stealing - 4-5 years of age.
2. Homer Tate, 8 miles South of Hiway #77.
3. Howard Genuchi, Bennet, Nebraska, - pulled car out.
4. Everett Bohring, Bennet, Nebraska, - his son found bodies.
5. Mrs. Katherine Kamp, 319 North 12th Street, - week of December 1, 1957.
6. Jerry Kempstor, pal of accused.
7. Joyce Phillipi, 15th & "L" Streets.
8. Sue Allen
9. LindaBindsum, 1021 South 14th Street.

Statutes

I N D E X

CRIMES and PUNISHMENTS

A. HOMICIDE:

B. TRIAL:

(a) HOMICIDE

28-401. "Murder in the first degree," defined; penalty. Whoever shall purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another; or, whoever by willful and corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury.

Source: G.S. p. 720; Laws 1893, c. 44, § 1, p. 385; R.S.1913, § 8581; C.S.1922, § 9544; C.S.1929, § 28-401.

1. **Definition**
2. **Premeditation**
3. **Motive and intent**
4. **Information**
5. **Instruction**
6. **Evidence**
7. **Penalty**
8. **Miscellaneous**

1. Definition

Murder may be committed in the perpetration of a rape although it occurs after the rape itself has been technically completed if the homicide is committed within the res gestae of the rape. MacAvoy v. State, 144 Neb. 827, 15 N.W. 2d 45.

A homicide committed in the perpetration of a robbery is murder in the first degree. Rogers v. State, 141 Neb. 6, 2 N.W. 2d 529.

Homicide, in the perpetration of robbery, is a separate offense as distinguished from ordinary first degree murder. Swartz v. State, 118 Neb. 591, 225 N.W. 766.

Under this section, homicide in the perpetration of robbery, or an attempt to commit robbery, is first degree murder; the turpitude involved in the robbery takes the place of deliberate and premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for robbery. South v. State, 111 Neb. 383, 196 N.W. 684.

Killing while escaping from scene of burglary may constitute murder in first degree. Francis v. State, 104 Neb. 5, 175 N.W. 675.

Homicide committed either in perpetration of or in attempt to perpetrate rape, is murder in first degree. Taylor v. State, 86 Neb. 795, 126 N.W. 752.

Homicide in the perpetration of robbery was first degree murder with the element of deliberate and premeditated malice supplied by the turpitude of the act. Pumphrey v. State, 84 Neb. 636, 122 N.W. 19.

Homicide in the perpetration of rape is first degree murder. Morgan v. State, 51 Neb. 672, 71 N.W. 788.

Murder is committed at time fatal blow or wound is inflicted. "Deliberation" defined. Debney v. State, 45 Neb. 856, 64 N.W. 446.

2. Premeditation

Premeditation and deliberation are elements of first degree murder only, but both first and second degree murder involve a killing that is malicious and on purpose. Nanfito v. State, 136 Neb. 658, 287 N.W. 58.

Where one shares with others in intent to commit burglary, and killing results from it as one of its ordinary consequences, he cannot be heard to

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deny intent to kill. Romero v. State, 101 Neb. 650, 164 N.W. 554.

In a prosecution for homicide in the perpetration of robbery, proof is not required of premeditation and deliberation, or a purpose to kill. Keezer v. State, 90 Neb. 238, 133 N.W. 204.

Purpose to kill is an essential element of first degree murder where the homicide was committed with deliberation and premeditation, but is not an element where the homicide was committed in the perpetration or attempt to perpetrate any of the felonies enumerated in this section. Rhea v. State, 63 Neb. 461, 88 N.W. 789.

Premeditation and deliberation must precede the killing, but they need not exist for any particular length of time. Savary v. State, 62 Neb. 166, 87 N.W. 34.

Premeditation and deliberation, in addition to purposely killing, must be proved to sustain conviction of first degree murder. Anderson v. State, 26 Neb. 387, 41 N.W. 951.

3. Motive and intent

Intent is an essential element of the crime of murder in the first degree. Luster v. State, 148 Neb. 743, 29 N.W. 2d 364.

Motive was not an essential element of murder but material in determining whether the killing was malicious and premeditated and done by the accused. Sharp v. State, 117 Neb. 304, 220 N.W. 292.

4. Information

Information charging homicide in attempt to perpetrate a robbery charges only murder in the first degree. Garcia v. State, 159 Neb. 571, 68 N.W. 2d 151.

Information charging offense under this section is sufficient to include lesser degrees of homicide. Moore v. State, 148 Neb. 747, 29 N.W. 2d 366.

Where information charges murder in first degree, murder in second degree and manslaughter are included in charge, and where different conclusions may be drawn from evidence, court should submit different degrees for determination of jury. Jackson v. State, 133 Neb. 786, 277 N.W. 92.

Information omitting element of premeditation did not charge first degree murder. "Purposely," "deliberate," "premeditated," and "malice" are defined. Pembrook v. State, 117 Neb. 759, 222 N.W. 956.

Information charged defendant with having administered poison with intent to take life. Recommended form of information, charging first degree murder by poisoning, is set out in opinion. Davis v. State, 116 Neb. 90, 215 N.W. 785.

An information, charging homicide in the perpetration of robbery charged first degree murder only, and, in a prosecution under such an information, an instruction to the jury on manslaughter was error. Thompson v. State, 106 Neb. 395, 184 N.W. 68.

Information for murder should be construed as a whole giving language employed its usual meaning. Blazka v. State, 105 Neb. 13, 178 N.W. 832.

Information, charging first degree murder, was sufficient to support conviction for second degree murder. Turley v. State, 74 Neb. 471, 104 N.W. 934.

Election between several counts charging offense under this section is only required where separate and distinct offenses, not part of same transaction, are charged. Furst v. State, 31 Neb. 403, 47 N.W. 1116.

An indictment for homicide should allege the character of the instrument used to produce death and the evidence should conform so as to show death was produced in substantially the same way as alleged. Long v. State, 23 Neb. 33, 36 N.W. 310.

5. Instruction

On trial of one charged with first degree murder, court should instruct jury only on such degrees of homicide as find support in the evidence. Clark v. State, 131 Neb. 370, 268 N.W. 87.

Court is not required to instruct as to law applicable to manslaughter or murder in second degree where evidence clearly establishes either guilt of first degree murder or innocence. Davis v. State, 116 Neb. 90, 215 N.W. 785; Thompson v. State, 106 Neb. 395, 184 N.W. 68; Rhea v. State, 63 Neb. 461, 88 N.W. 789; Morgan v. State, 51 Neb. 672, 71 N.W. 788.

Instructions to the jury defining malice, self defense and the elements thereof, and intoxication as a defense are discussed and approved. Maynard v. State, 81 Neb. 301, 116 N.W. 53.

Instructions to the jury defining first degree murder, the defense of

insanity, accidental death, self defense, including defense of the person and domicile, were approved. Reed v. State, 75 Neb. 509, 106 N.W. 649.

Failure of court to instruct the jury as to the degree of murder other than first degree was not error where the evidence showed defendant was guilty of first degree murder or not at all. Jahnke v. State, 68 Neb. 154, 94 N.W. 158.

6. Evidence

A dismissal of one or more degrees of criminal homicide by a trial court because of a want of adequate evidence to support them will ordinarily be construed as a withdrawal of such degrees from consideration by the jury. State v. Hutter, 145 Neb. 798, 18 N.W. 2d 203.

Where defense is insanity, burden rests upon state to prove defendant sane. Prince v. State, 92 Neb. 490, 138 N.W. 726; Hamblin v. State, 81 Neb. 148, 115 N.W. 850.

When contested issue in criminal case is as to mental condition of defendant, question is one for jury to determine, and not for court. Larson v. State, 92 Neb. 24, 137 N.W. 894.

Malice is question for jury. Flege v. State, 90 Neb. 390, 133 N.W. 431.

Law implies malice in cases of homicide, if killing alone is shown. Davis v. State, 90 Neb. 361, 133 N.W. 406.

Proof of a motive is always competent, but motive is not an indispensable element. Lillie v. State, 72 Neb. 228, 100 N.W. 316.

Where all elements necessary are proved, motive need not be established. Robinson v. State, 71 Neb. 142, 98 N.W. 694.

Essential matters to be proved in order to convict stated. Beers v. State, 24 Neb. 614, 39 N.W. 790; Milton v. State, 6 Neb. 136.

Evidence of intoxication may be admitted to rebut idea of deliberation. Smith v. State, 4 Neb. 277.

7. Penalty

Doctrine of reasonable doubt has no application in jury's determination of penalty to be imposed. Grandsinger v. State, 161 Neb. 419, 73 N.W. 2d 632.

Upon finding murder in first degree, jury has to make choice of penalty to be inflicted. Griffith v. State, 157 Neb. 448, 59 N.W. 2d 701.

Punishment to be inflicted on conviction of first degree murder is committed to the judgment and conscience of jury. Sundahl v. State, 154 Neb. 550, 48 N.W. 2d 689.

It is within discretion of jury to inflict death penalty or life imprisonment. Iron Bear v. Jones, 149 Neb. 651, 32 N.W. 2d 125.

Penalty is determinable by jury where statute expressly so requires. Haffke v. State, 149 Neb. 83, 30 N.W. 2d 462.

In a prosecution under this section, a trial court had no jurisdiction to fix the penalty for a defendant who had pleaded guilty, and its attempt to do so was a mere nullity, and objections thereto might be raised for the first time on appeal Wilson v. State, 117 Neb. 692, 222 N.W. 47.

Where one defendant had been charged with aiding and abetting a second to commit first degree murder, and the second had been charged with the principal crime, it was the duty of the jury in returning a verdict of guilty to fix the punishment of each defendant at either death or life imprisonment. Grammer v. State, 103 Neb. 325, 172 N.W. 41.

8. Miscellaneous

Court had jurisdiction of offense and person, and sentence was within power of court. Swanson v. Jones, 151 Neb. 767, 39 N.W. 2d 557.

A previous acquittal on a charge of murder by poisoning barred a prosecution under a complaint charging a conspiracy and an attempt to commit that crime. The section relating to poisoning with intent to kill punishes the attempt to commit the offense created by this section. In re Resler, 115 Neb. 335, 212 N.W. 765.

A defendant accused of first degree murder may be convicted of any lesser degree of homicide established by the evidence. In re application of Cole, 103 Neb. 802, 174 N.W. 509.

Title "Offenses against the person" is construed. Griffith v. State, 94 Neb. 55, 142 N.W. 790.

Instructions to the jury correctly stated the various degrees of homicide and the elements of self defense. Kennison v. State, 83 Neb. 391, 119 N.W. 768.

Self defense is justification. Kennison v. State, 83 Neb. 391, 119 N.W. 768; Maynard v. State, 81 Neb. 301, 116 N.W. 53; Lucas v. State, 78 Neb. 454, 111 N.W. 145; Reed v. State, 75

Neb. 509, 106 N.W. 649; Turley v. State, 74 Neb. 471, 104 N.W. 934.

Effect of other causes, in conjunction with mortal wound causing death, is discussed. Hamblin v. State, 81 Neb. 148, 115 N.W. 850.

A purpose and intention to kill unlawfully is a necessary element of both first and second degree murder, and is presumed from proof of killing only where the circumstances surrounding the killing are not proved. Lucas v. State, 78 Neb. 454, 111 Neb. 145.

Defendant may be convicted of lesser degree of murder than charged. Haddix v. State, 76 Neb. 369, 107 N.W. 781.

Where there was threatened danger, real or apparent, such as would induce a reasonable and well-grounded belief that one's life was in peril or that great bodily harm was impending, a homicide may be justified as having been done in self defense. Coil v. State, 62 Neb. 15, 86 N.W. 925.

Malice is necessary to constitute murder. "Malice" defined. McVey v. State, 57 Neb. 471, 77 N.W. 1111; Housh v. State, 43 Neb. 163, 61 N.W. 571.

Defendant must have mental capacity to distinguish right from wrong. Anderson v. State, 25 Neb. 550, 41 N.W. 357; Hart v. State, 14 Neb. 572, 16 N.W. 905.

Homicide has degrees in Nebraska. Hawk v. Olson, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 67, reversing Hawk v. Olson, 145 Neb. 306, 16 N.W. 2d 181.

Contention that petitioner was forced into trial for capital offense with such expedition as to deprive him of effective assistance of counsel must be presented to state court before resort can be had to habeas corpus in federal court. Ex parte Hawk, 321 U.S. 114, 64 L.Ed. 448.

28-402. "Murder in the second degree," defined; penalty. Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and upon conviction thereof shall be imprisoned in the penitentiary not less than ten years, or during life.

Source: G.S. p. 720; R.S.1913, § 8582; C.S.1922, § 9545; C.S. 1929, § 28-402.

1. **Definition**
2. **Information**
3. **Evidence**
4. **Instruction**
5. **Miscellaneous**

1. Definition

Purpose to kill and malice are material elements of murder in second degree. Woodard v. State, 159 Neb. 603, 68 N.W. 2d 166.

Purpose to kill and malice are material elements of offense. Vanderheiden v. State, 156 Neb. 735, 57 N.W. 2d 761.

First degree murder is distinguished from second degree murder by the required elements of premeditation and deliberation, which must precede the killing but which need not exist for any particular length of time. Savary v. State, 62 Neb. 166, 87 N.W. 34.

Intentional killing of human being, without explanatory circumstances, is murder in second degree. Anderson v. State, 26 Neb. 387, 41 N.W. 951.

Malicious killing done upon sudden quarrel and in heat of passion is at least murder in second degree. Bohanan v. State, 15 Neb. 209, 18 N.W. 129.

2. Information

If information charges murder in the first degree, a conviction of murder in the second degree thereunder may be sustained. Moore v. State, 148 Neb. 747, 29 N.W. 2d 366.

Short form of information charging murder in second degree was sustained against claim that it did not allege intent to kill. Chadek v. State, 138 Neb. 626, 294 N.W. 384.

Where information charges murder in first degree, murder in second degree and manslaughter are included

in charge, and where different conclusions may be drawn from evidence, court is without error in submitting different degrees under proper instructions for determination of jury. Jackson v. State, 133 Neb. 786, 277 N.W. 92.

Information was sufficient hereunder. Bordeau v. State, 125 Neb. 133, 249 N.W. 291.

Information charging first degree murder by poisoning does not include second degree murder and manslaughter. Davis v. State, 116 Neb. 90, 215 N.W. 785.

Information charging first degree murder was sufficient to support conviction for second degree murder. Turley v. State, 74 Neb. 471, 104 N.W. 934.

Where information charging murder in second degree contained the words "without deliberation or premeditation," it was error to omit the words in stating substance of charge to jury. Hans v. State, 72 Neb. 288, 100 N.W. 419.

Intent or purpose to kill must be averred in indictment. Schaffer v. State, 22 Neb. 557, 35 N.W. 384.

3. Evidence

In prosecution based largely on dying declarations evidence was sufficient to sustain conviction of murder in second degree. Nanfito v. State, 136 Neb. 658, 287 N.W. 58.

Conviction of second degree murder was reversed for insufficiency of evidence to show malice and purpose to kill. Childs v. State, 120 Neb. 310, 232 N.W. 575.

4. Instruction

On trial of one charged with first degree murder, court should instruct jury only on such degree of homicide as finds support in the evidence. Clark v. State, 131 Neb. 370, 268 N.W. 87.

Where evidence is such that reasonable minds could not differ on proposition that whoever fired fatal shot did so purposely and maliciously, failing to submit question of manslaughter to jury was not error. Fields v. State, 125 Neb. 290, 250 N.W. 63.

Purpose to kill and malice are material elements, and both must be proved beyond reasonable doubt. It is error to instruct that malice is presumed from homicidal act where eyewitnesses testify to circumstances surrounding the homicide. Runyan v. State, 116 Neb. 191, 216 N.W. 656; Whitehead v. State, 115 Neb. 143, 212 N.W. 35.

5. Miscellaneous

Penalty for murder in second degree stated. Sundahl v. State, 154 Neb. 550, 48 N.W. 2d 689.

There is presumption of malice when circumstances of killing are not shown. Kennison v. State, 80 Neb. 688, 115 N.W. 289.

Person has right to defend domicile even to extent of taking life. Thompson v. State, 61 Neb. 210, 85 N.W. 62.

Malice is an essential element of murder in second degree. Davis v. State, 51 Neb. 301, 70 N.W. 984.

28-403
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28-403. "Manslaughter," defined; penalty. Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year.

Source: G.S. p. 720; R.S.1913, § 8583; C.S.1922, § 9546; C.S. 1929, § 28-403.

Cross References

For allegations in complaint, see section 29-1512.
For conviction resulting from operation of motor vehicle, see section 39-7,125.

1. Definition
2. Evidence
3. Instruction

1. Definition

Unintentional killing, without malice, resulting from an assault and battery, may constitute manslaughter. Fisher

v. State, 154 Neb. 166, 47 N.W. 2d 349.

Negligent violation of statutory provisions with respect to operation of motor vehicles resulting in death of another person may render operator guilty of manslaughter. Schluter v. State, 153 Neb. 317, 44 N.W. 2d 588.

Short form of information was sufficient to charge violation of this section through leaving motor vehicle illegally parked on highway. Vaca v. State, 150 Neb. 516, 34 N.W. 2d 873.

Time and place of death are not essential elements of offense required to be set out in information. Anderson v. State, 150 Neb. 116, 33 N.W. 2d 362.

Where one drives an automobile in violation of law pertaining to operation of such vehicles on public highway and in so doing, as a result of the violation of law, kills another, he is guilty of manslaughter. Puckett v. State, 144 Neb. 876, 15 N.W. 2d 63.

The crime of manslaughter is a separate and distinct offense from leaving the scene of an automobile accident where death has occurred. Wright v. State, 139 Neb. 684, 298 N.W. 685.

Conviction of manslaughter for driving car, while intoxicated, into rear of car on highway and killing passenger therein, sustained. Benton v. State, 124 Neb. 485, 247 N.W. 21.

Police officer slaying person during attempt to arrest may be guilty of manslaughter. Broquet v. State, 118 Neb. 31, 223 N.W. 464.

"Malice" defined. In construing homicide statutes, each word should be considered as material. Pembrook v. State, 117 Neb. 759, 222 N.W. 956.

Manslaughter is included in charge of first degree murder, and degree is ordinarily for jury. Denison v. State, 117 Neb. 601, 221 N.W. 683.

Trial and punishment under manslaughter act were proper where homicidal acts constitute violation of motor vehicle act. Crawford v. State, 116 Neb. 125, 216 N.W. 294.

Furnishing liquor was sufficient to supply wrongful intent and to support charge of manslaughter where death resulted from drinking. Thiede v. State, 106 Neb. 48, 182 N.W. 570.

Culpable neglect of infant child by parent, causing death, is manslaughter. Stehr v. State, 92 Neb. 755, 139 N.W. 676.

Conviction for manslaughter may be had on charge of murder; manslaughter defined. Boche v. State, 84 Neb. 845, 122 N.W. 72.

Accidental discharge of pistol was manslaughter where death resulted. Ford v. State, 71 Neb. 246, 98 N.W. 807.

This section provides that an unintentional killing without malice, occurring while an unlawful act is being committed, is manslaughter. Rhea v. State, 63 Neb. 461, 88 N.W. 789.

Manslaughter may be an unlawful killing without malice, under the influence of passion and hot blood, produced by adequate and reasonable provocation and before a reasonable time has elapsed for the blood to cool and for reason to control. Savary v. State, 62 Neb. 166, 87 N.W. 34.

Killing of escaping felon by officer is manslaughter if felon can be recaptured or escape prevented without killing. Lamma v. State, 46 Neb. 236, 64 N.W. 956.

A person has the right to resist unlawful arrest. Simmerman v. State, 16 Neb. 615, 21 N.W. 387.

2. Evidence

Evidence held insufficient to sustain conviction of manslaughter through operation of motor vehicle. Jeppesen v. State, 154 Neb. 765, 49 N.W. 2d 611.

Evidence was insufficient to show commission of unlawful act in driving of motor vehicle. Fielder v. State, 150 Neb. 80, 33 N.W. 2d 451.

On third trial, evidence was of such character as to forbid holding by appellate court that it was insufficient to sustain verdict. Flege v. State, 98 Neb. 587, 153 N.W. 579.

Where the evidence was not sufficient to show that the defendant had formed the purpose and intention to kill, unless it was necessary to do so in self defense, the defendant should have been put upon trial upon a charge of manslaughter. Lucas v. State, 78 Neb. 454, 111 N.W. 145.

3. Instruction

Instruction on manslaughter was proper although not in exact words of statutes. Luster v. State, 148 Neb. 743, 29 N.W. 2d 364.

Where there was no evidence tending to prove manslaughter, the trial court in murder prosecution was not required to charge the jury with reference thereto. Veneziano v. State, 139 Neb. 526, 297 N.W. 920.

Where evidence does not show sudden quarrel, instruction omitting this element of crime of manslaughter is

not error. Chadek v. State, 138 Neb. 626, 294 N.W. 384.

Where information charges murder in first degree, murder in second degree and manslaughter are included in charge, and where different conclusions may be drawn from evidence, court is without error in submitting different degrees under proper instructions for determination of jury. Jackson v. State, 133 Neb. 786, 277 N.W. 92.

Where evidence does not sustain a higher grade of homicide than manslaughter, it is error to instruct on higher degrees even though verdict returned is manslaughter. Clark v. State, 131 Neb. 370, 268 N.W. 87.

Where evidence is such that reasonable minds could not differ on proposition that whoever fired fatal shot did so purposely and maliciously, failure to submit question of manslaughter to jury is not error. Fields v. State, 125 Neb. 290, 250 N.W. 63.

Instruction given by court on manslaughter was not prejudicial to defendant where he was convicted of second degree murder. Torske v. State, 123 Neb. 161, 242 N.W. 408.

Where evidence does not prove a higher grade of homicide than manslaughter, it is error to instruct jury on second degree murder. Whitehead v. State, 115 Neb. 143, 212 N.W. 35.

28-403.01
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28-403.01. Motor vehicle homicide; definition; penalty. Whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be deemed guilty

28-403.01
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of a crime to be known as motor vehicle homicide and, upon conviction thereof, shall be (1) fined in a sum not exceeding five hundred dollars, (2) imprisoned in the county jail for not to exceed six months, (3) imprisoned in the penitentiary for a period not less than one year nor more than ten years, or (4) by both such fine and imprisonment.

Source: Laws 1949, c. 64, § 1, p. 176.

Unlawful operation of motor vehicle must be a proximate cause of the death. Birdsley v. State, 161 Neb. 581, 74 N.W. 2d 377.

In prosecution for motor vehicle homicide, it was error to give instruction on presumption arising from body fluid test. Hoffman v. State, 160 Neb. 375, 70 N.W. 2d 314.

Where death resulted from operation of motor vehicle in excess of speed limit, violation of this section was shown. Birdsley v. Kelley, 159 Neb. 74, 65 N.W. 2d 328.

28-404. "Foeticide," defined; penalty. Any physician or other person who shall administer, or advise to be administered, to any pregnant woman with a vitalized embryo, or foetus, at any stage of utero gestation, any medicine, drug, or substance whatever, or who shall use or employ, or devise to be used or employed, any instrument or other means with intent thereby to destroy such vitalized embryo or foetus, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such vitalized embryo, or foetus, or mother, in consequence thereof, be imprisoned in the penitentiary not less than one nor more than ten years.

Source: G.S. p. 720; R.S.1913, § 8584; C.S.1922, § 9547; C.S.1929, § 28-404.

TRIAL - STATUTES.

29-2001. Trial; felony, misdemeanor; presence of accused required; exceptions. No person indicted for a felony shall be tried unless personally present during the trial. Persons indicted for a Misdemeanor may, at their own request, by leave of the court be put on trial in their absence. The request shall be in writing and entered on the journal of the court.

1. Felony.

Court may not, without notice to and in absence of defendant and his counsel, orally instruct the jury while it is deliberating on the verdict. Strasheim v. State, 138 Neb. 651, 294 N.W. 433.

. . . . . .

Person, convicted of felony, and represented by counsel, cannot, as matter of right, insist on being present either at time of filing, argument or ruling on motion for new trial. Davis v. State, 51 Neb. 301, 70 N.W. 984.

Prisoner must be present at time verdict is received. Dodge v. People, 4 Neb. 220; Burley v. State, 1 Neb. 385.

2. . . . . .

3. Miscellaneous.

Presence of accused at trial being once shown by record is presumed to have continued unless contrary is made to appear. Bolln v. State, 51 Neb. 581, 71 N.W. 444.

29-2002. Joint indictment; separate trial; when required. (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(2) Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(3) The court may order two or more indictments, informations, or complaints, or any combination thereof, to be tried together if the offense, and the defendants, if there are more than one, could have been joined in a single indictment, information or complaint. The procedure shall be the same as if the prosecution were under such single indictment, information, or complaint.

(4) If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

FOOTNOTE:

Court may refuse to allow prisoner's codefendant to be present at trial. Evidence is not inadmissable because it also tends to establish guilt of co-defendant. Krens v. State, 75 Neb. 294, 106 N.W. 27.

29-2003. Joint indictment; special venire; when required; how drawn. When two or more persons shall have been charged together in the same indictment or information with a crime, and one or more shall have demanded a separate trial and had the same, and when the court shall be satisfied by reason of the same evidence being required in the further trial of parties to the same indictment or information, that the regular panel and bystanders are incompetent, because of having heard the evidence, to sit in further causes in the same indictment or information, then it shall be lawful for the court to require the clerk of the court to write the names of sixty electors of the county wherein such cause is being tried, each upon a separate slip of paper, and place the same in a box, and, after the same shall have been thoroughly mixed, to draw therefrom such number as in the opinion of the court will be sufficient from which to select a jury to hear such cause. The electors whose names are so drawn shall be summoned by the sheriff to forthwith appear before the court, and, after having been examined, such as are found competent and shall have no lawful excuse for not serving as jurors shall constitute a special venire from which the court shall proceed to have a jury impaneled for the trial of the cause. The court may repeat the exercise of this power until all the parties charged in the same indictment or information shall have been tried.

FOOTNOTE:

Where separate trials are held on joint indictment or information for comission of single offense, jurors who sat in trial of one defendant are disqualified to sit in trial of others. Seaton v. State, 106 Neb. 833, 184 N.W. 890.

Section applies only when two or more persons are charged in the same indictment and one has had a separate trial. Koenigstein v. State, 101 Neb. 229, 162 N.W. 879.

Provisions of this section are not exclusive. Aabel v. State 86 Neb. 711, 126 N.W. 316; Barber v. State, 75 Neb. 543, 106 N.W. 423; Barney v. State, 49 Neb. 515, 68 N.W. 636.

29-2004. Jury; how drawn and selected; alternate jurors. In all cases, except as may be otherwise expressly provided, the accused shall be tried by a jury drawn, summoned, and impaneled according to provisions of the code of civil procedure; PROVIDED, HOWEVER, whenever in the opinion of the court the trial is likely to be a protracted one, the court may, immediately after the jury is impaneled and sworn, direct the calling of one or two additional jurors, to be known as "alternate jurors". Such jurors shall be drawn from the same source and in the same manner, and have the same qualifications as regular jurors, and be subject to examination and challenge as such jurors, except that each party shall be allowed one peremptory challenge to each alternate juror. The alternate jurors shall take the proper oath or affirmation and shall be seated near the regular jurors with equal facilities for seeing and hearing the proceedings in the cause, and shall attend at all times upon the trial of the cause in company with the regular jurors. They shall obey all orders and admonitions of the court, and if the regular jurors are ordered to be kept in the custody of an officer during the trial of the cause, the alternate jurors shall also be kept with the other jurors, and, except as hereinafter provided, shall be discharged upon the final submission of the cause to the jury. If, before the final submission of the cause a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his place in the jury box. If there are two alternate jurors the court shall select one by lot, who shall then take his place in the jury box. After an alternate juror is in the jury box he shall be subject to the same rules as a regular juror.

FOOTNOTE:

Accused cannot waive right to trail by jury. Michaelson v. Beemer, 72 Neb. 761, 101 N.W. 1007.

Challenge to array or motion to quash panel must be in writing and should point out grounds relied upon. Strong v. State, 63 k Neb. 440, 88 N.W. 772.

Jurors may be summoned for trial of criminal case when no regular panel is present. Carrall v. State, 53 Neb. 431, 73 N.W. 939.

In criminal trials, jurors are not judges of the law. Parrish v. State, 14 Neb. 60, 15 N.W. 357.

29-2005. Peremptory challenges. Every person arraigned for any crime punishable with death, or imprisonment for life, shall be admitted on his trial to a peremptory challenge of twelve jurors, and no more; every person arraigned for any offense that may be punishable by imprisonment for a term exceeding eighteen months and less than life, shall be admitted to a peremptory challenge of six jurors; and in all othercriminal trials, the defendant shall be allowed a peremptory challenge of three jurors. The attorney prosecuting on behalf of the State shall be admitted to a peremptory challenge of ten jurors in all cases where the offense is punishable with death or imprisonment for life, six jurors where the offense is punishable by imprisonment for a term exceeding eighteen months and less than life, and three jurors in all other cases; PROVIDED, that in all cases where alternate jurors are called, as provided in section 29-2004, then in that case both the defendant and the attorney prosecuting for the state shall each be allowed one added peremptory challenge to each alternate juror.

FOOTNOTE:

Order of exercise of peremptory challenges rested in discretion of trial court. Callies v. State, 157 Neb. 640, 61 N.W.2d 370; Sherrick v. State, 157 Neb. 623, 61 N.W.2d 358.

Where both state and defendant waived peremptory challenge, objection to disqualification of juror who had read newspaper article was waive. Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689.

Peremptory challenges are not to be exercised until jurors have been passed for cause. Fetty v. State, 119 Neb. 619, 230 N.W. 440; Mathes v. State, 107 Neb. 212, 185 N.W. 425; Rutherford v. State, 32 Neb. 714, 49 N.W. 701.

Order in which challenges shall be made is left to sound discretion of trial court. Johnson v. State, 88 Neb. 565, 130 N.W. 282; Gravely v. State, 45 Neb. 878, 64 N.W. 452.

Failure to exercise right of peremptory challenge is waiver of any disqualification then known to exist. Morgan v. State, 51 Neb. 672, 71 N.W. 788; Curran v. Percival, 21 Neb. 434, 32 N.W. 213.

29-2006. Challenges for cause. The following shall be good causes for challenge to any person called as a juror or alternate juror, on the trial of any indictment; (1) That he was a member of the grand jury which found the indictment; (2) that he has formed or expressed an opinion as to the guilt or innocence of the accused; PROVIDED, if a juror or alternate juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror or alternate juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify, and the juror or alternate juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror or alternate juror is impartial and will render such verdict, may, in its discretion, admit such juror or alternate juror as competent to serve in such case; (3) in indictments for an offense the punishment whereof is capital, that his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death; (4) that he is a relation within the fifth degree to the person on whose complaint the prosecution was instituted, or to the defendant; (5) that he has served on the petit jury which was sworn in the same cause against the same defendant and which jury either rendered a verdict which was set aside or was discharged, after hearing the evidence; (6) that he has served as a juror in a civil case brought against the defendant for the same act; (7) that he has been in good faith subpoenaed as a witness in the case; (8) that he is an habitual drunkard; (9) the same challenges shall be allowed in criminal prosecutions that are allowed to parties in civil cases.

Source: G.S. p. 826; R.S.1913, § 9109; C.S.1922, § 10134; C.S.1929, § 29-2006; Laws 1933, c. 38, § 3, p. 243; C.S.Supp.,1941, § 29-2006.

1. Capital punishment
2. Opinion of juror
3. Relation to defendant
4. Other grounds
5. Miscellaneous

1. Capital punishment

If juror has conscientious scruples against inflicting death penalty in murder case, he may be excused on challenge by state. Sharp v. State, 117 Neb. 304, 220 N.W. 292.

Statement of juror, on trial of defendant charged with murder in first degree, that he would not join in verdict of guilty with death penalty, renders him incompetent. Johnson v. State, 88 Neb. 565, 130 N.W. 282.

Right of person charged with capital offense to examine jurors on competency should not be unreasonably obstructed. Wilson v. State, 87 Neb. 638, 128 N.W. 38.

State's attorney may ask juror on examination if he has conscientious scruples against capital punishment. Taylor v. State, 86 Neb. 795, 126 N.W. 752.

Provision making conscientious scruples against death penalty a ground of challenge for cause was not repealed by amendment of 1893, conferring on jury discretion to fix punishment for first degree murder at life imprisonment instead of death. Hill v. State, 42 Neb. 503, 60 N.W. 916.

Statement of juror that his convictions are such as would preclude conviction of guilty on circumstantial evidence, when punishment is death, is ground for challenge. St. Louis v. State, 8 Neb. 405, 1 N.W. 371.

2. Opinion of juror

Voir dire examination furnishes a defendant ample opportunity to establish whether prospective jurors have been prejudiced by newspaper articles. Kitts v. State, 153 Neb. 784, 46 N.W. 2d 158.

Opinion based upon newspaper reports does not afford cause for challenge, where it is shown that same will not interfere with juror in rendering fair and impartial verdict upon evidence, under instructions of the court. Ringer v. State, 114 Neb. 404, 207 N.W. 682; King v. State, 108 Neb. 428, 187 N.W. 934; Bridges v. State, 80 Neb. 91, 113 N.W. 1048.

Juror, having formed opinion, is not disqualified in view of statement that he would disregard opinion and return fair and impartial verdict. King v. State, 108 Neb. 428, 187 N.W. 934.

Where juror answers that evidence is necessary to remove opinion, such fact will not disqualify him, if opinion formed, and he is otherwise qualified, in accordance with statute. Whitcomb v. State, 102 Neb. 236, 166 N.W. 553.

Challenge for cause, where juror has formed opinion founded on reading testimony of witnesses, should be sustained; statute is mandatory. Flege v. State, 93 Neb. 610, 142 N.W. 276.

Mere fact that juror, otherwise competent, had feeling that white race was superior to colored race, of which defendant was one, did not render him incompetent. Johnson v. State, 88 Neb. 565, 130 N.W. 282.

Mere sentimental feelings against death punishment is not sufficient; juror must be so prejudiced against it that opinion would preclude him from finding defendant guilty. Haddix v. State, 76 Neb. 369, 107 N.W. 781; Rhea v. State, 63 Neb. 461, 88 N.W. 789.

Hypothetical opinion, based solely on rumor and newspaper reports, may not disqualify. Barker v. State, 73 Neb. 469, 103 N.W. 71; Jahnke v. State, 68 Neb. 154, 94 N.W. 158, 68 Neb. 181, 104 N.W. 154; Rottman v. State, 63 Neb. 648, 88 N.W. 857; Ward v. State, 58 Neb. 719, 79 N.W. 725.

Juror is incompetent when he says it will require some evidence to remove his opinion, though he may also state that he can render impartial verdict under law and evidence. Owens v. State, 32 Neb. 167, 49 N.W. 226.

Where juror answered he had no bias or prejudice against defendant, it was not error to sustain objections to other questions seeking to elicit remarks made about defendant. Gandy v. State, 27 Neb. 707, 43 N.W. 747, 44 N.W. 108.

Juror, who admits having opinion, and does not state that he could render fair and impartial verdict, is incompetent. Thurman v. State, 27 Neb.

628, 43 N.W. 404.

To render a juror incompetent in a criminal case on the ground of an opinion formed or expressed, it must appear that opinion was in reference to guilt or innocence of defendant. Fillion v. State, 5 Neb. 351.

If veniremen has formed opinion from reading testimony of witnesses, he is incompetent, though he swears to be able, notwithstanding, to render an impartial verdict on the law and evidence. Smith v. State, 5 Neb. 181.

3. Relation to defendant

In prosecution for forging note payable to a bank, challenge to juror on ground that his wife and brother were depositors in bank was properly overruled. Flannigan v. State, 127 Neb. 640, 256 N.W. 321.

Juror, first cousin to accused, was properly excused as being a relation within fifth degree. Marion v. State, 20 Neb. 233, 29 N.W. 911.

4. Other grounds

This section furnishes ample opportunity to establish whether prospective jurors have been prejudiced by reading newspaper article. Sundahl v. State, 154 Neb. 550, 48 N.W. 2d 689.

Where competency of juror is challenged for first time after conviction, on ground that he had been convicted of felony and served term in penitentiary, such objection was waived. Reed v. State, 75 Neb. 509, 106 N.W. 649; Turley v. State, 74 Neb. 471, 104 N.W. 934.

Court must be satisfied that juror is impartial; that, notwithstanding his opinion, he will render impartial verdict upon law and evidence. Lucas v. State, 75 Neb. 11, 105 N.W. 976.

It is good cause for challenge that juror has served as juror in same court within two years. Coil v. State, 62 Neb. 15, 86 N.W. 925.

Juror should be excused if court discovers least symptom of prejudice, though his formal answers bring him within letter of statutory qualification. Cowan v. State, 22 Neb. 519, 35 N.W. 405.

5. Miscellaneous

Opportunity for prejudice or disqualification of juror is not sufficient to raise a presumption that they exist. Medley v. State, 156 Neb. 25, 54 N.W. 2d 233.

Opportunity for prejudice or disqualification is not sufficient to raise a presumption that they exist. Fisher v. State, 154 Neb. 166, 47 N.W. 2d 349.

Question of competency of veniremen to sit in trial of criminal cannot be raised by motion for continuance. Seaton v. State, 106 Neb. 833, 184 N.W. 890.

Error cannot be predicated on overruling challenge for cause, complaining party not having exhausted peremptory challenges. Kennison v. State, 83 Neb. 391, 119 N.W. 768; Brinegar v. State, 82 Neb. 558, 118 N.W. 475.

Proceedings relative to impaneling jury, to be reviewable, should be preserved by bill of exceptions. Shumway v. State, 82 Neb. 152, 117 N.W. 407, 119 N.W. 517.

If examination considered as whole, does not show incompetency, challenge is properly overruled. Keeler v. State, 73 Neb. 441, 103 N.W. 64.

Failure to interrogate juror as to residence is waiver of that objection. Hickey v. State, 12 Neb. 490, 11 N.W. 744.

29-2009. Jurors; oath; form. When all challenges have been made, the following oath shall be administered: "You shall well and truly try, and true deliverance make, between the State of Nebraska and the prisoner at the bar (giving his name), so help you God."

FOOTNOTE:

It is the duty of jury to endeavor to agree upon verdict; agreement by them to evade such duty is violation of oath. Green v. State, 10 Neb. 102, 4 N.W. 422.

Where record states that jury was sworn "to well and truly try and true deliverance make upon the issue joined between the parties," it is presumed that oath wasadministered in statutory form. Smith v. State, 4 Neb. 277.

29-2010. Jurors; affirmation; form. Any juror shall be allowed to make affirmation, and the words "this you do as you shall answer under the pains and penalties of perjury" shall be substituted instead of the words "so help you God."

29-2011. Witnesses; competency; impeachment; interest; crime commission; accused as witness; failure to testify; effect; comment. No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment made upon such neglect or refusal.

FOOTNOTE:

Any comment by prosecution on defendant's failure to testify is reversible error, except where the evidence of guilt is so conclusive that no other factor could possibly have influenced the result. Bruntz v. State, 137 Neb. 565, 290 N.W. 420.

Conviction will be reversed, where county attorney in argument made statements operating to challenge jury's attention to accused's failure to testify. Scott v. State, 121 Neb. 232, 236 N.W. 608.

Mentioning defendant's failure to testify in court's instruction is not reversible error, when, in same connection court directs that nothing must be taken against him on that account. Murray v. State, 119 Neb. 16, 226 N.W. 793.

Accused, testifying in own behalf, should be treated as any other witness; failure to deny material fact may be commented on. Brown v. State, 111 Neb. 486, 196 N.W. 926; Heldt v. State, 20 Neb. 492, 30 N.W. 626; Comstock vs. State, 14 Neb. 205, 15 N.W. 355.

Instruction to effect that defendant's failure to testify should not be taken as creating presumption against him is substantial compliance with section. Neal v. State, 104 Neb. 56, 175 N.W. 669.

(continued on following page)

Footnote continued (29-2011):

Where county attorney made improper statement, and was rebuked, and he thereupon states that he should not have made it, it was not prejudicial error. Hardesty v. State, 95 Neb. 839, 146 N.W. 1007.

29-2012. Joint indictees; discharge of one or more; when authorized; effect. When two or more persons shall be indicted together, the court may, at any time before the defendant has gone into his defense, direct any one of the defendants to be discharged that he may be a witness for the state. An accused may, also, when there is not sufficient evidence to put him upon his defense, be discharged by the court; or, if not discharged by the court, shall be entitled to the immediate verdict of the jury, for the purpose of giving evidence for others accused with him. Such order of discharge in either case shall be a bar to another prosecution for the same offense.

FOOTNOTE:

When separate trials are awarded to parties jointly indicted, each is a competent witness for the state upon the trial of other, without being first acquitted, and without entry of nolle prosequi. Carroll v. State, 5 Neb. 31.

29-2016. Trial; order of procedure. After the jury has been impaneled and sworn, the trial shall proceed in the following order: (1) The counsel for the state must state the case of the prosecution and may briefly state the evidence by which he expects to sustain it; (2) the defendant or his counsel must then state his defense and may briefly state the evidence he expects to offer in support of it; (3) the state must first produce its evidence; the defendant will then produce his evidence; (4) the state will then be confined to rebutting evidence, unless the court for good reason in furtherance of justice, shall permit it to offer evidence in chief; (5) when the evidence is concluded, either party may request instructions to the jury on the points of law, which shall be given or refused by the court, which instructions shall be reduced to writing if either require it; (6) when the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury; (7) the court after the argument is concluded shall immediately and before proceeding with other business charge the jury, which charge or any charge given after the conclusion of the aegument shall be reduced to writing by the court, if either party requests it before theargument to the jury is commenced; and such charge or charges or any other charge or instruction provided for in this section, when so written and given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court; and all written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court, and shall remain on file with the papers of the case.

1. Instructions
2. Opening statement
3. Misconduct
4. Procedure

1. Instructions

Defendant may not predicate error on an instruction that is more favorable to him than is required by law. Stump v. State, 132 Neb. 49, 271 N.W. 163.

Proper time to submit requested instructions is as early in trial as possible, but not later than close of evidence. Whitehall v. Commonwealth Casualty Co., 125 Neb. 16, 248 N.W. 692.

It is the court's duty, on own motion, to instruct as to general rules of law; instruction desired should be submitted in writing. Osborne v. State, 115 Neb. 65, 211 N.W. 179.

Examples of instructions on "reasonable doubt" given. Stehr v. State, 92 Neb. 755, 139 N.W. 676; Brown v. State, 88 Neb. 411, 129 N.W. 545; Clements v. State, 80 Neb. 313, 114 N.W. 271; Atkinson v. State, 58 Neb. 356, 78 N.W. 621; Maxfield v. State, 54 Neb. 44, 74 N.W. 401; Whitney v. State, 53 Neb. 287, 73 N.W. 696; Ferguson v. State, 52 Neb. 432, 72 N.W. 590.

It is not error to refuse requested instruction when substance of it has been given. Graham v. State, 90 Neb. 658, 134 N.W. 249; Lillie v. State, 72 Neb. 228, 100 N.W. 316.

Instruction should be applicable to precise question being tried. Flege v. State, 90 Neb. 390, 133 N.W. 431.

Instructions on burden of proof where defense is insanity discussed. Davis v. State, 90 Neb. 361, 133 N.W. 406; Knights v. State, 58 Neb. 225, 78 N.W. 508; Snider v. State, 56 Neb. 309, 76 N.W. 574.

Where circumstances surrounding homicide are proved, it is error to instruct that malice will be implied from killing. Davis v. State, 90 Neb. 361, 133 N.W. 406.

Instruction on credibility of informers will not ordinarily apply to a county attorney, sheriff, or his deputy. Keezer v. State, 90 Neb. 238, 133 N.W. 204.

Erroneous instruction, legal effect of which is practically same as one given on request of defendant, is generally not ground for reversal, unless clearly prejudicial to defendant. Coffman v. State, 89 Neb. 313, 131 N.W. 616.

Trial court in giving instruction may describe offense in language of statute. Jones v. State, 87 Neb. 390, 127 N.W. 158.

If court in its instructions purports to copy a section of criminal code, quotation should be correct. Boyer v. State, 84 Neb. 407, 121 N.W. 445.

If an instruction is given when no testimony sustains it, and prejudice results, new trial will be granted. Parker v. State, 76 Neb. 765, 108 N.W. 121.

It is duty of court to instruct as to rules of law governing disposition of criminal case whether requested or not. Young v. State, 74 Neb. 346, 104 N.W. 867; Martin v. State, 67 Neb. 36, 93 N.W. 161.

Instructions must not conflict, must be construed together, and correctly state law. Higbee v. State, 74 Neb. 331, 104 N.W. 748; Bartley v. State, 53 Neb. 310, 73 N.W. 744.

Where jury is not required to fix punishment, court's refusal to instruct as to penalty prescribed, or to permit that question to be argued to jury, is proper. Edwards v. State, 69 Neb. 386, 95 N.W. 1038.

Instruction on circumstantial evidence approved. Lamb v. State, 69 Neb. 212, 95 N.W. 1050; Cunningham v. State, 56 Neb. 691, 77 N.W. 60.

Instructions should be construed as a whole; one having no foundation in evidence is properly refused. Rhea v. State, 63 Neb. 461, 88 N.W. 789.

Instructions, purporting to cover whole case, which fail to include all elements involved in issue, are erroneous. Dobson v. State, 61 Neb. 584, 85 N.W. 843; Bergeron v. State, 53 Neb. 752, 74 N.W. 253.

Instruction which casts burden on defendant to prove defense is erroneous. Howell v. State, 61 Neb. 391, 85 N.W. 289.

Instruction to jury that oath imposes no obligation to doubt where no doubt would have existed if no oath had been administered, and that they are not at liberty to disbelieve as jurors, if from the evidence they believe as men, was proper. Leisenberg v. State, 60 Neb. 628, 84 N.W. 6.

Failure to number instructions is not reversible error if not excepted to when charge is given. Kastner v. State, 58 Neb. 767, 79 N.W. 713.

Instruction as to credibility of witnesses, and refusal to give instruction which would have effect of withdrawing consideration of material evidence, discussed and sustained. Chezem v. State, 56 Neb. 496, 76 N.W. 1056.

Assumption of facts stipulated as true by defendant, and instruction as to legal effect, was proper. Pisar v. State, 56 Neb. 455, 76 N.W. 869.

Instruction on drunkenness as defense discussed. Latimer v. State, 55 Neb. 609, 76 N.W. 207.

Quotation of main portion of section under which prosecution was instituted was not misleading. Instruction as to consideration of circumstances was proper. Mills v. State, 53 Neb. 263, 73 N.W. 761.

Objection to instruction, because it contains two or more propositions, will not be considered, when made for first time in Supreme Court. Morgan v. State, 51 Neb. 672, 71 N.W. 788.

Instruction, that burden is on accused to establish an alibi, is erroneous. Beck v. State, 51 Neb. 106, 70 N.W. 498.

Error in refusal to give proffered instruction must affirmatively appear from inspection of entire record. Lauder v. State, 50 Neb. 140, 69 N.W. 776.

Instructions must be applicable to facts, as well as a correct statement of law; to make failure to give instruction prejudicial, proper one must be submitted. Wells v. State, 47 Neb. 74, 66 N.W. 29.

Instruction is erroneous if it infringes on province of jury or tends to shift burden of proof to accused. Haskins v. State, 46 Neb. 888, 65 N.W. 894.

Instruction reciting material evidence which is not before jury is error. Williams v. State, 46 Neb. 704, 65 N.W. 783.

Instruction, submitting question of fact material to issue, when there is no evidence to support finding of its existence, is error. Morearty v. State, 46 Neb. 652, 65 N.W. 784.

Instructions on larceny, and reasonable doubt, discussed. Lawhead v. State, 46 Neb. 607, 65 N.W. 779.

It is error to give instruction which assumes a material fact, evidence thereon being conflicting. Metz v. State, 46 Neb. 547, 65 N.W. 190.

Repetition of proposition of law, not of such character as to prejudice rights of accused, was not reversible error. Dixon v. State, 46 Neb. 298, 64 N.W. 961.

2. Opening statement

Opening statement of county attorney was a sufficient compliance with statute. Morris v. State, 109 Neb. 412, 191 N.W. 717.

Defendant may waive opening statement to jury. Pumphrey v. State, 84 Neb. 636, 122 N.W. 19.

It is competent for county attorney, before introduction of evidence, to outline evidence which state expects to produce. Russell v. State, 62 Neb. 512, 87 N.W. 344.

3. Misconduct

Alleged misconduct of officers in giving statements to newspaper reporters during trial is not ground for new trial unless prejudice is shown. Rogers v. State, 93 Neb. 554, 141 N.W. 139.

Objection that prosecuting attorney is guilty of misconduct at the trial, prejudicial to defendant, must be taken at the time. It is primarily a question for trial court. Goldsberry v. State, 92 Neb. 211, 137 N.W. 1116.

Arguments and insinuations not based upon competent evidence are improper. Kanert v. State, 92 Neb. 14, 137 N.W. 975.

To review ruling on alleged misconduct of counsel, it must be excepted to at time. Hanks v. State, 88 Neb. 464, 129 N.W. 1011.

In reviewing alleged misconduct of county attorney, decision by trial judge on conflicting evidence will not be disturbed unless clearly wrong. Holmes v. State, 82 Neb. 406, 118 N.W. 99; Harris v. State, 80 Neb. 195, 114 N.W. 168.

Adverse ruling and exception thereto must be shown to review ruling on misconduct of attorney in arguing case. Hamblin v. State, 81 Neb. 148, 115 N.W. 850.

Misconduct of counsel, so flagrant that neither retraction nor rebuke from court can entirely destroy its influence, is cause for new trial. Parker v. State, 67 Neb. 555, 93 N.W. 1037.

Prosecuting attorney should not state to jury his belief in guilt of accused, unless based on evidence. Reed v. State, 66 Neb. 184, 92 N.W. 321.

4. Procedure

On rebuttal, court may permit evidence of confession. Drewes v. State, 156 Neb. 319, 56 N.W. 2d 113.

Cautionary direction need not be in writing. Schreiner v. State, 155 Neb. 894, 54 N.W. 2d 224.

It is within the discretion of the trial court to permit in rebuttal the introduction of evidence not strictly rebutting. Hampton v. State, 148 Neb. 574, 28 N.W. 2d 322.

Order in which a party shall introduce his proof is, to great extent, discretionary with trial judge, and court's action will not be reversed unless abuse of discretion is shown. Hukill v. State, 109 Neb. 279, 190 N.W. 867; Joyce v. State, 88 Neb. 599, 130 N.W. 291; Baer v. State, 59 Neb. 655, 81 N.W. 856.

In larceny case, it is discretionary to permit state to withdraw announcement of rest, and prove ownership. Kurpgeweit v. State, 97 Neb. 713, 151 N.W. 172.

County attorney under direction of court may procure the assistance of counsel to prosecute person charged with felony. McKay v. State, 90 Neb. 63, 132 N.W. 741; Johns v. State, 88 Neb. 145, 129 N.W. 247.

Permission to put leading questions to witnesses of a party, where they appear hostile or unwilling, is in discretion of trial court. Ainlay v. State, 89 Neb. 721, 132 N.W. 120.

In trial for felony, prosecution should examine in first instance witnesses who have knowledge of res gestae. Johnson v. State, 88 Neb. 328, 129 N.W. 281.

Trial judge, in ruling upon objections to evidence, should refrain from expressing opinion concerning weight of evidence or credibility of witness. Johns v. State, 88 Neb. 145, 129 N.W. 247.

Order permitting separation of jury in murder case for period of twenty-one days on account of quarantine of defendant's witnesses was not prejudicial error. Ossenkop v. State, 86 Neb. 539, 126 N.W. 72.

Plea of guilty entered at preliminary upon advice of officer cannot be received in evidence over objections of

defendant. Heddendorf v. State, 85 Neb. 747, 124 N.W. 150.

Credibility of defendant as witness is tested by same rule as applied to other witnesses. Holmes v. State, 85 Neb. 506, 123 N.W. 1043.

Answer, responsive to question asked, should not be stricken from record. Fouse v. State, 83 Neb. 258, 119 N.W. 478.

Right to cross-examine is confined to matters brought out in direct examination. Poston v. State, 83 Neb. 240, 119 N.W. 520.

On trial for felony, court may, in his discretion, exclude from courtroom all witnesses for state who are not being examined. Maynard v. State, 81 Neb. 301, 116 N.W. 53.

Court may, in exercise of reasonable discretion, limit number of witnesses testifying to a fact, where a number have already testified thereto, and fact is not in dispute. Cate v. State, 80 Neb. 611, 114 N.W. 942.

Dying declaration, in prosecution for homicide by procuring an abortion, admitted. Edwards v. State, 79 Neb. 251, 112 N.W. 611.

Sufficiency of evidence, identifying defendant as perpetrator of crime, discussed. Buckley v. State, 79 Neb. 86, 112 N.W. 283.

Where it appears to court that a juror has failed to hear part of the evidence, witness should be required to repeat that part which juror failed to hear. Haddix v. State, 76 Neb. 369, 107 N.W. 781.

It is error for judge to absent himself from courtroom, out of sight and hearing of parties, during the argument of counsel. Powers v. State, 75 Neb. 226, 106 N.W. 332; Palin v. State, 38 Neb. 862, 57 N.W. 743.

Trial court has large though not unlimited discretion in granting or refusing permission to ask leading questions. Woodruff v. State, 72 Neb. 815, 101 N.W. 1114; Dinsmore v. State, 61 Neb. 418, 85 N.W. 445.

Court may permit a party to reopen case and introduce other evidence before close of trial. Blair v. State, 72 Neb. 501, 101 N.W. 17.

Where party is cross-examined on a collateral matter, he cannot be subsequently contradicted as to his answer. Ferguson v. State, 72 Neb. 350, 100 N.W. 800.

Evidence admitted without objection, not necessarily injurious to defendant, is without prejudice. Lillie v. State, 72 Neb. 228, 100 N.W. 316.

Moral insanity as a defense is not recognized in this state. Bothwell v. State, 71 Neb. 747, 99 N.W. 669.

Test of admissibility of confession stated. State v. Force, 69 Neb. 162, 95 N.W. 42; Strong v. State, 63 Neb. 440, 88 N.W. 772.

Confession, voluntarily made, is admissible when not prompted by any inducement. McNutt v. State, 68 Neb. 207, 94 N.W. 143; Reinoehl v. State, 62 Neb. 619, 87 N.W. 355; Coil v. State, 62 Neb. 15, 86 N.W. 925; Hills v. State, 61 Neb. 589, 85 N.W. 836.

Length of time jury should be kept together rests in discretion of trial court. Jahnke v. State, 68 Neb. 154, 94 N.W. 158, 68 Neb. 181, 104 N.W. 154.

Prior statements of accused, as to how crime might be committed, were properly admitted. Keating v. State, 67 Neb. 560, 93 N.W. 980.

Nonexpert may give opinion in regard to a matter, which men in general are capable of comprehending, when it is impossible to lay before jury all pertinent facts as witness saw it. Russell v. State, 66 Neb. 497, 92 N.W. 751.

Witness may be asked if he has known of defendant being arrested, defendant having offered evidence of good character. McCormick v. State, 66 Neb. 337, 92 N.W. 606.

Trial court may limit number of witnesses to prove facts collateral to main issue. Biester v. State, 65 Neb. 276, 91 N.W. 416.

Right of trial judge to cross-examine accused should be exercised sparingly. Leo v. State, 63 Neb. 723, 89 N.W. 303; Nightingale v. State, 62 Neb. 371, 87 N.W. 158.

Court in charging jury is only required to state the law applicable to the facts proven. Strong v. State, 63 Neb. 440, 88 N.W. 772.

Where expert witnesses testify to manner and cause of death, and refer to and use exhibits, it is proper to admit exhibits. Savary v. State, 62 Neb. 166, 87 N.W. 34.

As a general rule, re-examination should be limited to points arising out of cross-examination. George v. State, 61 Neb. 669, 85 N.W. 840.

Every fact which implies defendant's guilt is pertinent evidence to sustain such hypothesis. Jerome v. State, 61 Neb. 459, 85 N.W. 394.

To justify conviction on circumstantial evidence, circumstances must be consistent with each other and inconsistent with any hypothesis of inno-

cence. Smith v. State, 61 Neb. 296, 85 N.W. 49.

It is error to exclude evidence, tendency of which is to put an innocent look upon inculpatory circumstances. Burlingim v. State, 61 Neb. 276, 85 N.W. 76.

Prior inconsistent statements of witness may be shown in rebuttal, to affect credibility. Tatum v. State, 61 Neb. 229, 85 N.W. 40.

Submission to jury of theory which has no basis in evidence is error. Thompson v. State, 61 Neb. 210, 85 N.W. 62.

Burden of proof in criminal case does not shift to accused. Williams v. State, 60 Neb. 526, 83 N.W. 681.

Objection to question calling for incompetent testimony cannot be reserved until answer is received. Dunn v. State, 58 Neb. 807, 79 N.W. 719.

Rule of res gestae applied to statements in murder case. Sullivan v. State, 58 Neb. 796, 79 N.W. 721.

Testimony of similar acts by defendant may be received to establish intent only. Knights v. State, 58 Neb. 225, 78 N.W. 508; Morgan v. State, 56 Neb. 696, 77 N.W. 64.

Order of introducing testimony will not prevent defendant from introducing evidence to impeach witness used on rebuttal by state. Argabright v. State, 56 Neb. 363, 76 N.W. 876.

Preliminary to impeachment of a witness because of inconsistent statements at previous time, the attention of the witness should be called to the time and place where such alleged statements were made. McVey v. State, 55 Neb. 777, 76 N.W. 438.

Nondirection will not work reversal, proper instruction not being requested. Maxfield v. State, 54 Neb. 44, 74 N.W. 401; Johnson v. State, 53 Neb. 103, 73 N.W. 463.

Error cannot be predicated on admission of facts subsequently admitted. Whitney v. State, 53 Neb. 287, 73 N.W. 696.

Order in which a party shall introduce his proof is discretionary with trial court. Davis v. State, 51 Neb. 301, 70 N.W. 984.

It is competent for witness on redirect examination to make clear matters left incomplete or obscure on cross-examination. Collins v. State, 46 Neb. 37, 64 N.W. 432.

If information contains two counts, there being no evidence to sustain one, it is error to submit question to jury on that count. Botsch v. State, 43 Neb. 501, 61 N.W. 730.

Limit to cross-examination respecting past life of witness, other than defendant, for purpose of affecting his credibility, rests with court. Hill v. State, 42 Neb. 503, 60 N.W. 916.

It is only when there is total failure of proof, or where testimony is so weak or doubtful in character that a conviction could not be sustained, that trial court is justified in directing a verdict of not guilty. Wanzer v. State, 41 Neb. 238, 59 N.W. 909.

Objections to admission of testimony must be made at trial, and ruling had thereon. Dutcher v. State, 16 Neb. 30, 19 N.W. 612.

29-2017. Jury; place of occurrence of material fact; view. When-

29-2020. Bill of exceptions by defendant; law applicable; when evidence to be set out. In all cases where a defendant shall feel himself aggrieved by any opinion or decision of the court, he may present his bill of exceptions thereto, and it shall be the duty of the court to sign and seal the same; and the taking, preparing, signing and sealing of such bill shall be governed by the rules established in such matters in civil cases. Where the ground of exception is that the verdict is not sustained by sufficient evidence, or is contrary to law, and the court has overruled a motion for a new trial made on that ground, the bill of exceptions shall set out the evidence. The bill of exceptions, when signed and sealed, shall be made a part of the record and shall have the same force and effect as in civil cases.

FOOTNOTE:

Sufficient exceptions were taken by convicted defendant to warrant consideration of alleged errors committed at trial. Scott v. State, 121 Neb. 232, 236 N.W. 608.

Affidavits for continuance will not be considered by appellate court unless embodied in bill of exceptions. Hans v. State, 50 Neb. 150, 69 N.W. 838.

Facts, of which there is no evidence or recitation in bill of exceptions, will be disregarded in Supreme Court. McCall v. State, 47 Neb. 660, 66 N.W. 635.

In capital case, want of exception will not necessarily deprive prisoner of right to new trial for prejudicial errors of court. Schlencker v. State, 9 Neb. 300, 2 N.W. 710.

Arguments of counsel on questions raised during trial and remarks of court in deciding them serve no useful place in bill of exceptions and should be omitted. Clough v. State, 7 Neb. 320.

Prisoner tried for felony is entitled to new trial on ground of prejudicial erroneous instruction, even though no objection was taken thereto. Thompson vs. People, 4 Neb. 524.

29-2021. Bill of exceptions by county attorney; law applicable. The county attorney may take exceptions to any opinion or decision of the court during the prosecution of the cause; and the bill containing the exceptions, upon being presented, shall, if it is conformable to the truth, be signed and sealed by the court, which bill shall be made a part of the record, and be in all respects governed by the rules established as to bills of exceptions in civil cases, except as herein provided.

FOOTNOTE:

Procedure for review by state of rulings made and instructions given is in part afforded by this section. State v. Hyslop, 131 Neb. 681, 269 N.W. 512.

Section is not applicable to procedure to obtain review of final order in habeas corpus proceeding. State v. Decker, 77 Neb. 33, 108 N.W. 157.

Decision refusing permission to file amended information may not be reviewed where proposed amended information is not before Supreme Court. State v. Dennison, 60 Neb. 192, 82 N.W. 628.

Prosecuting attorney, presenting bill of exceptions to Supreme Court, must obtain leave of court to file same. State v. Page, 12 Neb. 355, 11 N.W. 459, 12 Neb. 386, 11 N.W. 495.

29-2022. Jury; conduct after submission. When a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court. The officer having them in charge shall not suffer any communication to be made to them, or make any himself, except to ask them whether they have agreed upon a verdict, unless by order of the court; nor shall he communicate to anyone, before the verdict is delivered, any matter in relation to the state of their deliberations. If the jury are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on the subject of the trial, nor to listen to any conversation on the subject; and it is their duty not to form or express an opinion thereon until the cause is finally submitted to them.

FOOTNOTE:

1. Reversible error.

Communication by county attorney to juror was reversible error. Olsen v. State, 113 Neb. 69, 201 N.W. 969.

On trial for felony after case has been submitted to jury, it is error to permit court reporter to read testimony of witness for prosecution to jury in absence of defendant's counsel. Bartell v. State, 40 Neb. 232, 58 N.W. 716.

2. Not reversible error.

An admonition is not required each time the jury is permitted to separate. Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689.

Right to have jury kept together after submission of case may be waived. Sedlacek vs. State, 147 Neb. 834, 25 N.W.2d 533.

Where prosecution adjourned for illness of juror, order overruling defendant's objections after twenty-six day adjournment was not reversible error. Penn v. State, 119 Neb. 95, 227 N.W. 314.

Separation of jury during recesses of court while trial is in progress and before final submission and permitting jurors to go home at close of day's service in court is within discretion of court. Wesley v. State, 112 Neb. 360, 199 N.W. 719.

Postponement for twenty-one days, after

(continued on following page)

29-2022. continued from preceding page:

state had made case in chief, permitting jury to separate, was not error where no misconduct of juror is shown. Ossenkop v. State, 86 Neb. 539, 126 N.W. 72.

Fact that deputy sheriff was called as witness does not disqualify him from having charge of jury. Van Syoc v. State, 69 Neb. 520, 96 N.W. 266.

Objection based on mere inference that jury was allowed to separate, raised for first time in Supreme Court, is unavailing. Coil v. State, 62 Neb. 15, 86 N.W. 925.

Where one juror separated from others after submission but no one communicated with him during separation, it was not ground for new trial. Spaulding v. State, 61 Neb. 289, 85 N.W. 80.

Assignment of error on ground of separation of jury is not sufficient unless it alleges they were not admonished, or failed to comply with their duty. Langford v. State, 32 Neb. 782, 49 N.W. 766.

Use of statute in jury room during deliberation vitiates verdict. Harris v. State, 24 Neb. 803, 40 N.W. 317.

Bailiff, by remaining in jury room during time of considering verdict, vitiates verdict. Gandy v. State, 24 Neb. 716, 40 N.W. 302.

Separation of jury before submission, known to prisoner and counsel, but not disclosed to judge until after verdict, is not ground for new trial. Polin v. State, 14 Neb. 540, 16 N.W. 898.

29-2023. Jury; discharged before verdict; effect; journal entry. In case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, or after they have been kept so long together that there is no probability of agreeing, the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and such discharge shall be without prejudice to the prosecution.

FOOTNOTE:

In a criminal trial where the jury is discharged in accordance with this section, such discharge is without prejudice to the prosecution. State v. Hutter, 145 Neb. 798, 18 N.W.2d 203.

Drunkenness of joror is an accident or calamity requiring discharge of jury. Fetty v. State, 119 Nebr. 619, 230 N.W. 440.

Serious illness of juror's wife and death of his child was sufficient to warrant discharge of jury. Salistean v. State, 115 Neb. 838, 215 N.W. 107.

Where biased juror is discovered during progress of trial, court may discharge jury. Quinton v. State, 112 Neb. 684, 200 N.W. 881.

Holding accused for trial after discharge of jury because of jury's inability to agree is not former jeoparty. Sutter v. State, 105 Neb. 144, 179 N.W. 414.

Court has large discretion as to length of time jury shall be kept together in consultation. Russell v. State, 66 Neb. 497, 92 N.W. 751.

Insanity of juror authorizes discharge, being an "accident or calamity." Davis v. State, 51 Neb. 301, 70 N.W. 984.

Entry of reasons on journal should be ordered; "sickness" must be of a sudden and calamitous nature. Conklin v. State, 25 Neb. 784, 41 N.W. 788.

Record must show necessity for discharge. State v. Shuchardt, 18 Neb. 454, 25 N.W. 722.

29-2024. Jury; verdict; poll. When the jury have agreed upon their verdict they must be conducted into court by the officer having them in charge. Before the verdict is accepted the jury may be polled at the request of either the prosecuting attorney or the defendant.

FOOTNOTE:

1. Reception of verdict.

Irregularity in receiving verdict in absence of counsel may be waived. Hyslop v. State, 159 Neb. 802, 68 N.W.2d 698.

Verdict received in vacation time is not a "privy verdict". Manion v. State, 104 Neb. 130, 175 N.W. 1013.

Reception of verdict in criminal case is governed by this section. Evers v. State, 84 Neb. 708, 121 N.W. 1005.

Verdict must be given in open court. Longfellow v. State, 10 Neb. 105, 4 N.W. 420..

Jury may not return instead of verdict a statement that they have agreed to disagree. Green v. State, 10 Neb. 102, 4 N.W. 422.

Verdict signed by all jurors is good. Clough v. State, 7 Neb. 320.

Verdict finding defendant guilty, without adding "in manner and form", etc., is good. Preuit v. State, 5 Neb. 377.

2. Polling of jury.

Jury need not be polledunless requested by defendant or prosecuting attorney. Feddern v. State, 79 Neb. 651, 113 N.W. 127.

3. Miscellaneous.

Verdict should be certain, not ambiguous; sufficient if in light of record meaning is clear beyond reasonable doubt. Keeler v. State, 73 Neb. 441, 103 N.W. 64.

Verdict is void which omits name of guilty party. Williams v. State, 6 Neb. 334.

29-2025. Jury; lesser included offense; form of verdict. Upon an indictment for an offense consisting of different degrees the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto; and upon an indictment for any offense the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense.

FOOTNOTE:

Charge of shooting with intent to would may include lesser offense of assault or assault and battery. Moore v. State, 147 Neb. 390, 23 N.W.2d 552.

It is not error to fail to submit question of accused's guilt of lesser offense where evidence is not such as to warrant such verdict. Davis v. State, 116 Neb. 90, 215 N.W. 785.

Jury may find accused not guilty of offense charged but guilty of attempt to commit same where such attempt is an offense. In re Resler, 115 Neb. 335, 212 N.W. 765.

Provisions of section extend to subsequently created offenses. Mulloy v. State, 58 Neb. 204, 78 N.W. 525.

Verdict of guilty of manslaughter on charge of murder in first degree is valid, though it fails to specifically negative fact that crime was of higher grade. Williams v. State, 6 Neb. 334.

29-2026. Jury; verdict; finding of value of property; when required. When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled or falsely obtained.

FOOTNOTE:

Where offense charged is larceny, jury is required to ascertain and declare in verdict value of property stolen. Spreitzer v. State, 155 Neb. 70, 50 N.W.2d 516.

Conviction for embezzlement cannot be sustained without determination in verdict of value of property embezzled. Hogoboom v. State, 120 Neb. 525, 234 N.W. 422, 79 A.L.R. 1171.

Verdict of "guilty of larceny" which omits statement of value of property stolen is fatally defective. Vickers v. State, 111 Neb. 380, 196 N.W. 629; Holmes v. State, 58 Neb. 297, 78 N.W. 641.

Jury must declare in verdict value of property stolen or falsely obtained. Fowler v. State, 109 Neb. 400, 191 N.W. 702; Lee v. State, 103 Neb. 87, 170 N.W. 359; Hennig v. State, 102 Neb. 271, 166 N.W. 617.

When value does not affect character of crime, omission of value is not fatal error. Keller v. Davis, 69 Neb. 494, 95 N.W. 1028.

It is not necessary that value of money be fixed; courts will take judicial notice of worth of dollar. Reed v. State, 66 Neb. 184, 92 N.W. 321.

Verdict finding amount embezzled to be a certain number of dollars is sufficient finding of value. Bartley v. State, 53 Neb. 310, 73 NW. 744.

Definite finding is required; mere estimate is insufficient. McCormick v. State, 42 Neb. 866, 61 N.W. 99.

29-2027. Jury; verdict in trials for murder; conviction by confession; procedure to determine degree of crime. In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first degree or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly.

FOOTNOTE:

1. Degree of offense.

Where different inferences may be drawn, court must submit different degrees to jury. Vanderheiden v. State, 156 Neb. 735, 57 N.W. 2d 761.

This section prescribes the duty of court and jury in ascertaining the degree of offense and imposition of sentence. Moore v. State, 148 Neb. 747, 29 N.W.2d 366.

Degree of murder is ordinarily for jury; different degrees of murder must be submitted to jury under evidence and circumstances authorizing different inferences as to degree. Dennison v. State, 117 Neb. 601, 221 N.W. 683.

In all trials for murder, if it find accused guilty, to find whether guilty of murden in first degree second degree or manslaughter; jury may acquit accused of degree charged and convict of lesser degree. Russell v. State, 66 Neb. 497, 92 N.W. 751.

In all trials for murder, the provisions of this section are mandatory. Bourne v. State, 116 Neb. 141, 216 N.W. 173.

Verdict of guilty which does not ascertain whether it be murder or manslaughter confers no power on court to pass sentence. Parrish v. State, 18 Neb. 405, 25 N.W. 573.

Failure to negative fact that crime was of higher degree than that found is no ground for reversal. Williams v. State, 6 Neb. 334.

2. Plea of guilt.

Proceedings in error carried on within statutory term after final judgment are required to review alleged error of trial court in failing to examine witnesses in open court to determine degree of guilt. Newcomb v. State, 129 Neb. 69, 261 N.W. 348.

(continued on following page)

29-2027. continued from preceding page:

Instruction given by trial court constituted a determination of degree of guilt on plea of guilty. Cole v. State, 105 Neb. 371, 180 N.W. 564.

3. Habeas corpus.

One charged with murder in first degree and convicted of second degree cannot obtain release on habeas corpus on ground he was convicted of a separate and distinct offense from that charged. Jackson v. Olson, 146 Neb. 885, 22 N.W.2d 124.

Regularity of proceedings leading up to sentence cannot be inquired into by habeas corpus. Fuller v. Fenton, 104 Neb. 358, 177 N.W. 154.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. CHARLES STARKWEATHER, Defendant.	DOC. 9 PAGE 205 DEFENDANT'S MEMORANDUM BRIEF

I N S A N I T Y

How long does presumption of sanity exist?

The evidence of sanity exists only until evidence of insanity is introduced by either the State or the Defendant.

According to SNIDER v. STATE, 56 Neb. 309; 76 NW 574:

> " . . . . as soon as there is any evidence tending to show insanity, then the state must convince the jury of sanity, as of every other element of guilt. . . " (Underscoring added).

In order that there be no misunderstanding about its choice of the term "any evidence", the Court goes on to say:

> " . . . . It is not necessary that there must first be evidence sufficient to raise a reasonable doubt . . . . . "

DAVIS v. STATE, 90 Neb. 361; 133 NW 406 affirms the rule by simply using the word "evidence" which is of sufficient force when "tending to impair or weaken the presumption "that the prisoner was of sound mind at the time the crime is alleged to have been committed.

While FISHER v. STATE, 140 Neb. 216; 299 NW 501, says that the State must bear the burden after the defense of insanity is "properly raised", a more recent case, decided in 1955, THOMPSON v. STATE, 159 Neb. 685; 58 NW2d 267, dispels any implication that therule had undergone any change in FISHER v. STATE with the following summation:

> "All men are presumed to be sane, but if, in the trial of a criminal case, any evidence tending to show or establish defendant's insanity is adduced by either the defense or the State, then the burden is upon the State to convince the jury of the sanity of the defendant beyond a reasonable doubt as one ofthe elements necessary to establish guilt. To cast upon the State the burden of proving the sanity of the defendant, it is only requisite that there be some evidence tending to prove insanity. . ." (Underscoring added).

The Court then went on to cite SNIDER V. STATE, DAVIS v. STATE, and FISHER v. STATE.

What kind of evidence is admissible?

Even though the surface has only been slightly scratched in the attempt to probe the workings of the human mind, we have come a long way since those suffering some form of insanity were burned at the stake. In the continuing search for an understanding of the complex groupings of all the seemingly endless number of factors that prevent a person from responding normally to the increasing pressures of modern society, progress has been made.

This progress has been and is receiving judicial recognition as has been evidenced by the courts' decisions

and dicta.

At least enough has been learned to make it possible, in some instances, to diagnose a distorted mind by examining a minimum of its manifold manifestations. This evidential progress has also received judicial recogniation.

According to DURHAM v. UNITED STATES, 214 F2d 862:

> "In determining whether accused was suffering from diseased or defective mental condition, and whether his act was caused by such condition, jury may consider symptoms, phases, manifestations, testimony of psychiatrists as to nature of the disease or defect, and its range of inquiry may include but is not limited towhether accused knew right from wrong, whether he acted under compulsion of an irristible impulse, or had been deprived of or lost the power of his will." (Emphasis supplied).

DURHAM v. UNITED STATES is now the leading authority on the subject of insanity and criminal responsibility. In reviewing the progress which has been made in this field since the time in the far distant past when the only competent evidence was whether a person knew "right from wrong", the Court said:

> "The right-wrong test, approved in this jurisdiction in 1882, was the exclusive test of criminal responsibility in the District of Columbia until 1929 when we approved the irristiable impulse test as a supplementary test in Smith v. United States. The right-wrong test has its roots in England. There, by the first quarter of the eighteenth century, an accused escaped punishment if he could not distinguish 'good and evil'. i.e., if he 'doth not know what he is doing, no morethan * * * * a wild beast.' Later in the same century, the 'wild beast' test was abandoned and 'right and wrong' was substituted for 'good and evil'. And toward the middle of the nineteenth century, the House of Lords in the famous M'Naughten case restated what had become the

accepted 'right-wrong' test in a form which has since been followed, not only in England but in most American jurisdictions as an exclusive test of criminal responsibility."

". . . . . .

"As early as 1838, Isaac Ray, one of the founders of the American Psychiatric Association, in his now classic Medical Jurisprudence of Insanity, called knowledge of right and wrong a 'fallacious' test of criminal responsibility. This view has long since been substantiated by enormous developments in knowledge of mental life. In 1928 Mr. Justice Cardozo said to the New York Academy of Medicine: 'Everyone concedes that the present (legal) definition of insanity has little relation to the truths of mental life.'

"Medico-legal writers in large number, The Report of the Royal Commission on Capital Punishment 1949-1953, and The Preliminary Report by the Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry present convincing evidence that the right-wrong test is 'based on an entirely obsolete and misleading conception of the nature of insanity.' The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior. . . . . ."

". . . . . .

"Nine years ago we said:

> "'the modern science of psychology * * * does not conceive that there is a separate little man in the top of one's head called reason whose function is to guide another unruly little man called instinct, emotion, or impulse in the way he should go.'

By its misleading emphasis on the cognitive, the right-wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in

determining criminal responsibility.

> "The fundamental objection to the right-wrong test, however, is not that criminal responsibility is made to rest upon an inadequate, invalid or indeterminable manifestation, but that it is made to rest upon any particular symptom. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible rule, not merely one for which they have no special competence. As the Royal Commission emphasizes, it is dangerous 'to abstract particular mental faculties, and to lay it down that unless these particular faculties are destroyed or gravely impaired, an accused person, whatever the nature of his mental disease, must be held to be criminally responsible * * *.' In this field of law as in others, the fact finder should be free to consider all information advanced by relevant scientific disciplines." (Underscoring added).

The Nebraska Court, in KRAUS v. STATE, 108 Neb. 331; 187 NW 895, also reviewed the famous McNaughten case and also came to the same general conclusion as the United States Court of Appeals in the Durham case thirty-two years later. Naturally, the Nebraska Court did not go as far in its specific application of the general rule as the Durham case because the judges in the latter case had the benefit of thirty-two years of the most productive research in this field that was not yet available to the Nebraska Court when it wrote its opinion in the Kraus case.

Whereas the Court in the Durham case stated that "the fact finder should be free to consider all information advanced by relevant scientific disciplines," the Nebraska Court had already considered the evidential aspect against the advanced scientific background for in the Court's syllabus we were told that where the disease of the mind is such as to prevent the accused from comprehending the nature

of the act and he "is unable to distinguish between right and wrong with respect to it, he is not accountable, HOWSOEVER SUCH INSANITY MAY BE MANIFESTED, whether by insane delusion or in ANY OTHER MANNER."

Causes of Mental Incompetence that prevent criminal responsibility may be varied.

While delusions, hallucinations, mental disease, insanity, partial insanity and other manifestations of and synonyms for, insanity, are mentioned by the Courts in their treatment of the general subject of insanity and criminal responsibility, the scope of the basic law on mental incompetence cannot be fully comprehended without also examining the decisions in cases involving intoxication and feeblemindedness or sub-normal mentalities.

INTOXICATION:

In LATIMER v. STATE, 56 Neb 609; 76 NW 207, the Court held in its syllabus that:

> "The taking of money or property from the person or custody of one assaulted, with a felonious intent on the part of the accused to steal the same, is an essential ingredient of the crime of robbery; and whether the accused at the time of the assault, by reason of being intoxicated, was incapable of controlling his will, and forming and entertaining a felonious intent, is a question for the jury's consideration, in determining whether the accused is guilty of the crime charged." (Emphasis supplied).

In TVRZ v. STATE, 154 Neb 641; 48 NW2d 761, the Court held, where the charge was murder instead of robbery as was the charge in the Latimer case, that:

"In first-degree murder prosecution, where

> voluntary intoxication was interposed as a defense involving deliberation, premeditation and formation of intent, an instruction that excessive intoxication by which a person is wholly deprived of reason may prevent deliberation, premeditation or formation of a criminal intent, if such intoxication was not indulged in to commit crime, was proper." (Emphasis supplied).

Later, in the same opinion, the Court pointed out that such a rule was of long standing. It cited a very early case as follows:

> ". . . . . In O'Grady v. State, 36 Neb. 320, 54 N.W. 556, it was said: 'Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime had been committed, or to determine the degree where the offense consists of several degrees.' This principle of law was approved in Browzigg v. State, 136 Neb. 729, 287 N.W. 193. See, also, Hill v. State, 42 Neb. 503, 60 N.W. 916; Latimer v. State, 55 Neb. 609, 76 N.W. 207, 70 Am. St. Rep. 403; Brinegar v. State, 82 Neb. 558, 118 N.W. 475. . . ." (Underscoring added).

This rule was later reaffirmed in Thompson v. State, 159 Neb. 685, 68 NW2d 267.

FEEBLEMINDEDNESS and SUB-NORMAL MENTALITY:

In WASHINGTON v. STATE, 165 Neb 275; 85 NW2d 509, a situation was presented in which the defendant, instead of being afflicted with any of the manifestations of insanity of sufficient degree to come under one of the many insane classifications, was, nevertheless, afflicted by having only a sub-normal mentality. The issue presented to the Court was whether such a handicap, in a case where the charge was murder, was to be considered in determining

whether the crime had been committed deliberately and with premeditation.

The Court affirmatively answered such a question in the following manner:

> "Feebleness of mind or will, even though not so extreme as to justify a finding that a defendant is irresponsible, may properly be considered by a jury in determining whether a homicide has been committed with a deliberate and premeditated design to kill." (Underscoring added).

Later on in the same opinion, the Court affirmed the rule by repeating decisions from other jurisdictions:

> "In People v. Moran, 249 N.Y. 179, 163 N.E. 553, the court of appeals stated the rule as follows: 'Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may properly be considered by the triers of the facts in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense."
>
> ". . . .
>
> "In Battalino v. People, 118 Colo. 587, 199 P.2d 897, 901, the court held that evidence of mental derangement short of insanity was admissible, not for the purpose of seeking acquittal, but to prove absence of deliberate or premeditated design. The court held that the basis of the admissibility is the relevancy to deliberation and premeditation. It quoted with approval from 26 Am. Jur., Homicide, Par. 105, p. 229, as follows: 'However, evidence of insanity, or rather, evidence of the condition of the mind of the accused at the time of the crime, together with the surrounding circumstances, may be introduced, not for the purpose of establishing insanity, but to prove that the situation was such that a specific intent was not entertained - that is, to show absence of any deliberate or premeditated design.' See,

also, Becksted v. People, 133 Colo. 72, 292 P.2d 189; People v. Baker, 42 Cal. 2d 550, 268 P.2d 705; Hernandez v. State, 43 Ariz. 424, 32 P.2d18." (Underscoring added).

CONCLUSION

When we analyze all of the cases, we find that for many decades there has been no perceptible change in the basic law in relation to these matters. The change has been, instead, in our knowledge of the application of the basic law.

For a long time, the law in Nebraska has been that a person is presumed to be sane until ANY evidence tending to show insanity has been introduced by either the Defendant or the State. That was true in Snider v. State that was decided 60 years ago and it was still true according to the Nebraska Supreme Court in 1955 when the court considered Thompson v. State.

As for the kind of evidence that is admissible, ANY kind that is relevant is acceptable. And neither is this a theory which is now to be considered for the first time; it was held to be the law in Nebraska in the Kraus case that was decided 36 years ago and our court, in that particular instance, was affirming the rule as it had been set forth many years before.

But it is when we begin to analyze the causes and manifestations of insanity and mental incompetence in

their relation to criminal responsibility that we begin to understand the real nature of our courts' progress. On this point, the law itself has not changed one iota in more than a century. During the last hundred years the law has remained unchanged in that when a person is incapable of comprehending the nature of his act and is unable to distinguish between right and wrong with respect to it, he is not accountable and this has been held true in all the cases that have been decided whether the cause of such failure to comprehend was a diseased mind, some manifestations of insanity, a sub-normal mentality of sufficient degree to be recognized as insanity or intoxication.

On the other hand, it is now, and always has been, the law that even where a person's mental infirmities, feeblemindedness, insanity, or state of intoxication were not of sufficient degree to hold him not accountable, THEY WERE STILL factors to be considered in determining whether a deliberate or premeditated design was present.

No one is trying to maintain that the courts ever considered insanity, any of its manifestations, intoxication, feeblemindedness, etc, as defenses per se to crime. But the courts do say that these conditions and symptoms, together with any other evidence that is pertinent, are to be considered in determining whether the afflicted is either prevented, on the one hand from comprehending the nature of

his deed as far as criminal responsibility is concerned or whether, failing that, they prevent him from deliberately and premeditatively designing to killand thus is not guilty of first degree murder.

The Latimer and the Tvrz cases are particularly important to us because in the former, the court held that the crime of robbery does not exist without a felonious intent and in the latter it held that there is no first degree murder without deliberation or premeditation. In both cases, the state of intoxication prevented the accused from being ultimately found guilty of the respective crimes.

This also means, then, that unless the criminal intent is present during the perpetration of a robbery, it cannot be imputed by statute if a homicide was perpetrated at the same time. If the criminal intent is not there during the robbery, there is no "hokus pokus" that can declare it into existence during an accompanying homicide if the only wayit could be materialized is by imputation.

What we have seen in the sequence of court decisions dealing with mental competence and its relation to criminal responsibility is NOT a transition of any kind in the basic law. What we havewitnessed is a continuing scientific advancement in the recognition and interpretation of the manifestations of mental incompetence and their causes.

There was a time, long before the McNaughten case, when the only symptom of mental incompetence which was