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GENERAL NUMBER 34498

IN THE SUPREME COURT OF NEBRASKA

CHARLES R. STARKWEATHER,

Plaintiff-In-Error,

vs.

THE STATE OF NEBRASKA,

Defendant-In-Error.

ERROR TO THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Hon. Harry A. Spencer, Judge.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF QUESTIONS INVOLVED

The principal questions involved in this appeal are:

1. Whether the trial court committed prejudicial error in refusing to submit to the jury defendant's requested Instruction No. 6, with reference to defendant's mental capacity or ability to deliberate and premeditate the killing as charged in Count No. 1 of the Information.

2. Whether the trial court committed prejudicial error by refusing defendant's requested Instruction No. 10 relating to the necessity of the defendant possessing the mental capacity for forming and entertaining a felonious intent to steal as an essential ingredient of the crime of robbery.

3. Whether the verdict of the jury was contrary to the evidence.

STATEMENT OF THE CASE

(a) This is an appeal from a conviction on a criminal action instituted in the District Court of Lancaster County, Lincoln, Nebraska, charging the defendant with two Counts: (1) that plaintiff-in-error, on or about the 27th day of January, 1958, in Lancaster County, Nebraska, feloniously and purposely and of his own deliberate and premeditated malice, killed Robert William Jensen; and (2) feloniously and purposely killed Robert William Jensen in the perpetration of a robbery (T11).

(b) The issues actually tried in the Court below were the guilt or innocence of the plaintiff-in-error of both crimes as charged (T23-52).

(c) Plaintiff-in-error was found guilty by a jury of both crimes as charged (T52) which fixed the penalty at death (T52), and plaintiff-in-error was duly sentenced to be put to death on the 17th day of December, 1958, in the manner provided by law (T55).

ASSIGNMENTS OF ERROR

1. The Court erred in refusing to give Instruction No. 6 requested by the defendant and by restricting the jury's consideration to the defendant's feebleness of mind or will in determining whether the homicide had been committed with a deliberate and premeditated design to kill, thus preventing the jury from considering whether the defendant was suffering from such insanity or impairment of the mind that would, if present, eliminate capital punishment from the sentence for the perpetration of a homicide.

2. The Court erred in refusing to give Instruction No. 10 requested by the defendant.

3. The verdict is contrary to the evidence.

PROPOSITIONS OF LAW

I.

Deliberation and premeditation are essential elements of the crime of murder in the first degree.

R. R. S. 1943, § 28-401.

Savary v. State, 62 Neb. 166; 87 N.W. 34.

II.

Mental derangement short of insanity may be considered by the jury in order to determine 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.

Washington v. State, 165 Neb. 275; 85 N.W.2d 509.

People v. Moran, 249 N.Y. 179; 163 N.E. 553.

Battalino v. People, 118 Colo. 587; 199 P.2d 897, 901.

American Jurisprudence, Vol. 26, Homicide, § 105, Page 229.

III.

A felonious intent on the part of the accused to steal from the one assaulted is an essential ingredient of the crime of robbery.

Latimer v. State, 55 Neb. 609; 76 N.W. 207.

IV.

While a state of voluntary intoxication short of insanity is not, of itself, a complete defense to the charge of robbery,

it is nevertheless to be considered for the purpose of ascertaining and determining the state of the defendant's mind at the time of the robbery, in order to show whether he was incapable of controlling his will, and forming and entertaining a felonious intent.

Latimer v. State, 55 Neb. 609; 76 N.W. 207.

V.

All men are presumed to be sane, but if, in the trial of a criminal case, any evidence tending to show or establish the 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 of the elements necessary to establish guilt.

Snider v. State, 56 Neb. 309; 76 N.W. 574.

Davis v. State, 90 Neb. 361, 364; 133 N.W. 406.

Kraus v. State, 108 Neb. 331; 187 N.W. 895 (on rehearing, original opinion, 102 Neb. 690; 169 N.W. 3).

Torske v. State, 123 Neb. 161, 167; 242 N.W. 408.

Plessman v. State, 130 Neb. 758, 760; 266 N.W. 629.

Fisher v. State, 140 Neb. 216, 218; 299 N.W. 501.

Thompson v. State, 159 Neb. 685; 68 N.W.2d 267.

VI.

In all criminal cases that now are, or may hereafter be

pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence.

R.R.S. 1943, § 29-2308.

Guedea v. State, 162 Neb. 680; 77 N.W.2d 166.

STATEMENT OF THE FACTS

On February 3, 1958, information was filed in the County Court of Lancaster County, Nebraska, by Elmer M. Scheele, Lancaster County Attorney, which charged that on or about January 27, 1958, Charles R. Starkweather in said Cpunty did unlawfully, feloniously, purposely and of his own deliberate and premeditated malice kill Robert William Jensen; and second, that the said Charles R. Starkweather, whom we will hereafter refer to as defendant, did also unlawfully, feloniously, and purposely, in the perpetration of a robbery, kill the said Robert William Jensen (T4).

The defendant was thereafter arraigned on the same date, pleaded thereto not guilty, and the preliminary hearing was set for March 1, 1958, (T5-6).

After the preliminary hearing, defendant was bound over to the District Court to appear forthwith in answer to the complaint (T8), and to be held in custody without bond.

The defendant was not represented by counsel at this arraignment but was furnished an attorney by the Legal Aid Bureau of the University of Nebraska College of Law for the purpose of

representing him at that particular hearing (13-17:629). On March 10, 1958, the Court appointed T. Clement Gaughan and William F. Matschullat as Attorneys for the defendant (T14) and on May 5, 1958, the case went to trial (T21). At this point, his Attorneys amended his plea to not guilty by reason of insanity.

While the defendant was only charged with the killing of Robert William Jensen, it is necessary to describe, even though it be but briefly, a whole series of events; in order to properly evaluate the importance of the objections raised by the plaintiff-in-error, the whole pattern must be presented, in at least its broad outlines. While the story, as far as the state's case was originally concerned, began with the events that were significant only from the standpoint that they brought Starkweather and Jensen into orbit with each other, to evaluate the defendant's defense requires that the Jensen killing be put into position chronologically as it is only a single piece in a much larger and tragic jigsaw. To be understood, it must be seen as a part of a large panorama and not just as an isolated event.

The story, as we can piece it together with all of the available evidence, begins with a youngster who was unable, practically from the very beginning, to satisfactorily fit himself into society, starting to fight with the other youngsters on the second day he entered school (4-14:780); he had trouble with his

school work and had poor eyesight, not being able to see the blackboard without glasses since he was seven years old (15:780-10:781). He was unable to get along practically all of his school career which was cut short at the end of the eighth grade as far as the regular school classes were concerned because of this inability to get along with the rest of the students (19:782-25:784). Charles went to school one more year but it was in a special class that was reserved for problem students (1-13:785). From the time he was twelve years old and during the years he was in school, and afterwards, he held down odd jobs, part-time and otherwise. The longest employment the defendant had was as a refuse hauler on a garbage route (17-25:689) and as a warehouse hand for the Western Newspaper Union.

The manager of the Western Newspaper Union testified that he did not consider Charles fit for anything but common labor (22:550-7:551) and said that he was not only the dumbest man working for him (4:552) but was one who gave the impression of being mentally retarded (7-10:556).

Julius A. Humann, Director of Guidance in the Lincoln Public School System, testified that Charles received grades of 3, 4, 4 and 3 in the First Grade; 4, 4, 3, 4 and 4 in the Second Grade; and 5, 5, 5, 5, 4, 4, in the Third Grade. At that time a 4 was below average and 5 was failing. He remained in the Third Grade another year and then received grades of 4, 5, 5, 4, 4 and 3 (11-22:653). Although he was now a year behind, from the Sixth Grade on he did not advance regularly in the c lasses (17:654-23:656).

His intelligence tests, in the main, classified the defendant as a "dull normal" before he got into Junior High School (3:657-8:662).

It was while Charles was working at the Western Newspaper Union that he had an accident; a paper baling handle slipping loose and striking him on the side of the head in the corner of the left eye. This happened in January of 1957 (8-10:565) and he complained of chronic headaches from that time on (8:789-22:791).

The defendant quit his job at the Western Newspaper Union sometime in July of 1957 (20:562) and went back to work on a garbage route two months later in September (12-20:690). This job did not last long as the defendant could not get along, even with strangers. After only two months they had to let him go because, as his brother, Rodney, admitted, Charles had the habit of sticking his head out of the door and hollering at people (6-12:691). The defendant himself later rationalized it by claiming that all he was doing was to tell "some old guy who didn't know how to drive" (6-11:793).

During this time, however, the defendant continued to display an abnormal personality. He was described by Robert A. McClung who talked with the defendant while McClung was employed by the Crest Service Station at 1545 Cornhusker Hiway where Charles hung around quite a bit, as "self-schooled on comic books and living in a shell" (25:811-1:812), limited in his conversational ability (9-10:813), and one who fitted into no recognizable personality pattern, further describing the defendant as "like something I have never seen" (3-17:814).

According to Rodney Starkweather, the defendant's brother, Charles imagined he owned many things which he actually did not have (4:594-10:695). Robert Von Busch, who knew the defendant for several years and who had worked with him (20:719-22:720), described how Charles imagined he had a chrome-

plated engine (2-14:724) and on another occasion Charles imagined an Aunt was dead when she was, in fact, alive and walking around (23:724-4:725).

This inability to restrain himself that was even apparent when the defendant began his school career, underwent no change as the years went by. According to Richard L. Gropp who knew the defendant in Everett Junior High and who had, himself, been the victim of a couple of beatings at the hands of the defendant (8:734-18:736), Charles sometimes would fly off the handle at the slightest provocation (17-25:737). It was not just an ordinary loss of temper, either, according to ~~his~~ Robert ~~xxxxxxxxxxxxxxx~~ Von Busch, Charles would "get nervous and shake all over" (9-11:721). Unable to get along with his own family, Charles left home in November of 1957 after having had a fight with his father (10-19:646) and moved to an apartment on North 10th Street, Lincoln, Nebraska.

The only witness who had any direct knowledge of the defendant's activities and the acts of violence preceding and relating to the death of the Jensen boy was a fourteen year old girl by the name of Caril Fugate who was accompanying the defendant at the time. She was also charged with the same offenses and was not called as a witness by either the state or the defense. And since all others who might be able to

testify as to the defendant's conversations and actions during his homicidal spree were dead, we must rely, to a great extent, on the defendant's own statements which were not given or available until after he was apprehended near Douglas, Wyoming, on January 29, 1958.

On January 30, 1958, the day following his capture, the defendant wrote out a 6-page statement while in the County Jail at Douglas, Wyoming, (E34:621).

Two days later, on February 1, 1958, after he had been taken to the Nebraska State Penitentiary, the defendant was questioned at great length by County Attorney Elmer M. Scheele. This statement was divided into 5 Volumes: Volume I covering the Colvert incident (E31:406); Volume II describing the Bartlett family incident (E31:819); Volume III relating to the Meyer incident (E31:819); Volume IV describing the Jensen-King incident (E31:819); and Volume V covering the Ward residence incident (E31:819).

Almost four weeks later, on February 27th, the defendant gave another statement in the penitentiary (E32:819). This time,however, it was in response to questioning conducted by Deputy County Attorney Dale E. Fahrnbruch. Two-thirds of this story of some 160 pages of text was devoted to details of the Bartlett incident but differing in several very important respects, from the first two statements contained in the Douglas, Wyoming, statement and the first one given

to Mr. Scheele.

Then, a letter written by the defendant to the County Attorney postmarked April 19th, contained a few afterthoughts in which the defendant ascribed a more important role to Caril Fugate in the Jensen-King and the Collison incidents (E35:805).

On the morning of December 1, 1957, the defendant became involved in the Crest Service Station incident that resulted in the death of Robert Colvert (E31:406) (see Pages 9-31 of Volume I).

On Tuesday, January 21, 1958, Charles went to the Bartlett home located at 924 Belmont Avenue, arriving around 1:30 in the afternoon (E31:819) (see 25:4-1:5 of Volume 2). What began as petty bickering involving only "dirty looks" soon passed through the successive stages of slapping, scuffling, and fighting, ending in a homicide which numbered among its victims, not only Marion Bartlett and his wife, Velda, but their infant daughter whose only contribution to the melee was "hollering pretty loud" (24-25:13 of Volume 2).

After disposing of the bodies by placing them in an outhouse and chicken house in the Bartlett back yard, and cleaning up the mess, Charles practised throwing the knife at the living room wall for something to do while he was waiting for Caril Fugate, Velda Bartlett's daughter by a former marriage, to come home from school (23:15-9:21 of Volume 2). Charles and Caril

stayed at the Bartlett place for six days, until Monday morning, January 27th (24:46 of Volume 2).

In spite of his inhuman ferocity, the infant daughter, Betty Jean, having been killed by having a knife thrown at her and then being beaten by thegun butt (24:13-20:5 of Volume 2), Charles did not seem visibly affected by what he had done. During these six days while the defendant was staying at the Bartlett home andwhile the bodies were lying in state in the outbuildings, Charles visited Mrs. Elsie Neal, his father's half-sister, on the Wednesday and Friday of that period (10-13:604). According to Mrs. Neal, Charles didn't act much different on those days than at other times (8-11:607) except for the fact that he said he didn't feel good on Wednesday (8-13:605) and acted somewhat moody (1:607).

After leaving the Bartlett place, it was only a matter of 5 or 6 hours before the defendant was involved in still another killing (2:10 of Volume 3), the victim being, this time, a friend of the defendant's by the name of August Meyer and on whose place the defendant used to hunt from time to time (14-19:5 of Volume 3).

After leaving the Meyer farm Charles and Carll drove around awhile and they decided to go back to the Meyer place (E31:819) (see 18:1-22:3, Volume 4). They were afraid that someone else had been there so they left. Before going very far their car got stuck so they started walking (see 23:3-12:6 of Volume 4).

It was at this point that the Jensen boy and King girl picked them up (see 4:7 of Volume 4).

When they were picked up, which was around 7:30 P.M. that same evening (Monday), Charles said he wanted to get to a telephone but when they got to Bennett, Charles told Jensen to keep on going towards Lincoln (see 7:8-4:9 of Volume 4). After driving about 5 miles, Charles told Jensen to turn around and go back to the old school house grounds near the Meyer farm (see 9:9-20:9 of Volume 4). The school house had been torn down and all that is there is a cave that is constructed something like a bomb shelter (see 13:7-8:7 of Volume 3). When they got there, Charles told the Jensen boy to go down into the cave which he started to do, butabout half way down he turned around and started back. When he did this, Charles shot him several times. (see 22:9-20:12 of Volume 4). When the King girl started to scream, Charles shot her, also. (see 3:11-9:11, of Volume 4). Later, the defendant attempted to have sexual intercourse with the dead girl (E32:819) (see Page 133). These killings were around 8:30 P.M. (see 12:17 of Volume 4).

Charles and Carll started back in the Jensen car but got stuck, not getting loose for another hour or so. They headed for Lincoln, drove on out to Belmont, saw the police around there, and then went over to West "O" where they went west as far as Hastings. (see 4:17-25:18 of Volume 4).

Turning around, they came back to Lincoln where they

parked in the neighborhood of 24th & Van Dorn Streets (see 2:19-12:19 of Volume 4). They slept there from around 3 A.M. until 7:00 A.M. Tuesday morning when they started driving around (see 12:9-25:19 of Volume 4). Around 8:30 A.M., after driving around for an hour or so, they drove up to the Lauer Ward residence located at 2843 South 24th Street in Lincoln (see 25:19-16:20 of Volume 4 and 20:5 of Volume 5).

In his statement to Scheele (E31:819) the defendant admits killing Mr. Ward (see 20:41-18:43 of Volume 5),throwing a knife into the back of Mrs. Ward (see 21:17-18:19 of Volume 5), but denies doing anything more than tying up Lillian Fencil, the maid who worked for the Wards (see 22:46-12:48 and 24:53-17:55 of Volume 5).

Upon leaving the Ward residence that Tuesday evening in Mr. Ward's Packard automobile, some time around 7:30 P.M (see 25:58 of Volume 4), Charles and Caril again drove by the Bartlett place (see 4:59-3:60 of Volume 5) and then headed for the State of Washington where Charles has a brother (E31:621) (see Page 6).

The next day, about 14 miles West of Douglas, Wyoming, they noticed a 1957 Buick by the side of the road in which its owner, Merle Collison, was sleeping. When Collison refused to turn over his car to the defendant, the defendant shot him several times (E31:621). Shortly afterwards a man by the name of Joseph Sprinkle stopped and was wrestling with the defendant when William S. Romer, Deputy Sheriff of Netrona County, Wyoming, and another man drove up (21:236-18:237). It was at this point

that Caril Fugate ran away from the defendant and up to the Deputy Sheriff's car (1-2:238). The defendant then took off in the Ward Packard which he had been driving and headed back to Douglas, being apprehended by Earl Heflin, Sheriff of Converse County, Wyoming, and an associate, 3½ miles East of Douglas, Wyoming (22:256-6:260).

ARGUMENT

QUESTION I.

The jury should not have been limited tothe single aspect of "feebleness of the mind or will" in appraising the mental condition of the accused for the purpose of determining whether the homicide was committed with the premeditation and deliberation necessary to constitute first degree murder.

Murder in the first degree is defined by Statute, R.R.S. 1943, 28-401, as follows:

> "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; * * * every person so offending shall be deemed guilty of murder in the first degree, * * *."

Murder in the second degree is defined by Statute, R.R.S. 1943, 28-402, as follows:

> "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; . . .".

When these Statutes are analyzed, it is apparent that premeditation and deliberation are the elements by which murder in the first degree is distinguished from murder in the second degree. In the case of Savary v. State, 62 Neb. 166; 87 N.W. er, the Court states:

> "First degree murder is distinguished from second degree murder by the required elements of premeditation

and deliberation, which must precede thekilling but which need not exist for any particular length of time".

This same proposition had been previously set forth in Nanfito v. State, 136 Neb. 658; 287 N.W. 58 in which the Court said:

> "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".

And Anderson v. State, 26 Neb. 387; 41 N.W. 951, also upheld this proposition of law and states:

> "Premeditation and deliberation, in addition to purposely killing, must be proved to sustain conviction of first degree murder."

In Instruction #3 (T36), the trial court described the word "deliberate" as meaning "not suddenly, not rashly; but that the party accused must have considered the probable consequences of his act before doing the act". In the same Instruction, it pointed out that "premeditate" meant "conceived or thought of beforehand; already meditated upon before the act of killing".

Then, later on, in Instruction #5 (T38), the Court went on to say:

> "If you are not satisfied beyond a reasonable doubt that the defendant was then not insane, or, in other words, if you have a reasonable doubt as to whether the defendant possessed the necessary mental capacity, as hereafter explained, then your verdict must be not guilty by reason of insanity, ..."

Instruction #10 (T42), was more detailed in instructing the jury on the defense of insanity. It included the following admonition:

> ". . . . Neither insanity nor uncontrollable impulse is a defense unless it renders the 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 what he is doing and to know it is wrong and deserves punishment, he is criminally responsible for his acts. In this case if, from all of the evidence, you are convinced beyond a ressonable doubt that the defendant committed the crime charged, or one of the lesser degrees, and at the time of the commission of such crime was of sufficient mental capacity to understand what he was doing, and was of such mental capacity as to know that such act was wrong and deserved punishment, the defendant would be legally responsible for his acts and you should return a verdict of guilty although you might find that at the time he was suffering from some insanity or impairment of the mind."

So far, so good. But note the next Paragraph of Instruction #10:

> "In this respect, feebleness of the mind or will, if suchyou find, even though not so extreme as to justify your finding that the defendant is irresponsible, may nevertheless be properly considered by you in determining whether a homicide has been committed with a deliberate and premeditated design to kill where the grade of the defense requires those elements."

This last Paragraph is discussing an entirely different issue from the one set forth in the Paragraph immediately preceding it.

The first one is referring to criminal responsibility and goes to a possible defense of a homicide while the second Paragraph is referring only to the one factor of deliberation and premeditation for the purpose of determining the degree of the offense, and not whether one has been committed.

It is with this last quoted Paragraph that we take issue, not for what it says, but for what it omits. By this particular Instruction, the trial court excluded from the consideration of the jury all evidence of the mental condition of the accused that could not be classified as "feebleness of the mind or will" to determine whether there was present a deliberate and premeditated design to kill.

This limited Instruction is not in conformity with the law. The rule permitting intoxication to be considered in such cases is of long standing. In Kraus v. State, 102 Neb. 690, 169 N.W. 3, our court said:

> "Intoxication is not an excuse for committing a crime. But when, in a criminal prosecution, the evidence tends to prove that the defendant was intoxicated at the time of the commission of the offense charged, even though the killing is admitted, it is the duty of the court to instruct the jury that if they believe from the evidence that the defendant was intoxicated, and that he was so intoxicated at the time of the shooting as to be incapable of deliberation or premeditation, or of forming a felonious intent to shoot and to kill decedent, in such case it would be their duty to return a verdict of murder in the second degree, or of manslaughter, or of not guilty."

In Washington v. State, 165 Neb. 275, 85 N.W.2d 509, this court cited with approval Battalino v. People, 118 Colo. 587,

199 P.2d 897, 901, by pointing out that the Colorado court "held that evidence of mental derangement short of insanity was admissible, not for the purpose of seeking an 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." (Underscoring added).

In Dejarnette v. Commonwealth, 75 Va. 867, "partial aberration" was included, along with "enfeeblement". In that case the court said:

> "At the same time, there are, doubtless, cases in which, whilst the prisoner may not be insane, in the sense which exempts from punishment, yet he may be in that condition from partial aberration or enfeeblement of intellect which renders him incapable of the sedate, deliberate and specific intent necessary to constitute murder in the first degree. These are questions for the jury and not for the court."

Azzman v. State, 123 Ind. 347, 352; 24 N.E. 123, stated the rule thus:

> "* * * it would be legal as well as logical incongruity to hold that the crime of murder in the first degree could only be committed after deliberate thought or premeditated malice, and yet thatit might be committed by one who was without mental capacity to think deliberately or to determine rationally."

Surely this principal is sound. The mentally afflicted should receive the same consideration as the feebleminded and the intoxicated. This view is supported in State v. Noel, 102 N.J.L. 659; 133 Atl. 274, by Justice Kalisch concurring in the opinion of the court:

> "The law is not the creation of such barbarous and insensible animal nature as to extend a more lenient rule to the case of a drunkard, whose mental facilities are disturbed by his own will and conduct, than to the

case of a poor demented creature afflicted by the hand of God."

QUESTION II.

Defendant's requested Instruction #10 was refused by the trial court (T33). It reads as follows:

> "A felonious intent to steal the same is an essential ingredient of the crime of robbery and if you find that the defendant did not have the mental capacity for forming and entertaining such a felonious intent at the time of the alleged perpetration of a robbery as charged in Count II, you are to find him not guilty of that crime as charged."

Under the circumstances of this case in which the defendant was charged with the two separate Counts, we think this requested Instruction was necessary. In Latimer v. State, 56 Neb. 609, 76 N.W. 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." (Underscoring added).

This also means, then, that unless the felonious intent is present during the perpetration of a robbery, it cannot be imputed by Statute if a homicide was perpetrated within the res gestae of the alleged robbery. If the criminal intent is not there during the robbery, there is nothing to impute into existence during any accompanying homicide.

QUESTION III.

Even though it might be considered debatable as to whether the State failed to establish, beyond a reasonable doubt, the sanity of the defendant, there is no doubt about the State's failure to meet the burden of establishing, beyond a reasonable doubt, the existence of deliberation and premeditation as essential elements to the crime of murder in the first degree.

The defendant was unable to fit himself normally into human society from the time he started to school and he possessed only sub-normal mental equipment. His inability to comprehend the reactions of normal people forced him to live apart, even from his own family, and ultimately made it possible for him to look back upon the death of eleven people at his own hands, without the slightest real trace of remorse or conscience.

His mental derangement prompted him to have sexual intercourse with one of his dead victims which he afterwards voluntarily admitted. His own delusions and imagination convinced him that it was necessary to kill a baby girl and unarmed women in "self-defense".

In addition to all of the evidence referred to in the statement of facts and which described the defendant's mental shortcomings, hair-trigger reactions, inability to feel any remorse, and abnormal reaction to various situations, there was medical testimony disclosed that the defendant was suffering from a mental illness of long duration; that the fact that the defendant had "never become domesticated in society" and his lack of ability to experience basic feelings about other people were symptoms of a very serious disease of the mind (1-21:855). That other symptoms included a lack of a normal capacity for self-control (5:856) and the ability to consider the consequences of an act between impulse and the act itself; a short-circuiting of certain mental processes that take place in the minds of normal people (1-11:857) which prevented any "deliberation or premeditation" (15-21:858). Dr. Nathan Greenbaum, the first expert witness to be heard, diagnosed the defendant's condition as such as to make him incapable of premeditating (8:859); not "mentally capable of formulating and entertaining a premeditation to commit robbery" (20-21:861).

Another symptom of the defendant's mental disability was the fact that he had given as many as five different confessions, no two of which were alike. Dr. Greenbaum pointed out that this showed a lack of concern for reality (7-11:871).

It was brought out that while the defendant could just get by under ordinary and controlled circumstances, "his emotional gun was always cocked and it has got a hair-trigger on it, and it just takes a little snap and it goes off. It doesn't take much. Particularly under stress he just becomes flooded with these things, as if the flood gates were opened and he has no way of controlling any longer the actions or impulses which come over him, which come upon him. He just acts on them. He does not restrain himself. He does not have the capacity to restrain himself. This is one of the very serious signs of a severe mental illness (1-11:877). "It is particularly under conditions of stress that this short-circuiting occurs" (4-6:878). This witness then went on to testify that he believed the defendant to be under extra-ordinary stress the night Robert Jensen was killed (13:878).

Dr. O'Hearne, the second medical witness, had examined the defendant both from the physical and neurological standpoint. He found that the defendant, if under stress, "would function more like a frightened animal than an ordinary human being" (3-11:939). The defendant might have the physical characteristics of a human being but he never became one in so far as the ordinary emotional reactions are concerned (11-17:942). The defendant had a "diseased or a defective mind" (11-12:947), and at the time he killed Robert Jensen, he did not have the power of controlling his actions (6-13:948).

Also, that if the defendant thinks that an act of violence is about to occur to him, his "judgment is practically paralyzed at the time and he can only act like a frightened animal and takes what he sees as the shortest, quickest way out of it" (24:953-3:954).

Dr. O'Hearne also discovered in his physical examination of the defendant that defendant had a perforated ear drum with what appeared to be a mild chronic drainage in the ear. Such a condition indicated that there could have been an infection in the middle ear which is less than an inch from the part of the brain and that under such conditions, the infection sometimes penetrates, with varying speed, into the brain where it may form abscesses or scar formation (14:958-6:959).

The next medical witness, John Francis Steinman, examined the defendant on six different occasions at the State Penitentiary (10:1017). He found that the defendant had a "diseased or sick mind" (22:1017), pointing out that a normal individual, upon receiving an impulse, is able to subject it to a certain amount of delay; in other words, has the ability to reflect in order to weigh it in terms of previous experiences. This particular part of the process is classified under the heading of judgment, leading to the final outcome of the process, which is action (19:1019-4:1012). The defendant's mental processes, however, in a stress situation, short-circuits "reflection" and "judgment" and is compelled to move directly

from "impulse" to "action" (17:1020-3:1021).

In addition to being afflicted with an animal mind that differs from the normal human mind in that it is too easily "short-circuited", the defendant's emotional range is limited, in the most part, to anger and fear (2:1029-5:1029). This is the basis of the "self-defense" complex with which the defendant is afflicted (1-4:1030). When this is coupled with an involuntary short-circuiting of the mind from impulse to action under stress, you have a dangerous individual, one who is not conscious that he was doing what he ought not to do or who possessed a sufficient degree of reasoning to know that he was doing an act that was wrong at the time he killed Robert Jensen (18:1034-6:1035).

Such facts as the defendant's admission to having killed nine people (11:1035), his incapability of premeditation and deliberation (12:1037), his inability to feel remorse over the killings (20-25:1038), and his imagining that people were always giving him dirty looks (Paranoid symptoms), were also evidence of a diseased mind.

CONCLUSION

Even though counsel for the defendant are of the opinion that he is criminally insane and more dangerous to society than any normal person could ever be, and that it would be wrong to turn him loose, they also feel that it would be a