

GAMES . . . DUNGEONS & DRAGONS® Role-Playing Game and Game Play

by Dr. Joyce Brothers

What's in a game? If it's the DUNGEONS & DRAGONS® game — a great deal and most of it positive. This is one of the reasons kids don't have to sneak away from adults in order to play the game. Some schools and camps have endorsed the new fad and make no attempt to discourage its appeal.

On the plus side (and this is a strong plus), the game stresses cooperation. When we talk about a role-playing game, we're talking about a social game. With a video game — even a two-player video game — you're playing against a machine. I think that the normal child at around age 2 gets very clear in his or her mind what is fantasy and what is reality. They're not confused. The DUNGEONS & DRAGONS game is a wonderful game because you are cooperating; it's a cooperative game, not a competitive one. You are making up your own story. You are role-playing, you are being the author. You're learning to read more because you want to read stories to make them up.

It's not a boardgame, it's a group game. You work around a table. You assume a mythological character: an elf, a fighter, a magic-user. You start with the characteristics that your character will role-play. Remember when we used to play cops & robbers, mommy & daddy, cowboys & Indians — we acted a character role in a play situation. In the game, you're not competing against another person; there are no winners or losers. You work out how to use weaknesses and turn them into strengths, how to build on your strengths, how to change and grow, just as you do in real life.

As psychologist Dr. Peter Schlipmann points out in his study of the game, in most cases it's not the game itself but how it is used that determines whether it has beneficial or undesirable features.

He observed in his study that the game not only provides a context in which players can socialize but it teaches players through actual experience the value of cooperation and the consequences of non-cooperation (such as when a chaotic character decides to double-cross the rest of the group).

By letting players belong to a group, the individuals get a feeling of being a part of something. They not only get a feeling of belonging, but also have a sense of status. This is especially valuable to insecure youngsters who are uncertain of their own identity.

Everyone likes to be able to win and succeed and kids find it easier to succeed in the D&D® game than in most academic subjects. This is a pleasant sensation for some, a new feeling that can help build self-confidence and self-esteem. This may carry over into their school work, because they may feel more capable of learning in the school room. We know that expectations tend to be self-fulfilling. The child who feels good about himself and his capabilities is much more apt to succeed at anything he or she tries than is the child who expects to fail.

Is the game just another escape? It's imaginative and certainly, in this sense, it's an escape. But one highly respected California psychologist insists that it's not escapism, because in the game the kids are in real contact with themselves. Monopoly grew out of the Depression. DUNGEONS & DRAGONS game grew out of the atom. Just as Monopoly was obsessed with material security and property, the D&D game is taking us back into the cave to teach us survival in a nuclear age.

Although there's no hard data, Dr. Seymour Feshbach, Chairman of UCLA's Department of Psychology, estimates that at any one time about 15 to 20 percent of the UCLA student body is spaced out on alcohol or drugs. The D&D players don't seem to drink or use drugs; they seem to have found an alternative.

Is the game itself addictive? Probably. Almost everything can be addictive if people are susceptible. This isn't the fault of the game, but it is an indication that adults occasionally need to observe how the game is being used.

The real appeal of the game is that it allows players to create freely. They can go wild in their imagination; they can let their imagination roam with few restric-

tions, and this is something most of us can't do in real life. We're constantly fenced in by rigid rules and regulations. The game has infinite variety, but the basic flow is guided by the Dungeon Master, an experienced player who maps out adventures, sets the terrain and objectives, and acts as referee.

Each player selects a physical type (from human to dwarf, gnome or some other magical creature) and a basic role (cleric, fighter, druid, magic-user, etc.). With a throw of the dice, he determines the strengths and weaknesses of his character in terms of intelligence, charisma, strength, dexterity, constitution, or wisdom.

Of course, the player is faced with tremendous challenges. He may be stymied by paralyzing gray ooze, or he may have to find ways to escape from attacking goblins, wererats, or harpies.

What excites many players is being able to try out different roles and meeting imaginative challenges in unusual ways. The player learns to master extremely difficult situations and in doing this he is actively participating, rather than passively watching others act roles on TV or in film. He tests his behavior and his new approaches to see if they work. Will it work? Will it fool anyone? Should he have tried to negotiate? Will his strategy lead to survival?

Associate professor of sociology at the University of Minnesota, Gary Fine, reports that a typical fantasy game player is someone whose imagination takes him to distant times and places once or twice a week. This kind of person may spend seven or eight hours at one sitting, slaying dragons or seeking out strange new worlds. He or she is usually a non-conformist and proud of it. In the beginning years of the game, girls and women have sometimes chosen male characters. Now we see that boys and men are sometimes choosing to be female characters.

The person most likely to love the DUNGEONS & DRAGONS game is a student with a high opinion of himself, especially of his intelligence and imagination. He's well read in science fiction and history. He's probably also unmarried and in his late teens or early 20's, according to Dr. Fine. One survey of players showed 23.2 percent of the respondents had completed more than 16 years of schooling. That figure was impressive, Fine says, because the median age of the group was about 20 years.

Gamers claim they reject American mass culture, the sociologist points out. This led some to see them as misfits, but now the popularity of the game has increased and it has so many fans (3-4 million) that it's impossible to view the players as eccentrics.

Games are always more than just child's play. Play is a way of coping. Through play we not only assimilate information, we learn to accommodate ourselves to our environment. When games, such as the D&D game, involve role-playing, they not only help the player to learn more about himself, they help him to identify with and better understand other people. If necessity is the mother of invention, play must surely be its father.

Many people work through problems in games. They may, by working through unconscious fantasies, solve struggles that relate to sibling rivalry, oedipal problems, anger, and resentment. They may also be able to come to terms with some of their fears, such as a fear of death, fear of change, and a fear of being inadequate in emergencies.

Dr. Schlipmann discovered that the makeup of the D&D game is such that it deals with primitive fears of people. Caves, darkness, and monsters not only frighten most 4-year olds, they're also very primitive, very fundamental human fears. He speculates this may be one of the reasons some people have become upset about the game, even going so far as to fear it will lead to some kind of devil worship. He quite correctly observes that these primitive fears are very close to the surface in some people and almost anything can trigger them. Some of these fears might be dispelled if the frightened and superstitious critics could themselves participate in a game.

A brilliant Frenchman, Dr. Jacques-Olivier Grandjouan, studied games and how people play them for many years. A psychologist and linguist, he believes that the way we play games says a lot about ourselves. If you see a child at play, you will

learn much more about him than if you see him at study. There is a wonderful temporary nature of play. There is the element of risk, of danger, and the possibility of victory and with it a sense of power. But one can always start over and have another chance. One can practice life without really having all the danger and risk. Games can be like rehearsals for living. In a game, the consequences of losing are suffered only within the perimeter of the game: in real life, it must be consequential. Once too much money and work is involved in a game, it loses this charm and it can no longer be considered true recreation.

Almost everything in life involves taking a chance and the D&D® game, like many games, uses this. With a toss of the dice, we are lifted into another world and we're ready to commit ourselves to another uncertain outcome. As Dr. Grandjouan says, there is the same urge to take a risk, the same mental commitment, when someone dedicates himself to a philosophy, a religion, or a political belief. A person may be ready to die for it, with no rational basis. Dr. Grandjouan says, "it is foolish, but beautiful, just like human nature."

In a world where so much emphasis is put on computers and on hard, cold facts, perhaps a game that encourages inventiveness, creativity, and relatedness to others should be welcomed.

Studies at the University of Chicago show that creative thinkers have five specific characteristics; sensitivity to environment, ability to produce a large number of ideas in response to a problem, ability to concentrate, flexibility of thinking, and originality in responding to psychological tests.

Can creativity be taught? There's a great deal of evidence that it can at least be fostered and encouraged. One of the ways to foster creativity in a child is to allow him to be playful, to daydream and to use his imagination to awaken his creative processes.

The creative person is less bound by cultural conditioning than others. He sees the world differently, partly because he's learned to trust himself and his intuition. This frees him to express originality that might otherwise remain locked inside. It's possible that games like the D&D® game may provide a key to unlock the inhibitions that block creativity.

We know that creative people fantasize and never lose their childlike ability to put themselves in the place of others. They are curious and they find a kind of joy from new situations and the unexpected.

For the truly creative person, life itself is a wonderful game. Like players and gamers, they are motivated to enjoy living.

The DUNGEONS & DRAGONS® game provides an especially safe way for young people to meet their needs for excitement and adventure. As Dr. Schlipmann points out, it's just far enough removed from reality that the violence of the game doesn't promote real-life violence, but rather provides a way of draining off aggression and hostile impulses. The game is structured so that goodness rather than evil pays off.

Players learn they must evaluate strengths and weaknesses rather than judge them. Once they study the other characters in the game, they find ways to accommodate themselves to them and to turn their strengths or weaknesses to their advantage. The players begin to see people as the complex, complicated individuals that they are, rather than keeping them merely as one-dimensional stereotypes. Best of all, perhaps, players can try all the characters on for size, exploring their own strengths and weaknesses.

Play is a common human need, and man is unique in the animal world in that he plays as long as he lives. Judging from that, we can assume that games like the DUNGEONS & DRAGONS game are here to stay. Everyone needs a chance to dream and explore new worlds, if only for a few hours.

'Just a game'

Dear Editor:

I have been playing D&D and AD&D for three and half years. I have found it very enjoyable and interesting, and also quite harmless.

Yet I am constantly reading articles by people who claim that D&D gets kids into demonics, lowers their respect for life, and is anti-religious. Some of these people claim to have played D&D. One man said he was going to raise money through donations and "buy as many copies of the games as I can and then burn them." In some schools D&D has been prohibited.

Why is it that people can't see that D&D is just a game, and one of the best games around?

Nels Bruckner
Jasper, Ore.

Nels' letter is one of many on this subject that we've received over the past year or so, and it asks the same question we've asked: Why, indeed can't these people see that the D&D® and AD&D™ games are just games? Games that are meant as diversions, games that are meant to be fun, but games. Nothing more — and nothing less. What's wrong with playing a game?

We're sure you've all seen the stories in newspaper and magazines and on television. (Our critics are good at getting attention in the media, and this issue makes for sensational headlines.) Basically, those who criticize our games say they somehow promote violence and evil, devil-worship and the occult, that they're so popular that many people spend lots of time playing them.

Well, that last accusation may be true: many thousands of people do spend a lot of time playing the D&D and AD&D games. Just as many other people spend a lot of time playing baseball or golf or tennis or watching television: Any hobby presumably carries the potential for being too absorbing and time-consuming. But that doesn't mean all hobbies should be banned, does it?

As for the other observations made by certain self-appointed critics...

"The D&D game encourages violence and glamorizes evil" — Nothing could be further from the truth. Sure, there are evil monsters and characters; otherwise there wouldn't be anything for the forces of good to defeat.

Any Dungeon Master who uses the game rules in the manner they were intended to be used — and any player in that DM's campaign — will get the message loud and clear: It pays to be good. The most successful and longest-lived characters are those who disdain evil and work together, cooperating to defeat mutual foes. And, as we've said many times in these pages, the most interesting campaigns are those that challenge players to use their wits to conquer their foes. "Hack 'n' slash" campaigns exist, but neither this magazine nor this company encourages such behavior.

"The D&D game promotes devil-worship and the occult" — Only someone who takes the game materials totally out of context could make this statement (and sadly, that's exactly what some of our critics do). Sure, demons and devils can be found in the games — along with many other monsters and creatures, all on paper, as numbers and statistics, for one purpose and one purpose alone: to give the players something to battle against. They add flavor to the game, which, our critics fail to remember, takes place in a fictional world of heroic fantasy.

In this world, as in the many worlds described in the great works of fantasy literature, there are "gods" that can play a role in the lives of the mortals who make up the world. In this world, magic exists. But anyone who attempts to make more of it than that, has simply not bothered to read the rule books. The D&D and AD&D games don't encourage evil, etc., any more than the MONOPOLY games causes its players to become ruthless real-estate barons who evict widows and orphans. Nobody who wins a MONOPOLY game is deluded into thinking they can go out and spend all that lovely play money, are they?

Certainly, in our democracy, our critics are entitled to their views. But so are we. And if you know someone who has received an incorrect impression of our hobby, you don't have to let that misconception continue. Invite that person to roll up a character and see what the games are all about. We think that's the best argument anyone could make for the hobby.

And, try to remember how the games are intended to be played. We can't keep anyone from playing the game in an improper fashion, but we hope your characters and campaigns will always live up to the standards we try to maintain. — KM

Association Gifted Creative Children

FANTASY GAMES

March 22-1985

AGCC has decided to take a public stand in support of fantasy role playing games i.e. Dungeons and Dragons. Out of 420 families in AGCC, eighty-two percent have children who play fantasy games. AGCC has always strived to present the most up to date data concerning gifted/creative children and their total well being.

In recent months it has been suggested, by a few vocal critics, of fantasy games, that fantasy role playing games can lead to either emotional problems or even suicide. For those of us, who work with gifted children, we know that the gifted child has "problems" the average person never has, i.e. being brighter than those around them, not fitting into a pre-packed plan, etc. We also know that gifted children are often much more sensitive to the happenings around them, which can lead to emotional upsets. To suggest that fantasy games i.e. Dungeons and Dragons can lead to suicide, is highly questionable. As Dr. S. Kenneth Schonberg of the Albert Einstein College of Medicine, Division of Adolescent Medicine said, "I find most such easy explanations for complex human behavior to be far to glib for my liking and lacking in scientific credibility. Exceptional young people may be at greater risk of suicidal behavior and they are more likely to engage in complex games such as Dungeons and Dragons (Chess and Bridge too). Cause and effect should not be assumed and there is certainly no data to support such a conclusion." He and his associates have cared for over 700 young people subsequent to a suicide attempt, and they cannot recollect any attempt precipitated by Dungeons and Dragons or any other fantasy game. We have found that young people who play fantasy games are avid readers, who enjoy Shakespeare, J.R.R. Tolkien, C.S. Lewis, T.H. White, Isaac Asimov and many other authors. Gifted young people who play fantasy games are overwhelmingly bright, articulate, honest and reliable. Most of the young people we work with, are excellent students with families where there is excellent communication. Of the less than 1% who are having problems, it is not because of fantasy games i.e. Dungeons and Dragons, but because of separations among parents, illness or some other extenuating circumstance.

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Reflections of a real-life Cleric

Rev. Arthur W. Collins

Even though clergypersons are supposed to teach people how to be a "light to the world," there are times when one is tempted to go incognito and hide one's light under the nearest bushel basket. I am an ordained minister in the United Methodist Church, and yet there are times when I prefer not to be known as one.

And why should a minister ever wish not be known as one? For instance, when one is playing DUNGEONS & DRAGONS® fantasy role playing games. It's difficult enough to explain my hobbies to my congregation — but then, most of them figure that ministers are kind of spaced-out anyway. After a while, they come to accept me as "normal," because they see in my life the fruits of a healthy mind and heart, and we establish a relationship which enables us to appreciate each other.

However, when one is happily talking about fantasy gaming with a group of fellow hobbyists, sooner or later one is bound to ask you what you do for a living, and it's then that things tend to get awkward.

Like, after the initial shock, one will tend to say to you, "I bet all your characters are Clerics (or Lawful Good, or whatever)." In order to disabuse them of this stereotype, I generally tell them about the group of ministers and theologians I play with: My specialties are Bards and Druids; one fellow plays the most astounding Assassins you have ever seen; another is enamored of weaponless combat ("watch me pummel that displacer beast!"); and so forth.

Others assume that playing a fantasy game with a minister would be a crashing bore, and thus would feel awkward sharing their hobby in my presence. Again, this is stereotyping. In fact, I find the reverse is often true. The men and women I play with are of varying ages, all very well-read, with a breadth of imagination, a contact with real life with its sorrows and raw deals (and also its triumphs), and a feel for fantasy that I find very hard to duplicate elsewhere. After playing with them (or people like them), I find other groups less sophisticated and harder to get used to.

Another problem is that for many people, clergypersons are seen as *inhibitors of fun* rather than *sharers of fun*, and this brings me to the point of this essay. The non-churched population generally views the Christian faith (and religion in general) in terms of a body of rules and regulations designed to keep one from enjoying oneself. This is a false view, but a prevalent one, and voices in the Christian community have been raised of late saying that such things as DUNGEONS & DRAGONS games are questionable at best (damnable at worst). The double effect of misunderstanding and misguided righteousness on either hand have made fantasy role-playing games a hot topic in the religious community. It is my purpose to lay out a Christian understanding of the uses of fantasy, and then speak from a pastoral perspective on the value of role-playing games. Others may disagree with me, and they are welcome to do so. But for all those who feel that the real-life Clerics are after them, the bubble of fear and resentment needs to be burst.

The Uses of Fantasy

When I was in Seminary, I heard endless exhortations from accomplished preachers on the art of preaching. And one of the most oft-repeated statements I heard was "You gotta preach with the Bible in one hand and today's newspaper in the other." Now, I understand what these princes of the pulpit were trying to say, and I have tried to heed their advice. They were basically saying that the task of one who preaches is to address the very real concerns of very real people and connect their needs with the resources that the Christian faith offers: matching hatred with love; corruption with justice; brokenness with healing; sin with forgiveness; turmoil with peace; apathy with commitment. But what was often left out of their exhortations was the need of every human being to not only manage his life well, but to find fulfillment in it. And where fantasy

comes in is when we realize that fantasy is part of a very deep level of the human soul — a part of us that also aches to be filled with the wholeness offered by religious faith.

In his magnificent essay *On Fairy-Stories*, J.R.R. Tolkien spoke a definitive word about why human beings contrive make-believe. He writes,

The magic of Faerie is not an end in itself, its virtue is in its operations: among these are the satisfaction of certain primordial human desires. One of these desires is to survey the depths of space and time. Another is...to hold communion with other living things."

These desires are part of what make us human, and if they find not their object in God, then they will seek satisfaction elsewhere. Likewise, a faith that does not touch these deep recesses will fail to really satisfy human beings and cheat them of their hope for wholeness.

For Tolkien, fantasy is a natural imitation of God, and the gospel a realization of the dim longings of countless generations. On the one hand, he views the making of fantasy milieux as a part of what it means to be made in the image of God. He is the Creator, we are Sub-creators, given the grace to enrich his world with imaginary worlds; to add to his creatures creatures that never were. As Tolkien writes,

*"Dear Sir," I said — "Although now long estranged,
Man is not wholly lost nor wholly changed.
Dis-graced he may be, yet is not de-throned,
and keeps the rags of lordship once he owned:
Man, Sub-creator, the refracted Light
through whom is splintered from a single White
to many hues, and endlessly combined
in living shapes that move from mind to mind.
Though all the crannies of the world we filled
with Elves and Goblins, though we dared to build
Gods and their houses out of dark and light,
and sowed the seed of dragons — 'twas our right
(used or misused). That right has not decayed:
we make still by the law in which we're made."*²

And on the other hand, Tolkien sees the natural bent for human fantasy caught up, epitomized, and redeemed in the Incarnation of Jesus Christ. As usual, he puts it best:

"The Gospels contain a fairy-story, or a story of a larger kind which embraces all the essence of fairy-stories... But this story has entered History and the primary world; the desire and aspiration of sub-creation has been raised to the fulfillment of Creation... There is no tale ever told that men would rather find was true, and none which so many sceptical men have accepted as true on its own merits. For the Art of it has the supremely convincing tone of Primary Art, that is, of Creation. To reject it leads either to sadness or to wrath."³

In the same essay, Tolkien also notes three particular functions of fairy-stories (and by extension, of fantasy games): Escape, Recovery, and Consolation.

Escape is a legitimate exercise. Too many "realists" condemn fantasy as "escapist." But what is wrong with escape (or vacation, if you will)? Life presents us with certain hard facts, such as a limited amount of money, a comparatively short lifespan, and our social environment. Why should one be condemned for experiencing second-hand, as it were, things that he cannot afford, stretches of time he could not live to see, or a mode of living impossible in 20th-century America (such as fighting with edged weapons in real combat)? And if Life has dealt you a weak hand, who says it's your duty to enjoy it? Can't a person

living in the depths of a ghetto fantasize about drinking from a pure mountain stream he cannot realistically get to?

Recovery means seeing things from a new angle, recovering a proper sense of things. Fantasies and faery-stories of undying love help us to suddenly see our spouses and sweethearts in a new light, recovering a fresh appreciation for who they really are, and for what they mean to us. Fantasy vehicles involve moral implications that also sharpen our focus: Fantasized nobility helps clean out the shabbiness and cheapness which often clothes the world and its inhabitants for us. fantasized villainy awakens us to the potential Faust in each of us.

Consolation centers on the Happy Ending: not as a contrived, gimmicked, sugar-coated result with no bearing on reality or relation to previous events; but rather, fantasy vehicles involved us in joy through the resolution of their conflicts. And the greater the terror, the dreariness of the hassles, the greater the joy that uplifts us when the moment of triumph arrives. I always try to make my dungeons as challenging as possible. That way, when a player character emerges victorious, he has really accomplished something. And more than that — more than the satisfaction of having played well — he or she has experienced a joy that belongs only to those who have faced great odds and hopeless situations, and then seen deliverance won by a hair's-breadth. *That* is what keeps bringing 'em back to play again and again.

Thus, for me (and for many others) fantasy is an important and natural human activity: It is a function of the human soul which brings me fully alive. The pleasure I get from walking out of doors is greater because I have walked in the sweet shadows of Lothlorien and upon the high valleys of the Fixed Island on Perelandra.

Pastoral Perspectives

Of course, I do not mean to make this essay one long paean to fantasy. Fantasy heals the mind; it can also be used to rot the mind. Humanity is a two-edged sword: Nothing that can be used for good cannot also be used for evil. And so, let me lay a few patented pastoral profundities on you.

First, as to role-playing as a gaming device. Role-playing is fairly new to gaming, but it has been around in the counselling room for quite a while. Many self-destructive patterns in behavior and emotions can be linked to early psychological conditioning in the family, so often a person in counselling will be asked to assume the role of a parent or someone else deeply involved with his own psyche, and speak to "himself" in an empty chair, telling himself the healing messages that he needs to hear. For instance, a person with workaholic tendencies instilled by his upbringing might assume the role of his "parent" and tell his "child" that it's okay to have fun, too, and that you're important for who you are, not just for how much work you can crank out.

Role-playing is also used to train people in the caring professions. When I was doing clinical work in a major hospital, we seminarians would take turns playing ministers and patients with various concerns and personalities. Then we would evaluate how we had perceived each other, and both the "minister" and the "patient" would emerge with a deeper knowledge of the dynamics of the situation.

Role-playing is a liberating exercise. It frees you from the pretense of trying so hard to be what you want others to think you are. Instead, by assuming a role, you can be whatever you want to be, and in the process you grow in your understanding of human behavior (your own, not the least). One of the geniuses of D&D® and AD&D™ games is the identification of a player with a continuing, developing character. A good character, well played, involves particular aspects of your self-image and allows you to plumb their depths. Each of my most-favored characters contains within his personality some seed of myself. I get a different enjoyment and grow in different areas from playing each one.

Second, as a pastor, I find that playing D&D® games with others is an incredible tool for informal diagnosis. I am trained to understand the motives and makeup of people: It is part of

my calling to understand what makes them tick, in order to understand and affirm who they are, and minister to them. I have never found anything like fantasy role-playing for revealing who a person really is. And that enables me to effectively care for that person and affirm him or her even more.

Third, role-playing gives us a sanity break. People ask me why I play DUNGEONS & DRAGONS® games. One reason is for my emotional health. Aggression and anger, for instance, can be dealt with constructively or destructively. Destructively, you unload on people, or yourself. Constructively, you have the option of unloading on objects (e.g., a racquetball), or you can assume a role and unload on a bunch of hapless orcs with no guilt and no restraints.

Unfortunately, the fourth note in this chord is a sour one. I said that fantasy, like all that is human, is a two-edged sword. Each of these benefits of role-playing games has its pathological counterpart. It is possible to become obsessed with fantasy vehicles and lose contact with the real world, rather than returning to it refreshed. It is often seen that player characters are used as a means of relating to people dishonestly: Rather than assume a role, a player with emotional problems merely changes his name to "Siblurd Yorgenmiddling" or whatever and plays out his destructive behavior in a non-healthy way, inviting rejection and disrupting the enjoyment of others. There are those for whom magic and demonology cease to be conventions of the game and become real-life pursuits. The list of possible perversions is endless.

It is this which elicits the questioning response to fantasy role-playing games on the part of the religious community. Healthy people fear their kids/friends will become unhealthy; responsible people fear their charges will become irresponsible; believers fear that fantasy role-playing games produce non-believers, or at least provide a seductive arena for unhealthy commerce with hostile values.

On the whole, I think these fears are ungrounded. It is possible to misuse fantasy, role-playing, and any other hobby, but the great majority of people who dabble in them are healthy persons. And almost always, what comes out of a person who plays games like D&D® adventure games is merely a distillation of what that person brought to the game to begin with.

C.S. Lewis made a useful point in his book, *An Experiment in Criticism*. Rather than calling a book (or in this case, a game genre) *good or bad* on the basis of what we think of it, we ought to judge it by how it is used. Any book (or game) which can be used for healthy enjoyment (what Lewis called *healthy castle-building*) is a good work, even if poorly written or conceived, and even if some do misuse it. On the other hand, only those works which can *only* be used for what he called *morbid castle-building* should be condemned by critics.

As a pastor called to care for people and help them to find wholeness for their lives through God, I am as deeply concerned as any about those who misuse fantasy vehicles. As a convinced believer in the supernatural (and in the supernatural conflict between good and evil), I am a vocal partisan for my Lord against all other claimants to primacy in life. As a Christian, I believe the statement, "Bad company ruins good morals." ⁴But at its most fundamental core, I find that games such as DUNGEONS & DRAGONS® games provide immense enjoyment in a healthy way, and are even useful in personal growth. A healthy group of gamers can be a tremendous environment for a person to thrive in. It is not for everybody, of course: Some don't have the taste for it, and some should not play it if they are going to become compulsive about it. But on the whole, I say "Roll those dice!"

Notes

¹"On Fairy-Stories," *The Tolkien Reader*, Ballantine Books, New York 1966, p. 13

²ibid., p. 54

³ibid., pp. 71-72

⁴1 Corinthians 15:33

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7 July 1991

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Dear Dr. Victor:

Thanks for the packet of material. While the Sullivan case mercifully did not mention RPG, it was nonetheless useful. Because the demographics are so similar, I am doing a comparative study of suicides and violent crimes committed by members of the Boy Scouts. It has long struck me that whenever a gamer does this, games are blamed, but whenever a Scout does the same thing, it is pictured as incredible because he was a Scout. I anticipate that far more cases of "Scouting-caused" behavior will show up than "D&D-caused" and while both are totally irrelevant, it will at least put the mass media in the bind to show why they have been so selective. Also, Scouting is essentially bomb-proof and will hardly suffer from the comparison. I am certainly not out to hurt anybody by this.

Pierre Savoie and I have been in long communication, but there were a few items that I had not seen before from his collection. I have corresponded occasionally with Gary Alan Fine, but he seems to be deluged with gamer contacts now that we are finally getting some degree of organization to fight the attacks, and I am afraid he is getting just a little tired of the subject. I can easily see why a non-gamer would be. After all, Shared Fantasy was in 1983 and he would like to move on. Still, it was a great study and I wish he would update it. Ten years after would seem an appropriate round-number interval.

I am including my Lexis file (because it is a lot more reliable than the mass media), but I am compiling a file of references to what I call the Trophy List, the anti-game forces' "documentation" of game-related tragedies. They have given enough information to research a couple dozen of these. We can show that some of them never even played the game and can show other, more likely, causes in most of the rest. Only three cannot be disproven and one of those has no basis except oral tradition (a particularly difficult item to document, especially when all the oral tradition is from the mother of the victim). The material on this research is currently just loose in a file folder for each, but will ultimately be compiled into a periodically-updated monograph.

If there is anything else of use, let me know.

Sincerely,



Paul Cardwell, Jr.

Community role in the management of Rose-mauve disease

OHIO HISTORY

Trichoptera
Lepidoptera
Hymenoptera

© 2025 KET

Mr. H. C. G.

Dr. Jeffery A. Moller
Deputy Director of Sociology
James Jackson Community College

totally untagged

Traces left by the bookend prints of the 3D-printed base were visible on the surface of the model. Based on this observation, it was decided to remove the base from the print and to use a small amount of acetone to clean the surface. This was done by immersing the model in a container filled with acetone and leaving it for about 10 minutes. After this time, the base was removed and the model was rinsed with water and dried with a soft cloth.

State of Missouri, Respondent, v. Darren Molitor, Appellant

No. 50199

Court of Appeals of Missouri, Eastern District, Division
Four

729 S.W.2d 551; Motion History: Application to Supreme Court
for Transfer Denied 6/16/87

March 31, 1987, Filed

PRIOR HISTORY: Appeal from the Circuit Court of the County of St. Louis, Hon. Alphonso Voorhees.

JUDGES: Harold L. Satz, Judge, Crandall, Jr., P.J., Pudlowski, J., concur

OPINIONBY: SATZ

OPINION: Harold L. Satz, Judge

Defendant was convicted by a jury of first degree murder, @ 565.003 RSMo. 1978 (felony-murder) nl and was sentenced to life imprisonment. Defendant appeals. We affirm.

nl @ 565.003 RSMo. 1978 reads:

"Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping."

This statute was repealed by L. 1983, p. 922, S.B.No. 276, @ 1.

Defendant does not question the sufficiency of the evidence. Defendant and the victim, Mary Towey (Mary), were acquaintances. On April 12, 1983, Mary drove to the house of her friend, Cathy Molnar (Cathy), to pick up Cathy. They then picked up defendant and some other acquaintances: Warren Hutter (Warren), Marty Pezzani (Marty), Ron Adcox (Ron). They drove to Wilmore Park, where some of them smoked marijuana. The group left the park, took Warren home and took Cathy to St. Louis University. Mary then suggested they go to her house. Ron suggested they first pick up some marijuana at "Pot in the Box" across the river. They bought the marijuana and then went to Mary's house. Mary was planning a "Friday the 13th" party for the next day, and defendant hooked up Mary's stereo for the party. About 7:30 P.M., defendant, Mary and Ron drove Marty to his house. The three of them then purchased beer and liquor for the party, went by defendant's home so that he could pick up his cassette deck and tapes and, about 9:30 or 10:00 P.M., drove back to Mary's house. Defendant and Ron stayed at Mary's house all night, listening to music, consuming liquor, smoking marijuana and practicing martial arts. Mary fell asleep around 2:00 A.M.

Mary awoke the next morning about 5:30 or 6:00 A.M., showered, dressed, had coffee or tea and joined defendant and Ron. Defendant began to show Mary some martial arts moves. Then defendant and Ron began chasing Mary. Mary ran down the stairs to the basement. Defendant and Ron followed her, caught her, wrestled her to the floor and tied her hands and feet. According to defendant, they were "messing with her mind". Defendant and Ron went back upstairs. Defendant sat at the top of the stairs and drank a beer. Mary was yelling to be untied. Mary asked for a cigarette. Defendant went downstairs, lit a cigarette, "helped her smoke it" and gave her a few drinks of beer. Mary said she was cold, and, according to defendant, he and Ron unrolled a rug and put Mary on it. Mary continued to yell she wanted to be untied. Defendant found some tape and tried to tape Mary's mouth shut. He was unsuccessful. He then went back upstairs. In the meantime, Ron had located an ace bandage in the bathroom. Defendant tied a knot in the ace bandage, and, "to mess with her mind some more" i.e. "just to possibly quiet her up some more", he tied the ace bandage around Mary's neck. A

esaid he checked the ace bandage and found "it was loose". He went back upstairs, drank some more beer, smoked some more marijuana, listened to music and listened to Mary continuing to yell.

Subsequently, he went back downstairs and found Mary. Her feet were discolored, "sort of yellowish", her face was "purple like, black and blue", her eyes were "bulging out", and her tongue was hanging out of her mouth.

Defendant said he and Ron panicked. Leaving in the Towey's car, he and Ron took many items from the Towey house to pawn, packed Mary in the trunk and buried her in a wooded area. They then drove to Georgia. They met some acquaintances there and stayed with them in their motel. Defendant phoned his mother the following Tuesday, April 19, told her he was in Georgia and told her the last time he saw Mary she was at a party with "some bikers". On Sunday, April 22, defendant and Ron phoned home and were told FBI agents were looking for them. Ron and defendant called the FBI office in St. Louis and spoke with Agent Hoffman. FBI agents from the Atlanta, Georgia office met with defendant at the motel. Defendant was given his Miranda rights on two separate occasions. After giving two different versions of Mary's absence and death, defendant confessed to tying the ace bandage around Mary's neck and gave the location of her body. The examination of Mary's body revealed a lesion on her head which showed "a pretty severe blow to {her} head". The cause of her death was "{m}echanical asphyxiation with cerebral anoxia, secondary to ligature strangulation". In lay terms, she died because the blood was cut off from her brain by something tied around her neck and, thus, her brain did not get enough oxygen.

At trial, defendant attempted to qualify two witnesses, Dr. Thomas Radecki and Pat Pulling, as experts on the game of Dungeons and Dragons. Defendant made offers of proof on the testimony of both witnesses. If Dr. Radecki had been allowed to testify, his opinion would have been that the game of Dungeons and Dragons "desensitizes" its players and this "desensitization" limits the players' ability to appreciate the danger and harm of their violent acts. Pat Pulling would describe the violence imagined by the players in playing Dungeons and Dragons. The trial court sustained the prosecutor's objections to both witnesses' testimony on the grounds their testimony would be irrelevant.

On appeal, defendant contends the testimony of Dr. Radecki and Pat Pulling is relevant to show defendant's "state of mind" at the time of the homicide. Defendant does not contend he suffered or suffers from a mental disease or defect excluding complete responsibility; rather, he argues, he was "desensitized" by playing Dungeons and Dragons and his "experts'" opinions on desensitization would aid the jury in determining his state of mind at the time of the homicide. This would enable the jury, defendant argues, to determine whether defendant had the culpable mental state for capital murder or a lesser and included offense.

Defendant's argument is misdirected and, thus, misses the mark. Defendant focuses on the actual state of mind of an accused and points out the characteristics of the states of mind which distinguish capital murder from lesser degrees of murder. n2 Defendant, however, ignores the effect of the jury's verdict here on his argument. Defendant was charged with capital murder, @ 565.001, RSMo.1978, n3 and murder, first degree (felony - murder) @ 565.003, RSMo. 1978. The trial court properly instructed the jury on capital murder, felony murder and the lesser offenses of murder, second degree and manslaughter. The trial court also directed the jury to consider a lesser offense only after it had considered the next preceding greater offense. The jury convicted defendant of murder, first degree; i.e. felony-murder.

n2 Defendant argues:

Under our homicide statutes, the degree of murder depends upon the state of mind of the aggressor. Deliberation distinguishes capital murder from murder in the Second Degree. State v. Gilmore, 650 S.W.2d 627, 629 (Mo. banc 1983). Second Degree murder comprises a willful, premeditated killing with malice aforethought. State v. Mannon, 637 S.W.2d 674, 679 (Mo. banc 1982). And

manslaughter encompasses killings done without the other mental states of the greater degree of homicide. State v. Smith, 518 S.W.2d 665, 669 (Mo. App. 1975).

Willfulness, deliberation, premeditation and malice aforethought all constitute concepts or states of mind. State v. Battles, 212 S.W.2d 753, 758 (Mo. 1948), the presence or absence of which constitutes the major issue in determining the accurate degree of homicide present.

n3 @ 565.001 RSMo. 1978 reads:

Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

This statute was repealed by L.1983, S.B. No. 276, @ 1.

Admittedly, defendant's charge of capital murder did require proof of premeditation and deliberation for conviction. @ 565.001, RSMo. 1978. But defendant was not convicted of capital murder. He was convicted of the lesser offense; murder, first degree, felony - murder. Thus, defendant cannot possibly complain that the jury was kept from considering his experts' testimony about the mental state required for capital murder. Quite simply, the jury failed to find defendant killed Mary with "premeditation" and "deliberation".

Moreover, the jury did find defendant guilty of felony murder. More specifically, it found defendant killed Mary while committing or attempting to commit a robbery. The culpable mental state for murder, first degree when it is defined as felony - murder is supplied by the felony. See, e.g. State v. Lindsey, 507 S.W.2d 1, 4 (Mo. banc 1974). In this case, the felony was robbery, under 569.020 RSMo. 1978. The culpable mental state for robbery is not specifically spelled out in the statutory definition of robbery. Thus, arguably, under our statutory scheme, the culpable mental state for robbery is established if the accused acted "purposely", "knowingly" or "recklessly". See @ 562.021.2, RSMo. 1978; State v. Clark, 607 S.W.2d 817, 820-821 (Mo. App. 1980; see also State v. Logan 645 S.W.2d 60, 66 (Mo. App. 1982)). But see, @ 562.026 RSMo. 1978 and State v. Helm, 624 S.W.2d 513, 517 (Mo. App. 1981). (Intoxication is no defense to robbery because robbery does not have to be "purposely" or "knowingly" done). If robbery does require a culpable mental state, defendant does not argue nor has he demonstrated that the excluded testimony of Dr. Radecki or Pat Pulling would negate that mental state.

Of equal, if not more, importance, defendant's offers of proof made no showing that defendant was in fact "desensitized." To the contrary, Dr. Radecki never conversed with or examined defendant; nor does it appear he even talked with defendant's family. His only knowledge about the homicide comes from an undefined conversation with defense counsel and a brief undescribed newspaper article that he read some months prior to the trial. With no personal knowledge to support Dr. Radecki's opinion about defendant's mental state, his testimony was properly excluded by the trial court. See, e.g., State v. Lint, 657 S.W.2d 722, 725 (Mo. App. 1983); see also, State v. Brown, 669 S.W.2d 620, 622 (Mo. App. 1984).

Defendant argues, however, that he cured this defect by asking Dr. Radecki a hypothetical question based upon facts established at trial, and Dr. Radecki, as an expert, should have been permitted to answer this question. Defendant's argument is not persuasive.

For our purposes here, we shall assume defendant laid a proper factual foundation for his hypothetical question. The question was:

{A}ssume that we have two 18-year-olds, a male and a female. Previously, the female has invited several people to a Friday the 13th party. Both individuals are participants in { Dungeons and Dragons} . Assume further that the 18-year-old female and the 18-year-old male become involved in a wrestling activity. The 18-year-old male ties the female up. Assume further that in addition to tying the female up, the 18-year-old male places around her throat

aligature -- in this hypothetical, an Ace bandage.

{W}hat would be your opinion as to whether the activities that I've described could be an offshoot of the fantasy role-playing of { Dungeons and Dragons} .

The Doctor, quite candidly, responded that he could not tell what defendant's "intent" would be. Specifically, he answered:

The tendency toward that type of behavior could very certainly be increased by D&D play. What the intent of the young male at the time of the incident is, you know, is a different question and I wouldn't have any knowledge of that. But the tendency towards that type of behavior could certainly very easily be increased by D&D played, especially when the two people have played together. There's more of a desensitization of playing with violence between the two of them and it's certainly possible that -- you know, it's certainly likely, indeed, that there is a desensitization towards playing with violence or even commission of intentional violent behavior between the two. I don't have any knowledge of the particulars of the intent in this case. (emphasis added).

This answer clearly shows Dr. Radecki's inability to apply his perception of the general effect of playing Dungeons and Dragons to the particularized mental state of defendant here. Moreover, he could not and did not state the possible effect on defendant was the cause of defendant's acts. Given this offer of proof, the trial court was well within its discretion in rejecting Dr. Radecki's testimony as being irrelevant. E.g. State v. Guyton, 635 S.W.2d 353, 360 (Mo. App. 1982); State v. Taylor, 589 S.W.2d 302, 304 (Mo. banc 1979).

Pat Pulling's proffered testimony suffered from the same or greater defects. She never talked to defendant, nor his family. The primary purpose of Pulling's testimony was to describe the level of imagined violence in Dungeons and Dragons and how the players become addicted to it. However, with candor equal to Dr. Radecki, she said "she did not come out here to say Dungeons and Dragons was the cause of this case." Thus, defendant's argument has no merit.
n4

n4 We do not address whether defendant established that the relevant scientific community has accepted the theory of "desensitization" by playing Dungeons and Dragons. See, Alsbach v. Bader, 700 S.W.2d 823, 828-29 (Mo. banc 1985).

Although at oral argument defendant argued to the contrary, his "desensitization" defense is strikingly similar to "diminished mental capacity or partial responsibility". See 552.015.2 (8), RSMo. (Supp. 1987); State v. Strubberg, 616 S.W.2d 809, 816 (Mo. banc 1981). Defendant, however, did not give the state notice of this defense. We do not address the necessity of doing so. See, State v. Alexander, 693 S.W.2d 216, 222-223 (Mo. App. 1985).

Defendant next contends the prosecutor's "death qualification" of prospective jurors deprived him of his right to a jury from a fair cross-section of the community. During voir dire, five prospective jurors said they would be unable to impose the death penalty under any circumstances. Over defendant's objections, the trial court struck these prospective jurors for cause.

The state may strike for cause prospective jurors who cannot consider death as a possible punishment. See State v. Foster, 700 S.W.2d 440, 443 (Mo. banc 1985); State v. Malone, 694 S.W.2d 723, 726, 727 (Mo. banc 1985). The United States Supreme Court agrees. Lockhart v. McCree, 106 S.Ct. 2758, 1766 (1986). Thus, defendant's argument has no merit.

Defendant also argues the court improperly admitted the tape recording of a telephone conversation between defendant and FBI Agent Hoffman. Hoffman and other FBI agents entered the case after Mary had been reported missing. On April 22, 1984, Ron's mother phoned Hoffman to ask whether he would accept a collect phone call from her son. Hoffman received the call from Ron and talked with him and then talked to defendant. This conversation was taped.

Defendant's complaint about the admission of this taped conversation is neither clear nor explicit. Defendant argues the state failed to show defendant's statement on the tape was not induced by threats or promises and, therefore, a proper foundation was not laid for the admission of the tape. Defendant relies on State v. Spica, 389 S.W.2d 35, 43-46 (Mo. 1965).

Defendant's reliance on Spica is misplaced. In Spica, the court was addressing the propriety of admitting a criminal defendant's taped conversation, which was taped without his knowledge. The Court set out a seven point foundation for admitting the tape. n5 Six of these points were directed to the reliability of the recording itself and the seventh point was directed to the trustworthiness of the statement itself: "(7) a showing that the testimony elicited was voluntarily made without any kind of inducement". Id. at 44. Thus, the real thrust of defendant's complaint is not against the admission of the tape itself; but rather it is against the admission of the contents of defendant's statement. Defendant's real argument is that he was improperly induced into making incriminating statements by Hoffman "denigrating" the Miranda warnings which were given during the phone conversation. We disagree.

n5 The foundation referred to in Spica contains the following elements:

- (1) A showing that the recording device was capable of taking testimony,
 - (2) a showing that the operator of the device was competent,
 - (3) establishment of the authenticity and correctness of the recording,
 - (4) a showing that changes, additions, or deletions have not been made,
 - (5) a showing of the manner of the preservation of the recording,
 - (6) identification of the speakers, and
- (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

Later cases question this dicta. See, e.g. State v. Molasky, 655 S.W.2d 663, 668 (Mo. App. 1983).

Agent Hoffman did not initiate his conversation with defendant. Hoffman accepted Ron's phone call. Defendant voluntarily took the phone from Ron and began to talk. Defendant obviously was not "in custody". His liberty was not restrained, and defendant made no showing he was at that time the focus of a homicide murder inquiry. Thus, the Miranda rights are inapplicable. E.g. State v. Calmese, 628 S.W.2d 382, 387 (Mo. App. 1982); Oregon v. Mathieson, 429 U.S. 492, 493-496 (1977). If the Miranda rights are inapplicable, their alleged "denigration" is irrelevant.

Moreover, statements of an accused obtained through subterfuge are admissible unless the deception offends societal notions of fairness or is likely to procure an untrustworthy confession. State v. Evans, 676 S.W.2d 324, 327 (Mo. App. 1984); State v. Pugh, 600 S.W.2d 114, 118 (Mo. App. 1980). Hoffman gave defendant his Miranda rights with reference to a possible Dyer Act violation, because he drove the Towey's car across state lines. We have read the transcript of the entire taped conversation, however, especially those parts emphasized in defendant's brief, and find Hoffman's conversation was friendly and not deceitful. Defendant apparently thought so too and, thus, did not hang up on Hoffman.

Furthermore, defendant took the stand and described his actions in detail. In addition, defendant's signed statement describing his actions and another taped statement describing his actions were admitted into evidence. This evidence cures any possible error caused by the admission of defendant's taped conversation with Hoffman.

Judgment affirmed.

Crandall, Jr., P.J., Pudlowski, J., concur

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. DAVID K.
VENTIQUATTRO, Appellant

{No number in original}

Supreme Court of New York, Appellate Division, Fourth
Department

138 A.D.2d 925; 527 N.Y.S.2d 137; 1988 N.Y. App. Div. LEXIS
2723

March 4, 1988

OPINION: {*1}

Judgment unanimously reversed on the law, defendant's motion granted, and new trial granted, in accordance with the following memorandum: Defendant, a 15-year-old boy, was convicted, following a jury trial, of murder in the second degree (Penal Law § 125.25 {2}); under circumstances evincing a depraved indifference to human life) for shooting his 11-year-old companion in the back of the head with a shotgun while the two boys were playing in defendant's bedroom on the evening of November 12, 1985. On this appeal, defendant seeks review of the determination denying his motion to suppress his oral and written statements to the police. Defendant also contends that the proof at trial was legally insufficient to convict him of depraved indifference murder and that the conviction was against the weight of the evidence.

Following the shooting, defendant was interviewed by several investigators from the State Police and, over the course of the ensuing eight hours, gave a number of statements containing varying accounts of how the shooting occurred. When first questioned by police, defendant claimed that he did not know what happened. Later, he told the police that the victim shot himself. {*2} Still later, when interrogated at the station house, defendant claimed that he accidentally shot the victim while handling the shotgun. After defendant made this admission, police advised him of his Miranda rights and thereafter obtained a written statement from him incorporating those rights. In defendant's final statement, he stated that he was playing the game Dungeons and Dragons and that he shot the victim while fantasizing that his friend was evil and that it was his job to exterminate evil. Following a pretrial Huntley hearing, the court concluded that defendant's oral and written statements were voluntary and were not obtained in violation of defendant's statutory or constitutional rights. The statements were admitted in evidence at defendant's trial and he was convicted as charged.

At the outset, we note that the proof at trial was legally sufficient to support defendant's conviction of depraved indifference murder under Penal Law § 125.25 (2). Defendant's conduct in handling a loaded shotgun in the bedroom of his home while playing with a companion satisfies the requirement that he acted recklessly, i.e., that he was aware of and consciously disregarded a {*3} substantial and unjustifiable risk (Penal Law § 15.05 {3}; see, People v Gomez, 65 NY2d 9, 11). In addition, the defendant's conduct in pointing the gun at his companion and pulling the trigger evidences a wanton indifference to human life sufficient to satisfy the depraved indifference element of the statute (see, People v Register, 60 NY2d 270, 274, cert denied 466 US 953). The risks posed by defendant's conduct in this case and his callous indifference to them entitled the jury to conclude that he was guilty of murder (see, People v Gomez, *supra*).

Defendant's conviction must be reversed and a new trial granted, however, because we conclude that the hearing court erred in denying defendant's motion to suppress his oral and written statements to the police. It is well established that "special care must be taken to insure the rights of minors who are exposed to the criminal justice system" (People v Ward, 95 AD2d 351, 354; see, *In re Gault*, 387 US 1; *Haley v Ohio*, 332 US 596). Thus, "{i}t is well recognized that over and beyond the ordinary constitutional safeguards provided for adults subjected to questioning, the police must exercise greater care {*4} to insure that the rights of youthful suspects are vigilantly observed"

(People v Hall, 125 AD2d 698, 701; see also, Matter of John C., 130 AD2d 246, 254). Both the Family Court Act and the Criminal Procedure Law contain provisions which require that, when a minor has been arrested, the police immediately notify a parent or other legally responsible person of the arrest and the place of detention (Family Ct Act § 305.2 {3}, {4}; CPL 120.90 {7}; 140.20 {6}). Moreover, Family Court Act § 305.2 provides that a youth charged with juvenile delinquency cannot be questioned unless he and a person required to be notified pursuant to the statute have been properly advised of the child's rights. The hearing court found that the questioning of defendant did not violate his rights under the Constitution and the statute because it was noncustodial, investigatory and essentially exculpatory. On our review of the record, we find that the police questioning in this case violated defendant's statutory and constitutional rights, and that defendant's statements to the police should have been suppressed.

The determination whether one is in custody at the time of police questioning and therefore [*5] entitled to an advisement of his rights for purposes of the Family Court Act depends upon whether he has been formally arrested or has had his freedom restricted to the degree associated with formal arrest (Matter of Stanley C., 116 AD2d 209, 212, appeal dismissed 70 NY2d 667). The test, of course, is not what the defendant thought, but rather what a reasonable person, innocent of any crime, would have thought had he been in defendant's position (see, People v Yukl, 25 NY2d 585, 589, cert denied 400 US 851; People v Hall, supra, at 700).

Although it is clear that the police did not formally arrest defendant until sometime between 5:30 A.M. and 6:00 A.M. on November 13, 1985, the record of the suppression hearing reveals significant limitations upon defendant's freedom of movement to the degree associated with formal arrest. Defendant was initially questioned for 30 minutes in the presence of three officers in a police vehicle outside his home. At the time, defendant was upset, crying, and splattered with blood on his hands, face and clothing. Significantly, when, during the course of being questioned in the police car, defendant asked to be allowed to use [*6] the bathroom, he was given permission to do so, but was accompanied by two officers who physically accompanied him inside the bathroom and instructed defendant not to wash his hands. Police conceded that the reason for this demand was their desire to conduct a gunshot residue test on defendant's hands. Defendant was then questioned in the bathroom by these officers for an additional period of approximately one-half hour at which time he told them that the victim had shot himself. This explanation was clearly incredible in view of the fact that the victim was shot in the back of the head. At this point, the police decided to transport defendant to the station house to conduct the gunshot residue test and to question him further.

When they arrived at the police station, defendant was photographed, the gunshot residue test was administered and defendant was taken to a juvenile interview room for questioning. Defendant's aunt, however, who had accompanied him to the police station, was not permitted to accompany defendant into the interview room. When defendant's parents arrived at approximately midnight, they likewise were not allowed to be present in the interview room while defendant [*7] was being questioned. Instead, the police came out and talked to them on several occasions. Although it is undisputed that defendant's parents asked whether they needed a lawyer, the officer told them that it was their decision, and also advised them that he believed the shooting was accidental and that defendant would be going home soon. In the meantime, police continued to question defendant. Defendant's parents did not speak with their son until after the police had completed taking a written statement. It was not until after defendant had admitted accidentally shooting the victim that the police first advised him of his Miranda rights. The police then took a formal written statement. Thereafter, when the police learned of discrepancies between defendant's written statement and the evidence at the scene of the shooting, they reinterviewed defendant while his parents were again not permitted in the interview room. In addition, police asked defendant's mother to get him some clean clothes because they were going to retain the bloodstained clothing defendant was wearing.

Thus, although defendant was not formally placed under arrest until 5:30 A.M. on November 13, 1985, (*8) the record reveals that this juvenile suspect was continuously questioned by a number of police officers for a period of over eight hours. It is quite apparent that the police, armed with certain inconsistencies in his story, sought to isolate defendant to obtain a confession to the crime. Courts have repeatedly held that the law will not tolerate police conduct aimed at isolating a youthful suspect from his family or other supportive adults (see, People v Hall, *supra*, at 701; People v Cavagnaro, 88 AD2d 938; People v Harrell, 87 AD2d 21, affd 59 NY2d 620). We conclude that the police overstepped the bounds of permissible conduct in isolating this youthful suspect from his family and therefore all his oral and written statements to the police must be suppressed.

Defendant's testimony before the Grand Jury, made after he had consulted with counsel and had executed a waiver of immunity was clearly attenuated from the initial illegality and was properly received in evidence at defendant's trial (People v Benson, 114 AD2d 506, lv denied 67 NY2d 649). However, in our view, this conclusion does not in any way render harmless the hearing court's denial of defendant's {*9} motion to suppress. (Appeal from judgment of Jefferson County Court, Aylward, J. -- murder, second degree.) Present -- Callahan, J.P., Denman, Green, Pine and Davis, JJ.

State of Wisconsin, Plaintiff-Respondent, v. Daniel R.
Dower, Defendant-Appellant

No. 86-1729-CR

*

UNPUBLISHED LIMITED PRECEDENT OPINION

Court of Appeals of Wisconsin, District Two

140 Wis. 2d 867; 412 N.W.2d 902

July 8, 1987, Decided; Final Disposition By Denial of Review
September 15, 1987

PRIOR HISTORY: APPEAL from a judgment and an order of the circuit court for Kenosha county: DAVID BASTIAN, Judge. Affirmed.

DISPOSITION: By the Court.--Judgment and order affirmed.

JUDGES: Scott, C.J., Brown, P.J., and Nettesheim, J.

OPINION: PER CURIAM.

Daniel R. Dower (Dower) appeals from a judgment of conviction for first-degree murder, party to a crime, and from an order denying his motion for post-conviction relief. On appeal, his primary claim is that his trial counsel was ineffective in making statements which Dower characterizes as admissions but which we are persuaded are not. He also claims error in the trial court's failure to order a sua sponte mistrial upon the jury's request to do research and in the trial court's refusal to submit a jury instruction on second-degree murder. We are persuaded by none of Dower's arguments: accordingly, we affirm the judgment and order of the circuit court.

Dower was convicted of being party to the murder of his stepfather, Joseph Vite. He had pled not guilty and not guilty by reason of mental disease or defect. Much was made at trial of Dower's participation in Dungeons and Dragons -type fantasy games. Other facts will be set forth as necessary.

Dower's first claim is that he was denied his right to effective assistance of counsel under both the United States and Wisconsin Constitutions. n1 Dower contends that his trial counsel admitted, in closing argument, Dower's guilt without his consent. n2 As was the trial court, we are unpersuaded that such an admission actually was made. Dower acknowledges that such a finding as this will be reversed only if clearly erroneous. See State v. Pitsch, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). We are convinced, both by the particular language challenged and by the larger context of the closing argument in toto, that such a finding is not clearly erroneous. Throughout the closing argument, trial counsel asserted that Dower had no specific intent to kill. This strategy was not undercut by his conditional reference to the presumption of innocence, a reference which, in our reading, did not deny to Dower the benefit of that presumption.

n1 need not consider separately the federal and state tests for reversible error in an ineffective assistance of counsel claim unless we first conclude that trial counsel's representation was ineffective. State v. Marty, 137 Wis.2d 352, 358, 399 N.W.2d , (Ct. App. 1987). Here, we find nothing ineffective in trial counsel's representation.

n2 That part of the closing argument which Dower contends was incorrect is reproduced here in its entirety:

The fact that they fled to my mind only gives rise to the conclusion that both Danny and Eric wanted to leave before this. And about knew they had committed a crime, there was no doubt that if you kill somebody by actions which are depraved, regardless of human life that that's a crime. I'm not going to come before you and say that Danny didn't know that he had done something wrong

and something very serious. That would be absurd. So I don't believe that you can take the flight in and of itself as evidence proving beyond a reasonable doubt the specific intent to kill. I would indicate that as mentioned by myself somewhat in voir dire and somewhat in opening arguments, the testimony of the three experts called, Mr. Camp, Reginald Templin and Dr. Sanson, the testimony of Investigator Barnett as to the placement of the various bullets and cartridges, placement of the body, all lead to the conclusion that my client did not himself cause the death of Joseph Vite. And therefore, question must be looked at in terms of his intent and in terms of what Eric Nelson intended to do.

At this stage of the proceedings, Ladies and Gentleman, I think in our system compensating for the bifurcated nature of this trial my client has with him and submits to you his presumption of innocence. A constitutional presumption which just like a determination of guilt must be taken seriously by each and every one of you. A presumption which will go with you to the jury room and should not be discarded because of bias. Should not be discarded because of sympathy. Should not be discarded because of anger. A presumption which shield{s} my client unless and until each one of you finds that the State has proven beyond a reasonable doubt the elements of this offense and finds as a corollary that given the assuming {sic} during the first phase of the trial there is no reasonable explanation for this offense, that is not consistent with the State's charge and if that finding is made by each of you and if you put aside the presumption of innocence then a finding of guilt of first degree murder is warranted and then we continue. And I'm satisfied that each and every one of you will take into account the excellent introduction of what I believe to be all the pertinent facts during this phase by Mr. Koos. Consider those facts and come to a fair and just verdict in this case. Thank you.

Dower also challenges trial counsel's statements that Dower knew "he had done something wrong and something very serious" and that Dower's confession to a cellmate was "the most accurate account of the events." These, he contends, are inconsistent with his plea of not guilty by reason of mental disease or defect. Regarding the first of these, we conclude that such an acknowledgment does not constitute ineffective assistance of counsel. Section 971.15(1), Stats., states that:

{a} person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law. {Emphasis added.}

Even were we to interpret counsel's statement as an admission that Dower could appreciate the wrongfulness of his conduct, that statement does not comment on Dower's ability to conform his conduct to the requirement of law. The statute being written in the disjunctive, we conclude that counsel's statement did not constitute an admission antithetical to Dower's defense. Nor, we are persuaded, for the same reasons, did his endorsement of Dower's cellmate's account of the crime.

Dower next claims that trial counsel should have moved for a mistrial when a juror or jurors inquired, during the course of the trial, whether they could do further research on Dungeons and Dragons. We hold this claim waived in that trial counsel was not given the opportunity to explain his actions. It is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Here, no inquiry was made concerning this question. We therefore deem it waived.

As a correlative, Dower contends that the trial court should have granted a mistrial sua sponte. We disagree. A sua sponte determination of a mistrial is an exercise of discretion ordinarily entitled to considerable deference on review. *State v. Copening*, 100 Wis.2d 700, 709, 303 N.W.2d 821, 826 (1981). Hence, it follows that the decision not to do so should be entitled to deference as well. While we are ultimately unpersuaded that the jury's conduct here constituted premature deliberation, we note that the trial court carefully admonished the

jury not to discuss the case until they were called upon to deliberate. Further, Dower on appeal has not demonstrated, and we think cannot demonstrate, how this jury request prejudiced him. True, the fantasy game was of great import to Dower's defense, yet we are persuaded that the jury's mere inquiry about it was curable by the judge's caution. Jury misconduct (if misconduct this was) of this sort requires a showing of prejudice to justify reversal. Cf. *Shelton v. State*, 50 Wis.2d 43, 50-51, 183 N.W.2d 87, 91-92 (1971); cf. also *Zarling v. La Salle Coca-Cola Bottling Co.*, 2 Wis.2d 596, 606, 87 N.W.2d 263, 269 (1958). No prejudice has been shown here.

Finally, Dower argues error in the trial court's refusal to submit to the jury the lesser-included crime of second-degree murder. To warrant submission of a lesser-included offense instruction, the evidence, viewed in the light most favorable to the defendant, must demonstrate reasonable grounds both for acquittal on the greater charge and conviction on the lesser. *State v. Leach*, 124 Wis.2d 648, 675, 370 N.W.2d 240, 254 (1985). Here, Dower does not marshal that evidence in his appellate brief, but merely asserts that "enough facts" were elicited at trial to justify the lesser instruction. Our review of the record persuades us that the evidence does not provide the requisite reasonable grounds. There was no error.

Not recommended for publication in the official reports.

Sheila Watters, Individually and as Administratrix, Estate of Johnny Burnett, Deceased, Plaintiff-Appellant, v. TSR, Inc., a/k/a TSR Hobbies, Inc., Defendant-Appellee

Nos. 89-5844, 89-5891, 89-6021

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

904 F.2d 378; 1990 U.S. App. LEXIS 8827

April 5, 1990, Argued June 5, 1990, Decided June 5, 1990,
Filed

SUBSEQUENT HISTORY: As Corrected June 14, 1990.

PRIOR HISTORY: {**1}

On Appeal from the United States District Court for the Western District of Kentucky; D.C. No. 88-00298; Johnstone, D.J.

COUNSEL: Counsel for plaintiff-appellant: Mark Edwards, Charles A. Saladino, (Argued), Thomas A. Dockter, Paducah, Kentucky.

Counsel for defendant-appellee: Stephen E. Smith, Jr., (Argued), McMurry & Livingston, Paducah, Kentucky.

JUDGES: Damon J. Keith and David A. Nelson, Circuit Judges; and Leroy J. Contie, Jr., Senior Circuit Judge.

OPINIONBY: NELSON

OPINION: {*379}

Nelson, Circuit Judge.

This is a wrongful death case in which the plaintiff appeals from an order granting summary judgment to the manufacturer of a parlor game called "Dungeons & Dragons." The plaintiff alleges that her late son was an avid player of the game, and that it came to dominate his mind to such an extent that he was driven to suicide. She asserts that the defendant violated a duty of care in publishing and distributing the game materials; that the defendant violated a duty to warn that the game could cause psychological harm in fragile-minded children; and that the boy's death, which was caused by a self-inflicted gunshot wound, was a direct and proximate result of the defendant's alleged wrongdoing.

The defendant's motion for summary judgment was based {**2} on the First and Fourteenth Amendments and on familiar principles of tort law. Without addressing the common law questions, the district court held that the United States Constitution bars the imposition of liability in a case such as this. Watters v. TSR, Inc., 715 F.Supp. 819 (W.D.Ky. 1989). We see no need to reach the constitutional issue, because we believe that the law of Kentucky, on which the plaintiff's claim is based, would not permit recovery on the facts shown here. We shall affirm the district court's judgment on that basis.

I

Plaintiff Sheila Watters, a Kentucky resident, brought suit against defendant TSR, Inc., in a Kentucky circuit court. TSR, a Wisconsin corporation that has its principal place of business outside Kentucky, removed the case to federal court on diversity of citizenship grounds.

TSR's Dungeons & Dragons game is one in which the players assume the roles of characters in "adventures" suggested in illustrated booklets. These adventures, set in an imaginary ancient world, are narrated and orchestrated by a player known as the Dungeon Master. The results of various encounters between characters are determined {*380} by using dice in conjunction with tables

{**3} provided in the published materials.

The rules of the game do not call for the physical acting out of any role. The game is usually played at a table or in some other comfortable setting. We have seen no indication in the record that the game's materials glorify or encourage suicide, or even mention it. It does not appear that the materials allude in any way to guns. Many schools and libraries use Dungeons & Dragons as a learning tool and as a means of promoting creativity. More than a million copies have been sold, according to TSR's records, and this figure does not include sales by the several other companies that produce and sell other role-playing games.

Mrs. Watters describes her son, Johnny Burnett, as a "devoted" Dungeons & Dragons player who became absorbed by the game to the point of losing touch with reality. She claims that as a result of his exposure to the game, "he lost control of his own independent will and was driven to self-destruction." The record does not disclose Johnny's age at the time of the tragedy.

TSR moved for summary judgment on various grounds, including these: (1) the First Amendment, as applied to the states by the Fourteenth Amendment, precludes a {**4} Kentucky court from imposing liability on the basis of what the defendant said or published; (2) TSR owed no duty to refrain from distributing the game or to warn of the possible consequences of playing it; and (3) Johnny Burnett having died at his own hand, the suicide was an intervening or superseding cause of his death. Granting summary judgment to the defendant on First Amendment grounds, the district court did not reach any of the state law issues.

II

"Where there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so for '{the} Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander v. TVA*, 297 U.S. 288, 346, 80 L.Ed. 688, 56 S.Ct. 466 (1936) (Brandeis, J., concurring), quoting *Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 28 L.Ed. 899, 5 S.Ct. 352 (1885). . . . Quite simply, '{it} is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States* 196 U.S. 283, 295, 49 L.Ed. 482, 25 S.Ct. 243 {**5} (1905)." *Webster v. Reproductive Health Serv.*, 106 L.Ed.2d 410, 441, 109 S.Ct. 3040, 3060 (1989) (O'Connor, J., concurring.)

We see no reason to depart in this case from the venerable and salutary principle that constitutional questions should be decided only where necessary. While the constitutional question was the only one addressed in the briefs on appeal, the underlying common law issues were adequately dealt with in the briefs filed with the district court. The propriety of a grant of summary judgment is a pure question of law, and although it is often very helpful, in diversity cases, for an appellate court to have the benefit of the district court's thinking on questions of state law, we do not believe a remand is called for in the present situation. The governing principles seem clear enough, even though there is no Kentucky caselaw directly in point.

III

"Actionable negligence," under Kentucky law, "consists of a duty, a violation thereof, and consequent injury." *Illinois Central R.R. v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967), as quoted in *M & T Chemicals, Inc. v. Westrick*, 525 S.W.2d 740, 741 (Ky. 1974). "Every person owes a duty to every other person to exercise {**6} ordinary care in his activities to prevent any foreseeable injury from occurring to such other person," *Westrick*, 525 S.W.2d at 741, and it is "{a} fundamental principle of negligence . . . that there is no liability without fault." *Id.* (Emphasis supplied).

{*381} Liability without fault, or "strict liability," may sometimes attach where an injury is caused by an inherently dangerous product. As far as we have

been able to ascertain, however, the doctrine of strict liability has never been extended to words or pictures. Other courts have looked in vain for decisions so expanding the scope of the strict liability doctrine. See, e.g., *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802, 803 (S.D.Tex. 1983), and *Cardozo v. True*, 342 So.2d 1053, 1056-57 (Fla.Dist.Ct.App.), cert. denied, 353 So.2d 674 (Fla. 1977). See also *Beasock v. Dioguardi Enterprises, Inc.*, 130 Misc.2d 25, 29-30, 494 N.Y.S.2d 974, 978 (1985) ("The publications themselves did not produce the injuries and thus cannot serve as the basis for the imposition of liability under a theory of either strict products liability or breach of warranty"). We are satisfied that there could be {**7} no recovery of damages in a case such as this without proof that the defendant was actually at fault -- that the defendant violated its duty to exercise "ordinary care" to prevent "foreseeable injury."

The plaintiff's complaint alleges that the defendant violated its duty of ordinary care in two respects: it disseminated Dungeons & Dragons literature to "mentally fragile persons," and it failed to warn that the "possible consequences" of playing the game might include "loss of control of the mental processes." To submit this case to a jury on either theory, it seems to us, would be to stretch the concepts of foreseeability and ordinary care to lengths that would deprive them of all normal meaning.

The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a "mentally fragile" individual would be to refrain from selling it at all -- and we are confident that the courts of Kentucky would never permit a jury to say that simply by marketing a parlor game, the defendant violated its duty to exercise ordinary care. {**8}

As to the supposed breach of a duty to warn, Kentucky law imposes a general duty on manufacturers and suppliers to warn of dangers known to them but not known to persons whose use of the product can reasonably be anticipated. *Garrison v. Rohm and Haas Co.*, 492 F.2d 346, 352 (6th Cir. 1974), citing *Fest v. American Cleaning Equipment Corp.*, 437 S.W.2d 516 (Ky. 1968).

Johnny Burnett was certainly one of the class of people whose use of the game could reasonably have been anticipated, and there is no contention that he or his mother, Mrs. Watters, knew of any danger in using it. (An affidavit executed by Mrs. Watters indicates that she knew the game was often played at the public library; that Johnny and his friends played the game constantly after school and on weekends over a period of several years; and that never, either before or during the period when he and his friends were immersed in the game, did Johnny cause his mother any problems.) But if Johnny's suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to defendant TSR.

In moving for summary judgment on the breach of duty question, defendant TSR put Mrs. Watters to her {**9} proof on foreseeability and knowledge -- on whether TSR knew of some danger that made the suicide foreseeable. Mrs. Watters was not free simply to rest on her pleadings; she was required, by affidavits, depositions, answers to interrogatories, or the like, to "designate 'specific facts showing that there {was} a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), quoting Rule 56(e), Fed.R.Civ.P. This she failed to do. Aside from one vague reference to hearsay about the game's "dangerous propensities" -- Mrs. Watters' affidavit concluded with a sentence reading, in its entirety, "I have subsequently read in many publications including the Paducah Sun of the dangerous propensities of the game Dungeons & Dragons" -- the record sets forth no "specific fact" showing that the defendant's game was in fact dangerous {*382} or that the defendant had knowledge of any danger when the materials that Johnny and his friends had been using for so many years were manufactured and sold. *

-Footnotes- - - - -

* We have found two decisions, not cited in the briefs, mentioning claims

that Dungeons & Dragons has dangerous propensities. In *State v. Molitor*, 729 S.W.2d 551 (Mo.Ct.App. 1987), where a young woman was tied up and strangled after an all-night houseparty devoted to listening to music, consuming liquor, smoking marijuana and practicing martial arts, the defendant sought to introduce expert testimony suggesting that he had been "desensitized" at some point by playing Dungeons & Dragons. The appellate court sustained exclusion of the testimony on relevance grounds and because the defendant's offers of proof made no showing that he had, in fact, been "desensitized." In *People v. Ventiquattro*, 138 App.Div.2d 925, 527 N.Y.S.2d 137 (1988), a fifteen-year-old boy who killed a companion with a shotgun gave the police several conflicting accounts of how the shooting occurred. In one account he stated that he was playing the game Dungeons & Dragons and shot the victim while fantasizing that it was his job to exterminate evil. Whether this particular account was truthful, and whether TSR ever learned of it, we do not know.

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{**10}

The actual content of the materials in question would hardly have given TSR reason to foresee that players of the game would become more susceptible to murder or suicide than non-players. The materials make it clear that Dungeons & Dragons is a "let's pretend" game, not an incitement to do anything more than exercise the imagination. And the imaginary world referred to in the booklets -- a world of magical spells, hidden treasures, and fantastic monsters -- does not appear to be a world in which people kill themselves or engage in acts of wanton cruelty toward other people. We are not dealing here with the kind of violence or depravity to which children can be exposed when they watch television, or go to the movies, or read the fairy tales of the Brothers Grimm, for example.

Television, movies, magazines and books (including comic books) are far more pervasive than the defendant's games. Were the courts of Kentucky prepared to say that works of the imagination can be linked to a foreseeable danger of anti-social behavior, thereby giving rise to a duty to warn, one would expect to find Kentucky caselaw to that effect in lawsuits involving television networks, book publishers, or the {**11} like. There is no such caselaw. And what little authority exists outside Kentucky favors the defendant, not the plaintiff. See for example, *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D.Fla. 1979) (no cause of action stated against three major television networks for allowing the plaintiffs' minor child to become so "intoxicated" by television violence that he was "stimulated, incited and instigated" to shoot and kill an elderly neighbor.) Cf. *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802, *supra* (absent an allegation of incitement, no claim stated against magazine for publishing a description of "autoerotic asphyxiation" that allegedly prompted plaintiffs' decedent to hang himself).

Both Herceg and Zamora stressed that without actual incitement, First Amendment considerations "argue against the liability of a publisher for," as Herceg put it, "a reader's reactions to a publication. . . ." 565 F.Supp. at 804. In the case at bar, as we have noted, the district court rested its decision solely on constitutional grounds. Other courts have done likewise in analogous situations. See, e.g., *DeFilippo v. National Broadcasting Co., Inc.*, 446 A.2d {**12} 1036 (R.I. 1982) (notwithstanding allegations of negligent failure to give adequate warnings, First Amendment barred recovery against broadcaster in action arising out of a 13-year-old boy's death by hanging after he had watched a mock hanging of Johnny Carson on television); *Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981) (absent "a clear and present danger of injury," First Amendment precluded imposition of tort liability where child hurt self in trying to duplicate sound effect technique demonstrated on television); *Olivia N. v. National Broadcasting Co., Inc.*, 126 Cal.App.3d 488, 178 Cal.Rptr. 888 (1981) (absent incitement, and despite defendant broadcaster's alleged knowledge of studies showing that susceptible persons might imitate television violence, First Amendment barred submission to jury of action filed on behalf of 9-year-old victim of bizarre sexual crime committed by minors allegedly copying {**383} similar crime depicted on television), cert. denied, 458 U.S. 1108 (1982); *Bill v. Superior*

Court, 137 Cal.App.3d 1002, 187 Cal.Rptr. 625 (1982) (First Amendment concerns required entry of summary judgment for defendants, producers of {**13} a violent movie, in lawsuit brought on behalf of girl shot outside theater where defendants' movie was shown).

The able opinion of the district court in the present matter shows the seriousness of the constitutional concerns. A Kentucky court considering the application of Kentucky's common law in this situation would obviously be aware of the constitutional problems looming in the background -- and if possible, we believe, such a court would avoid applying the common law in a way that would bring the constitutional problems to the fore. The constitutional problems would be avoided, of course, by holding that the plaintiff failed to show a justiciable issue as to any breach of a recognized legal duty -- and that is where we think the Kentucky courts would come out.

IV

By itself, moreover, a breach of duty is not enough to warrant recovery; there can be no liability for negligence if the negligence is not shown to have "caused" the injury complained of. And the courts of Kentucky have long recognized that the chain of causation may be broken by "facts {that} are legally sufficient to constitute an intervening cause." *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 780 (Ky. {**14} 1984).

Facts sufficient to constitute an intervening cause "are facts of such 'extraordinary rather than normal,' or 'highly extraordinary,' nature, unforeseeable in character, as to relieve the original wrongdoer of liability to the ultimate victim." *Id.*, quoting *House v. Kellerman*, 519 S.W.2d 380, 382 (Ky. 1974), and Restatement (Second) of Torts @ 442(b), 447.

Although Kentucky courts may once have treated the issue of intervening or superseding cause as one that could be resolved by the jury, even in the absence of a factual dispute, the highest court of Kentucky has now held to the contrary:

"The question of whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury." *House v. Kellerman*, 519 S.W.2d at 382 (footnote omitted).

The fact of Johnny Burnett's suicide is undisputed. The third paragraph of Mrs. Watters' complaint affirmatively avers "{that} on the 29th day of September, 1987 the deceased departed this world as a direct and proximate result of a gun shot wound self inflicted by said deceased." Whether that extraordinary and tragic occurrence was or was not {**15} a "superseding cause" is thus a legal issue that must be resolved by the court.

Courts have long been rather reluctant to recognize suicide as a proximate consequence of a defendant's wrongful act. See, e.g., *Scheffer v. Washington City V.M. & G.S.R.R.*, 105 U.S. 249 (1882). Generally speaking, it has been said, the act of suicide is viewed as "an independent intervening act which the original tortfeasor could not have reasonably {been} expected to foresee." *Stasiqf v. Chicago Hoist & Body Co.*, 50 Ill.App.2d 115, 122, 200 N.E.2d 88, 92 (1st Dist. 1964), aff'd sub nom. *Little v. Chicago Hoist & Body Co.*, 32 Ill.2d 156, 203 N.E.2d 902 (1965), as quoted in *Jarvis v. Stone*, 517 F.Supp. 1173, 1175 (N.D.Ill. 1981).

There are several exceptions to the general rule. Where a person known to be suicidal is placed in the direct care of a jailer or other custodian, for example, and the custodian negligently fails to take appropriate measures to guard against the person's killing himself, the act of self destruction may be found to have been a direct and proximate consequence of the custodian's breach of duty. *Sudderth v. White*, 621 S.W.2d 33 (Ky.App. 1981). And because Kentucky's {**16} Workers' Compensation Act is liberally construed so as to effectuate the beneficent intent of the legislature in enacting it, the suicide of an employee covered by workers' compensation may be compensable if an injury

sustained {**384} in the course of the worker's employment causes a mental disorder sufficient to impair the worker's normal and rational judgment, where the worker would not have committed suicide without the mental disorder. Wells v. Harrell, 714 S.W.2d 498 (Ky.App. 1986).

Outside the workers' compensation area, and beyond the situation where someone with known suicidal tendencies is placed in the care of a custodian who is supposed to guard against suicide, exceptions to the general rule have been recognized where a decedent was delirious or insane and either incapable of realizing the nature of his act or unable to resist an impulse to commit it. Restatement (Second) of Torts @ 455; cf. Jamison v. Storer Broadcasting Co., 511 F.Supp. 1286, 1291 (E.D.Mich. 1981), aff'd in relevant part and reversed in part on other grounds, 830 F.2d 194 (6th Cir. 1987), and the authorities there cited. But the plaintiff in the case at bar points to no facts suggesting {**17} that the suicide of Johnny Burnett came within any such recognized exception.

Johnny was not known to be suicidal, as far as the plaintiff has told us, and he was not placed in the care or custody of defendant TSR. Accordingly, the plaintiff can derive no benefit from cases such as Sudderth v. White. This is not a workers' compensation case, so Wells v. Harrell is not in point. Even under principles of workers' compensation law, moreover, it would have to be shown affirmatively that Johnny would not have taken his own life absent a mental disorder induced by exposure to Dungeons & Dragons. That would be hard to do, and there has been no attempt to do it. The fact is, unfortunately, that youth is not always proof against the strange waves of despair and hopelessness that sometimes sweep seemingly normal people to suicide, and we have no way of knowing that Johnny would not have committed suicide if he had not played Dungeons & Dragons. Finally, of course, it does not appear that Mrs. Watters can show that Johnny was delirious or psychotic, or that he acted under an irresistible impulse or while incapable of realizing what he was doing.

On the contrary, Mrs. Watters' affidavit {**18} shows affirmatively that Johnny Burnett, who lived in her household throughout his life, never caused Mrs. Watters any problems. He went to school regularly, and he took care of a paper route. The record contains no affidavit from a psychiatrist or similar expert suggesting that he suffered from any psychosis. As far as the record discloses, no one had any reason to know that Johnny Burnett was going to take his own life. We cannot tell why he did so or what his mental state was at the time. His death surely was not the fault of his mother, or his school, or his friends, or the manufacturer of the game he and his friends so loved to play. Tragedies such as this simply defy rational explanation, and courts should not pretend otherwise.

The judgment for the defendant is AFFIRMED.

SHEILA WATTERS, Individually and as Administratrix, ESTATE OF JOHNNY BURNETT, DECEASED, PLAINTIFF, v. TSR, INC., a/k/a TSR HOBBIES, INC., DEFENDANT

Civil Action No. C88-0298 P(J)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, PADUCAH DIVISION

715 F. Supp. 819; 1989 U.S. Dist. LEXIS 7955

May 31, 1989, Decided and Entered

COUNSEL: {*1}

Charles A. Saladino, Attorney at Law, Paducah, Kentucky, Attorney for Plaintiff

Stephen E. Smith, Jr., McMURRY & LIVINGSTON, Paducah, Kentucky, Attorney for Defendant

OPINIONBY: JOHNSTONE

OPINION: MEMORANDUM OPINION

EDWARD H. JOHNSTONE, CHIEF UNITED STATES DISTRICT JUDGE

Plaintiff Administratrix brings this wrongful death action against Defendant, the publisher and manufacturer of the game " Dungeons & Dragons, " on the theory that Defendants' alleged negligence is responsible for her son's suicide.

" Dungeons & Dragons" (D&D) is a role-playing game in which players use their imaginations in a fictional medieval world where they pretend their characters are having adventures. The abilities and characteristics of each character consist of numerical values assigned to areas of strength, intelligence, dexterity, constitution, wisdom and charisma. The game characters participate in one or more adventures during the game as described in the various books and manuals published by Defendant. These adventures are narrated and orchestrated by one game participant known as the Dungeon Master. The results of various encounters between characters are determined by using dice and the tables provided in the D&D publications. {*2}

Plaintiff casts her son as a "devoted" player of Dungeons & Dragons, who became totally absorbed by and consumed with the game to the point that he was incapable of separating the fantasies played out in the game from reality. She states that as a result of his participation in a D&D game "he lost control of his own independent will and was driven to self-destruction." Complaint at 2.

Plaintiff claims that TSR breached its duty to her son by negligently publishing and distributing D&D game materials, or in the alternative, by failing to warn "mentally fragile" persons such as decedent of the possible dangerous consequences of playing D&D.

TSR has moved to dismiss the complaint, on the grounds that its publication of D&D manuals and games are privileged under the first amendment's guarantee of freedom of speech. In the alternative TSR argues that it owed no duty to Plaintiff's son and that decedent's suicide was an intervening superseding cause of death, breaking the chain of causation.

THE FIRST AMENDMENT

The first amendment is indeed implicated in this case where Plaintiff seeks an award of damages based on the content or effect of TSR's publication. An imposition of liability on {*3} TSR for the suicide of Plaintiff's son would have as much and perhaps more of an inhibiting impact on its future

publications than fear of prosecution under a criminal statute. *New York Times Company v. Sullivan*, 376 U.S. 254 (1964).

The infrequency with which courts have allowed encroachments upon the right to speak or express one's viewpoint reflects the cherished place the right of self expression holds in our society. "The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature." *Martin v. City of Struthers*, 319 U.S. 141 (1943) (Black, J.) (citations omitted). "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government." *Thornhill v. Alabama*, 310 U.S. 88, 95.

The amendment protects the publication of books, magazines, [*4] newspapers, and motion pictures, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); and its guarantees are applicable to state action under the fourteenth amendment's due process clause. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The amendment's protection is not limited to political expression or comment on public affairs. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). The first amendment's protection is broader than that. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. State of Alabama*, supra at 102 (1940). "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges v. State of California*, 314 U.S. 252, 269 (1941). Whether the publication is sold for a profit has no bearing on the amount of protection to which the first amendment entitles it. *Joseph Burstyn Inc.*, supra at 501.

Under these principles, [*5] the publication and distribution of the "Dungeons and Dragons" material, whether it is classified as literature or merely a game, falls within the class of publication which is generally afforded protection under the first amendment. In *Hammerhead Enterprises, Inc., v. Brezenoff*, 707 F.2d 33 (2d Cir. 1983) the court held that a game satirizing public assistance programs was entitled to first amendment protection. This protection extends to publications such as "Dungeons and Dragons," whether they are disseminated for the purpose of informing the public or merely for providing entertainment. *Winters v. People of State of New York*, 333 U.S. 507 (1948).

Mrs. Watters' objection to the D&D game is that it exerted some type of mind control over her son, eventually resulting in his withdrawal from society and his domination by the D&D concept. The essence of her objection to the game involves both the content of the game and the effect which it allegedly had on her son. Restrictions based on the content of speech and those based on injuries caused by speech must meet separate analytical criteria. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW @ 12-2 (2d ed. 1988).

A. Content-based [*6] Restrictions

The general rule with regard to restrictions aimed at the content of a particular speech or publication is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . ." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). The first amendment extends protection to materials even thought they may offend the sensibilities or tastes of some or a majority of members of society. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943). Generally the "choice, between the dangers of suppressing information and the dangers of its misuse of it is freely available" is one which "the First Amendment makes for us." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 770 (1976). This rule applies just as strongly where the restriction occurs subsequently through a tort action as where speech is

detarded because of a criminal statute. See New York Times, *supra*.

In order to survive scrutiny under the first amendment a content-based restriction "must be a precisely drawn means of serving a compelling state interest." *Consolidated Edison* {7} Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980).

The theories of liability sought to be imposed upon the manufacturer of a role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms. It cannot be justified by the benefit Plaintiff claims would result from the imposition. The libraries of the world are great reservoir of works of fiction and nonfiction which may stir their readers to commit heinous acts or violence or evil. However, ideas expressed in one work which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness. As was stated by the second Mr. Justice Harlan, "one man's vulgarity is another man's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). Atrocities have been committed in the name of many of civilization's great religions, intellectuals, and artists, yet the first amendment does not hold those whose ideas inspired the crimes to answer for such acts. To do so would be to allow the freaks and misfits of society to declare what the rest f the country can and cannot read, watch, and hear. n1 The court's statements in *Zamora v. Columbia Broadcasting System*, 480 F. Supp. {8} 199, 205 (S.D. Fla. 1979) in the context of television programming is even more apt when first amendment protection for publications is concerned. "(The) right of the public to have broad access to programming and the right of the broadcaster to disseminate should not be inhibited by those members of the public who are particularly sensitive or insensitive." *Id.* (Citations omitted).

n1 Despite Plaintiff's arguments to the contrary, it follows that TSR is not required to place any warning directed to "mentally fragile" persons on the D&D publications. Because the first amendment protects TSR from liability based on the content of publication, it likewise cannot constitutionally be required to warn its readers of possible consequences of reading or playing the game materials.

The first amendment safeguards the freedom of individuals to express themselves in their own way and leaves to the individual receiving their message the decision whether to accept or reject, emulate or ignore. As Mr. Justice Brandeis stated:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative {9} forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty Fear of serious injury cannot alone justify suppression of free speech and assembly. men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.

Whitney v. California, 274 U.S. 357, 375-76 (Brandeis, J., concurring).

The first amendment prohibits imposition of liability on TSR based upon the content of the game " Dungeons and Dragons. "

B. Restrictions Aimed at Noncommunicative Impact

Although the D&D publications come within the range of material protected by the first amendment, the right of free speech is "not absolute at all times and under all circumstances." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942). Certain classes of speech are subject to limitation under the first amendment, including obscenity, *Miller v. California*, 413 U.S. 15 (1973); "fighting words," *Chaplinsky*, *supra*; defamatory invasions of privacy and libel, *See New York Times v. Sullivan and Time, Inc., v. Hill*, *supra*; and words {10} "likely to produce or incite imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Only in these particular classes of cases has the right of freedom of speech been found to be inferior to the interests of

society in limiting such speech.

The reason that speech is unprotected in these cases flows naturally from the philosophy behind the first amendment's prohibition on content-based restrictions on speech. The public and the concept of freedom are better served if the ideas expressed in a speech or publication are left to thrive or perish in the open marketplace of public or personal debate rather than by having their message controlled or eradicated by a state censor. *Abrams v. United States*. 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

In each of the unprotected types of speech, the speech itself either creates an injury or "tends to incite an immediate breach of the peace." *Chaplinsky*, supra at 571-72. Generally the first amendment requires that dangerous ideas be exposed for what they are though the give and take of public discussion or by the listener's intuition. The negative impact such ideas may have on society are remedies {*11} through application of "more" speech, not by censorship. In the words of Thomas Jefferson: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by he false reasonings; these are safer corrections than the conscience of the judge." n2 Because in certain instances, "more" speech cannot undo the injury which the "bad words" have caused or there is not time for "more" speech, such speech may be prohibited before it is uttered or punished afterwards.

n2 Cited in the concurring opinion of Mr. Justice Brandeis in *Whitney v. California*, supra at 375 n.3.

It is clear form the record that the D&D publications do not fall into one of these unprotected classes of speech. The very manner in which the D&D game allegedly injured Plaintiff's son resolves all doubts as to whether the game is unprotected by the first amendment.

Plaintiff does not assert that her son was injured after playing " Dungeons and Dragons" one time or even after a few times. Rather, she asserts that his injury occurred after five years of playing the game. The basis for {*12} not protecting the types of speech listed is not applicable where the injury does not immediately result from the speech itself n3 or where the speech does not "incite imminent violence and such violence is likely to occur." See *Brandenburg*, supra.

n3 Although under Plaintiff's pleadings it could be argued that each time decedent played D&D he was incrementally or subliminally injured, where the injury alleged is so uncertain, the rational for not protecting "words that wound" is absent. A holding which would eliminate first amendment protection for this type of injury would have the effect of dissolving any distinction between content--based restrictions and restrictions based on the non-communicative impact of speech.

The injury alleged here is one which can be prevented by "more" speech. The rationale for denying first amendment protection applicable in cases of obsceniy, fighting words, libel, and incitement to violence, is absent.

A similar claim was also rejected by the court in *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D.Fla. 1979). There the plaintiffs claimed that their son had become addicted to the violent programs broadcast by the three {*13} major networks resulting in his desensitization to violent behavior and his killing an 83-year old woman. Id. at 200. The court held the general complaint of continuous exposure insufficient to fall within one of the unprotected classes of speech. Id. at 204. n4

n4 Several cases addressed in Defendant's brief illustrate instances where persons have been injured after reading books or watching a television program or a movie. In each case the court held there to be insufficient "incitement" to justify denying first amendment protection. See *DeFilippo v. National Broadcasting Co., Inc.*, 446 A.2d 1036 (R.I. 1983) (where the plaintiff's son hanged himself after watching a stung performed on "The Johnny Carson Show");

Olivia N. v. National Broadcasting Co., Inc., 178 Cal. Rptr. 888 (Cal.App.1982) (where the plaintiff was raped with a bottle by juveniles allegedly acting upon the stimulus of observing an "artificial rape" scene in a television drama); Walt Disney Productions, Inc., v. Shannon, 276 S.E.2d 580 (Ga.1981) (where a child was injured trying to reproduce a sound effect demonstrated on a television program by rotating a BB inside an inflated balloon).

The injuries in each of these cases present a stronger claim for redress under the "incitement" theory than that of Plaintiff. In each case, however, the court held the broadcast to be protected by the first amendment. {*14}

Because the first amendment shields TSR from liability for the death of Plaintiff's son, it is unnecessary to address Defendant's tort-based defenses.

For the reasons stated above Defendant TSR's motion for summary judgment is GRANTED. An appropriate Order will accompany this Memorandum Opinion.

DATED May 31, 1989

SUMMARY JUDGMENT

Pursuant to the accompanying memorandum opinion, Defendant TSR's motion for summary judgment is GRANTED and the complaint of Plaintiff Watters is DISMISSED.

IT IS SO ORDERED.

DATED May 31, 1989

Daniel E. Remeta, Appellant, v. State of Florida, Appellee

No. 69,040

Supreme Court of Florida

522 So. 2d 825; 1988 Fla. LEXIS 439; 13 Fla. Law W. 245

March 31, 1988

PRIOR HISTORY: {*1}

An Appeal from the Circuit Court in and for Marion County, Carven D. Angel, Judge - Case No. 85-1471-CF-A-Y.

COUNSEL: James B. Gibson, Public Defender and Larry B. Henderson, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida, for Appellant.

Robert A. Butterworth, Attorney General, and Joseph N. D'Achille, Jr., Paula C. Coffman and Sean Daly, Assistant Attorneys General, Daytona Beach, Florida, for Appellee.

JUDGES: McDonald, C.J., and Overton, Ehrlich, Shaw, Barkett, Grimes and Kogan, JJ., concur.

OPINION:

PER CURIAM.

Daniel E. Remeta appeals his conviction for first-degree murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm both the conviction and the sentence of death.

Remeta had been involved in a series of murders and robberies throughout three states during a two week period in early 1985. On February 8, 1985, the clerk of an Ocala, Florida, convenience store was murdered during a robbery. An autopsy of the victim revealed four gunshot wounds: one to the stomach, one to the upper chest, and two to the head, all made by a .357 Magnum gun. The appellant, Daniel Remeta, was later extradited to Florida in response to an indictment charging {*2} with him with the murder.

Two days after the Ocala murder, on February 10, 1985, Remeta and one companion entered a convenience store in Waskom, Texas, where they robbed the cashier, Camillia Carroll, at gunpoint, abducted her to a location two to three hundred feet from the store and shot her five times with the .357 Magnum used in the Ocala shooting. Miraculously, Carroll lived and testified to the events of that day at Remeta's trial in Florida. At the time of the Florida trial, Remeta had not been convicted of the crimes against Carroll.

On February 13, 1985, the manager of a Stuckey's gas station located along Interstate Highway 70 in Kansas was shot and killed with the same .357 Magnum gun used in the Ocala murder. Shortly thereafter, a Kansas sheriff following Remeta's car on the highway noticed suspicious activity and signaled for him to pull over. When he approached, one of Remeta's companions exited the passenger side of the car and shot the sheriff twice.

Remeta and his companions fled the scene and went to a grain elevator, where they abducted two men and took their truck. Shortly thereafter, the men were made to lie face down in the roadway and each was shot in the back {*3} of the head and killed with the same .357 magnum gun. The truck was later chased into a farmyard by Kansas authorities and a shoot-out occurred, in which one of Remeta's companions was killed and the other injured. Remeta pled guilty to charges of homicide and aggravated robbery against the Stuckey's store clerk and received two consecutive life sentences. Remeta also pled guilty to the

killings of the grain elevator employees and received two consecutive life sentences with no eligibility for parole for eighty-five years.

The Florida trial commenced in May, 1986. Defense counsel, after consulting with Remeta in a holding cell outside the courtroom, waived Remeta's presence during preliminary questioning of the jury venire. Before trial, the state filed a notice of intent to offer evidence of other crimes, wrongs, or acts pursuant to section 90.404(2), Florida Statutes (1985). At trial, the state was allowed to introduce the testimony of Camillia Carroll over Remeta's objection.

Carroll testified that on February 10, 1985, after Remeta and his friend had robbed the convenience store where she was working, they kidnapped her and drove her to a location two to three hundred feet away {*4} and shot her five times. Remeta objected to the testimony on the basis that it was not relevant to any material fact in issue, that the evidence was relevant solely to prove bad character or propensity, that the evidence was not necessary to the state's case, and that the evidence was not sufficiently similar to modus operandi and identity. The state presented a stipulation of fact that one of the bullets recovered from Carroll's body was fired by the gun which had killed the Ocala convenience store clerk two days earlier and which was found three days later in close proximity to Remeta.

In its case-in-chief, the state also presented several statements made by Remeta which the trial court found to have been freely and voluntarily made. A Kansas Bureau of Investigation agent had interviewed Remeta at Remeta's request and related that Remeta admitted involvement in both of the convenience store clerks' shootings, but implicated his deceased companion as the triggerman in both incidents. Remeta was also interviewed at his request by a newspaper reporter. Remeta told the reporter that he and his friends had robbed the Ocala convenience store because they needed money, and that he was {*5} the only one who had planned the robbery. Remeta also admitted sole possession of the .357 magnum revolver at the time of the Ocala murder. Remeta offered several alternative explanations for killing the victim, including that he "just liked to kill people" and that he "just didn't care." In a different interview with a television reporter, Remeta made a general comment on his intent to eliminate witnesses by stating, "{L}ike Florida, they ain't got no witnesses. Anytime I seen a witness, I took him out, or at least shot him."

In an interview with a member of the state attorney's office, Remeta first stated that he had committed the Ocala murder, but, at a later point, changed his story to implicate his companion as the triggerman. There was also presented videotaped portions of Remeta's testimony in other court proceedings, in which he stated he had possession of the gun used in the Ocala murder while in Kansas. Carroll had testified it was Remeta who had the gun at the Texas convenience store robbery. Remeta, as part of his theory of defense, attempted to establish that it was his accomplice who had possession of the murder weapon and was the triggerman in the Ocala murder. Remeta {*6} was found guilty by the jury of first-degree murder for the Ocala robbery.

During the penalty phase of the trial, Remeta introduced testimony of his mother, an expert clinical psychologist, and several social workers who had known Remeta since his childhood.

The state presented evidence of appellant's prior convictions, including his pleas of guilty to the Kansas crimes of first-degree murder and aggravated robbery. It also presented portions of a videotaped interview which the appellant had with a reporter containing his admission of executing two hostages so that they would not cause trouble.

The jury recommended imposition of the death sentence and the trial judge imposed the death penalty, finding that the four statutory aggravating factors clearly outweighed the four mitigating factors.

Guilt Phase

Remeta asserts several errors with regard to the guilt phase of his trial.

First, he contends that the trial court erred in failing to obtain a knowing, voluntary, and intentional waiver of his right to testify at trial. We reject this argument and find the trial court in this jurisdiction has no obligation to secure this type of affirmative waiver.

In his second point, Remeta {7} contends that the jury should not have been permitted to hear numerous witnesses testify about the offenses committed in Texas and Kansas as this testimony was inadmissible under *Williams v. State*, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959), and under sections 90.404(2) and 90.403, Florida Statutes (1985). We reject this contention and find that the evidence was properly admitted. The testimony was relevant to help establish appellant's identity and the extent of his participation in the Ocala murder in view of his asserted defense that his accomplice was the primary perpetrator and triggerman in the killing. We note that Remeta presented similar fact evidence in an effort to demonstrate that his companion possessed the Ocala murder weapon during the shoot-out in Kansas. We expressly reject Remeta's contention that the testimony of the Texas robbery survivor was cumulative to the evidence presented. Instead, we find it was clearly proper to establish Remeta's possession of the murder weapon and counteract Remeta's statements blaming the crimes on his companion.

In his third point, appellant claims the trial court erred in not obtaining an express personal waiver {8} from Remeta for his absence during the general qualification of the jury. Counsel for Remeta expressly waived Remeta's presence. It is important to understand the distinction between the general qualification of the jury by the court and the qualifications of a jury to try a specific case. In the former, the court determines whether prospective jurors meet the statutory qualification standards or whether they will not qualify because of physical disabilities, positions they hold, or other personal reasons. The general qualification process is often conducted by one judge, who will qualify a panel for use by two, three, or more judges in multiple trials. Counsel or a defendant does not ordinarily participate in this type of qualification process, although neither is excluded from doing so. In many instances, counsel and the defendant are not present because this preliminary qualification process occurs days prior to the trial.

Under the facts of this case, it is evident that defense counsel clearly understood this type of qualification process when he said:

Your Honor, I went back and advised my client what it was. He's in the holding cell right now and I told him that these were {9} just general questions that the court asked with respect to the age of the prospective jurors and family status, and if they had any illnesses, and had nothing to do with the specific questions we asked. He agreed to waive his presence at that proceeding.

It is uncontested that Remeta was present during the qualification of the specific jury to try his case, the entire individual voir dire, and the exercise of his peremptory challenges. We find no error in the general jury qualification process. We also totally reject Remeta's claim that his voluntary absence during his mother's testimony was error because the trial court did not make suitable inquiry. Accord, *Amazon v. State*, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314 (1986). The record reflects the trial court contemporaneously inquired of the appellant and obtained an express waiver of his presence during the testimony of his mother.

After a thorough review of the entire record, we find the evidence clearly sufficient to sustain Remeta's conviction of first-degree murder.

Penalty Phase

The trial judge, following the jury's recommendation of death, found the following four aggravating circumstances to {10} justify imposition of the death sentence: (1) that Remeta had been previously convicted of nine felonies which involved the use or threat of force to another person; specifically, three first-degree murders, two aggravated kidnappings, two aggravated robberies, an aggravated battery of a law enforcement officer, and an aggravated battery; (2)

that this first-degree murder was committed while the defendant was engaged in the commission of a robbery; (3) that this first-degree murder was committed for the purpose of avoiding or preventing a lawful arrest, based on the defendant's own statements that he "took the witnesses out" or "tried to"; and (4) that this first-degree murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court also found the following four mitigating circumstances: (1) that Remeta had a mental age of approximately thirteen years; (2) that Remeta had a deprived childhood, was raised in an unstable, poverty-stricken home by alcoholic parents and was an abused child; (3) that Remeta was of low-average to average intelligence and subject to discrimination because of his partial American Indian {11} heritage and his speech impediment; and (4) that Remeta is a long term substance abuser, who was institutionalized from age thirteen due to delinquent and criminal behavior. After finding these specific factors, the trial court expressly determined that "the aggravating circumstances far outweigh the mitigating circumstances so that the only appropriate sentence in this cause is death.

Remeta raises three challenges to the penalty phase of his trial. He first contends that the trial court erred in finding the aggravating circumstances that the murder was committed for the purpose of avoiding arrest. We reject this contention. Appellant's own statements establish a basis for the trial court to properly conclude that Remeta's predominant motive for murdering the Ocala convenience store clerk was to eliminate him as a witness. In addition, other physical and circumstantial evidence was introduced which overwhelmingly supported this aggravating circumstance. Kokal v. State, 492 So. 2d 1317 (Fla. 1986); Johnson v. State, 442 So. 2d 185 (Fla. 1983), cert. denied, 466 U.S. 963 (1984); Pope v. State, 441 So. 2d 1073 (Fla. 1983).

In his second point, Remeta challenges the {12} application of the aggravating circumstances that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. We also find that this aggravating circumstance is supported by the record and is consistent with the principles we recently adopted in Rogers v. State, 511 So. 2d 526 (Fla. 1987). The evidence establishes that Remeta planned the robbery in advance and planned to leave no witnesses.

We find without merit Remeta's claim that the jury instructions on the aggravating circumstances were inadequate because they failed to sufficiently set forth the elements of each of the aggravating circumstances. We decline to address the claim that the trial court erred in imposing court costs on him, rather than imposing community service. As we have on numerous occasions, we reject appellant's claim that Florida death penalty statutes violate the sixth, eighth, and fourteenth amendments. See, e.g., Long v. State, 517 So. 2d 664 (Fla. 1987); Smith v. State, 457 So. 2d 1380 (Fla. 1984); Martin v. State, 455 So. 2d 370 (Fla. 1984); Henry v. State, 377 So. 2d 692 (Fla. 1979).

For the reasons expressed, we {13} affirm first-degree murder conviction and sentence of death.

It is so ordered.

McDONALD, C.J., and OVERTON, ERHLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur.

STATE OF NORTH CAROLINA v. MARK EDWARD THOMPSON

No. 217A90 - Cumberland

Supreme Court of North Carolina

402 S.E.2d 386; 1991 N.C. LEXIS 264

December 11, 1990, Heard in the Supreme Court
April 3, 1991, Filed

SUBSEQUENT HISTORY: As Corrected.

PRIOR HISTORY: {*1}

Appeal by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing consecutive sentences of life imprisonment entered by Herring, J., on 25 September 1989, in Superior Court, New Hanover County. Defendant's motion to bypass the Court of Appeals on additional judgments allowed by the Supreme Court 1 June 1990.

COUNSEL: LACY H. THORNBURG, Attorney General, by ELLEN B. SCOUTEN, Assistant Attorney General, for the State.

WILLIAM O. RICHARDSON and RICHARD B. GLAZIER for defendant-appellant.

JUDGES: Frye, Justice.

OPINIONBY: FRYE

OPINION: On 2 February 1987, the Cumberland County Grand Jury indicted defendant on first degree burglary, robbery with a dangerous weapon and first degree murder charges. The first count of the indictment charged defendant with breaking and entering the occupied dwelling house of Paul H. and Janie M. Kutz during the nighttime between the hours of 11:30 p.m. on 1 December 1986 and 12:30 a.m. on 2 December 1986, with the intent to commit larceny therein, in violation of N.C.G.S. § 14-51. Counts two and three of the indictment charged defendant with unlawfully, willfully and feloniously taking and carrying away, by means of an assault with a deadly weapon, and from the person and presence {*2} of Paul H. and Janie M. Kutz, specifically described personal property, whereby the lives of Paul H. and Janie M. Kutz were endangered, in violation of N.C.G.S. § 14-87. Counts four and five of the indictment charged defendant with the murder of Paul H. and Janie M. Kutz in violation of N.C.G.S. § 14-17. All of the offenses were alleged to have occurred between the dates of 1 December 1986 and 2 December 1986. On defendant's motion, Judge Giles Clark ordered a change of venue from Cumberland County to New Hanover County where the trial took place.

The State presented evidence which tended to show that defendant, Mark Edward Thompson, age seventeen, was in the army and stationed at Fort Bragg, North Carolina, when the crimes occurred. In November of 1986, defendant and Jeff Meyer (Meyer), age twenty, were playing Dungeons and Dragons, a game of adventure in a medieval setting, where several Ninja assassins go into the house of an elderly couple and assassinate them.

On 1 December 1986, dressed in their Ninja outfits, defendant and Meyer broke into the Kutz home in rural Cumberland County around 11:15 p.m. The defendant and Meyer chose the Kutz home because it had something like a moat {*3} around it, which matched particular features of the game they were playing. After breaking into the house they found Mr. Kutz, age sixty-nine, in a recliner and Mrs. Kutz, age sixty-two, asleep in the bedroom. They killed Mr. Kutz by stabbing him seventeen times. They killed Mrs. Kutz by stabbing her twenty-five times.

Defendant and Meyer stole jewelry, credit cards and a television from the Kutz home. They drove back to Fort Bragg, still dressed in their Ninja

outfits, and were stopped by military police because they were in an off-limits area. The officer who stopped them saw a knife, some jewelry, and a television set inside the vehicle. Upon searching the truck, the officer found credit cards and business papers which belonged to Paul Kutz. Another military police officer found two pairs of latex gloves with blood on them in the truck. The officers then contacted the Cumberland County Sheriff's Department. Deputy Stewart was sent to the Kutz residence. Deputy Stewart went inside the Kutz home and found the dead bodies of Mr. and Mrs. Kutz.

An autopsy was performed on both victims. Laboratory experts found the following: 1) One of the Ninja shoes defendant was wearing was consistent {^{*4}} with a footwear impression found on a seat cushion from the living room of the Kutz home; 2) The cushion was on a chair located under the front window; 3) Blood on the butterfly knife, found closest to defendant when stopped, matched the blood type of Mrs. Kutz; 4) Fibers from Mrs. Kutz's nightgown matched fibers on the knife found next to defendant; 5) Fibers from Mrs. Kutz's bed blanket and also her quilt matched those found on the same knife; 6) A fiber found on defendant's shirt matched the fibers of Mrs. Kutz's bedsheets; and 7) A carpet fiber found on defendant's pants matched the carpet in the den where Mr. Kutz's body was found.

Defendant confessed to being present at the time of the murders, stealing the property, and watching Meyer stab Mrs. Kutz. Defendant stated in his confession that Meyer broke into the house and opened the front door for defendant to enter the house. Defendant later confessed to his psychologist that he participated in the stabbing of Mrs. Kutz.

Defendant presented an insanity defense. Dr. Rollins, a forensic psychiatrist at Dorothea Dix Hospital, testified that defendant had a personality disorder and was emotionally unstable, but at the time he committed {^{*5}} the crimes, defendant knew the nature, quality, and wrongfulness of his acts. Dr. Logan, a forensic psychiatrist at the Menniger Clinic in Topeka, Kansas, testified that defendant had an identity disorder and that he knew the nature of the crimes, but he did not realize the moral impact of what he was doing. However, Dr. Logan later testified defendant knew the killing was morally wrong, but defendant quickly retreated into a fantasy. Dr. Foster, a forensic psychologist with the Federal Bureau of Prisons in Rochester, Minnesota, testified that in his opinion, defendant was not psychotic, that he knew right from wrong in a sense of cognitive knowing, but could not appreciate the quality of his act.

The jury found defendant guilty of first degree burglary, two counts of robbery with a dangerous weapon, and two counts of first degree murder. After hearing evidence in the penalty phase, the jury recommended that defendant be sentenced to life imprisonment on both counts of first degree murder. The trial judge sentenced defendant to two consecutive terms of life imprisonment for murder and an additional consecutive life term for first degree burglary plus forty years imprisonment for the {^{*6}} combined counts of robbery with a dangerous weapon. Defendant appealed.

The first question we address is whether the trial court committed reversible error in instructing the jury that everyone is presumed sane and that soundness of mind is the natural and normal condition of people. We conclude that the trial court did not err.

Defendant contends that the part of the North Carolina Pattern Jury Instructions which states that "everyone is presumed sane" and that "soundness of mind is the natural and normal condition of people" is an unconstitutional burden shifting jury charge and blatantly at odds with *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344 (1985), and *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39 (1979). Defendant contends that Franklin and Sandstrom prohibit the use of conclusive or even rebuttable presumptions against the defendant in any criminal case.

In Franklin, the trial court instructed the jury that "the acts of a person of sound mind and discretion are presumed the product of a person's will, but the presumption may be rebutted and a person of sound mind and discretion is

presumed to [*7] intend the natural and probable consequences of his acts, but the presumption may be rebutted." 471 U.S. at 316, 85 L. Ed. 2d at 354. The Supreme Court held in Franklin, that the instruction at issue "undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent." 471 U.S. at 318, 85 L. Ed. 2d at 356.. In Sandstrom, the trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Supreme Court found that the instruction violated the defendant's Fourteenth Amendment right to due process because it tended to relieve the State of the burden of proof, on the critical question of state of mind. 442 U.S. at 524, 61 L. Ed. 2d at 51. The cases relied upon by the defendant prohibit the use of presumptions which relieve the State of the burden of proof of any essential element of the offense. The presumption of sanity does not relieve the State of its burden of proof of any essential element of the crimes committed in this case. In State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988), [*8] this Court concluded that the nature of the insanity defense is a separate issue from proof of the elements of a crime. Just as in Marley, the trial judge in this case instructed the jury that it could not consider the issue of defendant's insanity unless it first found beyond a reasonable doubt the existence of each element of the five crimes for which the defendant had been charged. There was nothing in the trial judge's instruction, considered as a whole, which would lead the jury to understand the instructions to mean that the State was relieved of its burden to prove all of the essential elements of each of the five crimes.

If we could not presume sanity, the State would have to prove sanity in every case, and there would be no burden of proof of insanity on the defendant. This Court has reaffirmed the presumption of sanity in many cases. See State v. Battle, 322 N.C. 69, 366 S.E.2d 454 (1988); State v. Heptinstall, 309 N.C. 231, 306 S.E.2d 109 (1983); State v. Jones, 293 N.C. 413, 238 S.E.2d 482 (1977). The defendant in the present case has not provided an argument sufficient to cause [*9] an overturning of the well-established precedent of this Court.

In defendant's second argument, defendant contends that the trial court committed reversible error in placing the burden of proof on the issue of insanity on defendant in violation of his due process right to have the prosecution prove every element of the crime beyond a reasonable doubt. Defendant contends that the instruction at issue violates due process by shifting the burden of proof on the mens rea element of first degree murder as well as the scienter elements of burglary and robbery with a dangerous weapon.

Defendant concedes that this Court rejected this very argument in State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987), and State v. Mize, 315 N.C. 285, 337 S.E.2d 562 (1985). However, he requests that we reconsider our previous decisions on this matter. We decline to overrule these cases. See State v. Battle, 322 N.C. 69, 366 S.E.2d 454.

In defendant's third assignment of error, he contends that the trial court committed reversible error in refusing to grant his requested jury instruction on the definition of "knowing [*10] the nature and quality of the act" as that term is used in the North Carolina Pattern Jury Instruction on insanity. It is defendant's contention that the testimony of expert witnesses concerning his mental state indicated that he could not appreciate the quality of the acts which occurred on 1 December 1986, or the fact that anyone was killed. According to defendant, a definition of the term "knowing" was required. The defendant requested the following jury instruction in connection with his insanity defense:

The definition of "knowing" in this context encompasses more than just minimal awareness of facts or the ability to mechanically repeat what has happened. Knowledge, for purposes of this test, exists when defendant is able to evaluate his conduct in terms of its actual impact upon himself and others and when he is able to appreciate the total setting in which he is acting.

The trial court refused to give this instruction. We find no error.

North Carolina utilizes the M'Naghten rule, and our cases have stated the

test for insanity as follows:

An accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise {11} be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act.

State v. Johnson, 298 N.C. 47, 65-66, 257 S.E.2d 597, 612 (1979) (quoting State v. Swink, 229 N.C. 123, 125, 47 S.E.2d 852, 853 (1948)). In most M'Naghten jurisdictions the word "know" is not defined at all, leaving the jury free to determine the meaning on the basis of the expert testimony received at trial. W. LaFave and A. Scott, Substantive Criminal Law, @ 4.2 (1986). The failure to define "knowing" has been explained as follows:

An expansive definition of "knowing" may create two significant difficulties. First, expert psychiatric witnesses may invoke a definition of "knowing" which could confuse lay jurors unfamiliar with psychiatric terms. The jury, judge, and psychiatrist well may have different conceptions when using the word "knowing." Furthermore, cross-examination probably would exacerbate the confusion.

{12} Second, the complexity involved in defining "knowing" differently from its common usage may undermine the advantages of the M'Naghten insanity test, which jurors theoretically understand without difficulty.

Comment, The Insanity Defense in North Carolina, 14 Wake Forest L. Rev. 1157 (1978).

In the present case, there was both lay and expert testimony on the issue of insanity. The trial judge charged the jury in pertinent part as follows:

The test of insanity as a defense is whether the defendant at the time of the alleged offense was laboring under such a defect of reason from disease or deficiency of the mind as to be incapable of knowing the nature and quality of the act; or, if he did know this, whether he was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to the act committed.

This defense consists of two things. First, the defendant must have been suffering from a disease or defect of his mind at the time of the alleged offense. Second, this disease or defect must have so impaired his mental capacity that he either did not know the nature and quality of the act as he was committing it; or, {13} if he did, that he did not know that this act was wrong. (Emphasis added.)

In addition the trial court gave a supplemental instruction as follows:

With respect to whether or not the defendant knew his act was wrong, the law does not require a defendant to know his act in question was both legally wrong and morally wrong. The test does not involve the understanding of abstract wrong. What it does require is that the defendant understand the moral wrongfulness of the particular and specific act at issue. (Emphasis added.)

We are not convinced that a further attempt to define the words "know," "knowing," or "knowledge" would be helpful to the jury in determining whether defendant had met his burden of establishing his insanity. Telling the jury, as defendant requested, that knowledge exists when one "is able to appreciate the total setting in which he is acting" would, in light of the expert testimony in this case, tend to confuse rather than assist the jury. Therefore, the trial judge did not err in refusing to give the requested instruction.

In defendant's next assignment of error, he contends that the trial court erred in denying defendant the opportunity to open and {14} close the final arguments because he bore the burden of proving his insanity. Defendant contends

that since his presence at the scene of the crimes and his partial participation were uncontradicted, defendant bore the burden of proving the only salient issue to the jury, the question of his insanity. Defendant concedes that this Court previously considered this issue and ruled that, even in insanity cases, where the defendant introduces evidence, Rule 10 of the General Rules of Practice for the District and Superior courts controls, with the State having the right to opening and closing arguments. *State v. Battle*, 322 N.C. 69, 366 S.E.2d 454. However, defendant contends that considering the prosecution's less than accurate arguments in this case, the fact that both prosecutors argued after defense counsel, and counsel's repeated requests to rebut those arguments solely limited to the issue of insanity, *Battle* is not dispositive.

As defendant concedes, this Court has considered and rejected this very argument in *Battle*. While defendant contends that the present case is different because of the prosecutor's less than accurate arguments, he has brought {*15} forth no assignment of error complaining of prosecutorial misconduct, nor did he object to the prosecutor's argument; therefore, we find our decision in *Battle* dispositive. This assignment of error is without merit and rejected.

Defendant next takes issue with the trial court's refusal to grant his requested jury instruction concerning limitations on the acting in concert theory as it relates to insanity and mental health defenses. The trial judge charged the jury in accordance with the Pattern Jury Instruction as follows:

For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime, {such as first degree burglary or armed robbery or murder}, each of them is held responsible for the acts of the others done in the commission of that crime.

Defendant requested, as a supplement to the Pattern Jury Instruction, that the trial judge also give the following instruction:

This instruction is subject to and is limited by the Court's subsequent instructions with respect to the defenses of diminished capacity and insanity. That is to say, if the {*16} jury finds the State has failed to prove beyond a reasonable doubt that defendant possessed the specific intent to kill, premeditate or deliberate or that he shared the same criminal purpose as Jeffrey Karl Meyer, then the fact that Meyer possessed these elements or acted with a specific criminal purpose may not be transferred to this defendant.

Furthermore if the defendant proves to the jury's satisfaction that he was insane at the time of the crime, a defense which I will fully instruct you on later, then whether or not Jeffrey Karl Meyer was sane or not is irrelevant to the issue of this defendant's sanity.

Defendant contends that the Pattern Jury Instruction was insufficient to explain the law in the context of the facts in this case. Defendant contends that the jurors could have relied on Meyer's mental state to override any doubts they had about defendant's mental state and thereby find defendant guilty of the crimes by acting in concert.

When a request for instructions is correct in law and supported by the evidence in the case, the court must give the instruction in substance. *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976). However, "the {*17} trial court is not required to give a requested instruction in the exact language of the request." *Id.* at 54, 229 S.E.2d at 174.

The State contends, *inter alia*, that the trial court gave the substance of the relevant portion of the requested instruction numerous times throughout the charge. The trial judge instructed the jury that if, as a result of the lack of mental capacity, this defendant did not have the specific intent to kill the deceased which was formed after some premeditation and deliberation, then he would not be guilty of first degree murder. He then reminded the jury as follows, "Again, I point out to you that the lack of mental capacity as I am discussing it here is entirely separate and distinct from the affirmative

defense of insanity." Our review of the jury instructions discloses a careful effort on the part of the trial judge to explain to the jury that the mental state of defendant, and not Meyer's mental state, is the relevant inquiry. We are satisfied that the instructions given by the trial judge were in substance those requested by defendant, except for the last sentence of the proposed instructions which should not [*18] have been given at that time. Thus, we find no error in failing to give the requested additional instructions.

Defendant next takes issue with the trial court's refusal to grant his requested jury instruction regarding defendant's flight from the scene. Defendant's requested instruction cautioned the jury that it could not consider flight as evidence of premeditation and deliberation in order to convict him of murder in the first degree. Defendant contends that the trial judge should have instructed the jury on flight because 1) the evidence is uncontroverted that defendant left the scene of the murder, and 2) the prosecution argued, in a direct attempt to show premeditation and deliberation, that defendant and Meyer took steps on Fort Bragg to avoid apprehension by the military police. We do not agree that an instruction on flight was required in this case.

A trial judge is not required to instruct a jury on defendant's flight unless "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." State v. Levan, 326 N.C. 155, 164-65, 388 S.E.2d 429, 435 (1990). Mere evidence that defendant [*19] left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension. Id. Here, the evidence showed that defendant and Meyer left the Kutz residence in defendant's truck after the crimes were committed. Defendant drove to Fort Bragg. Once defendant reached the military reservation, he mistakenly got off the main road and began driving along a road behind the officer's club which was considered an off-limits area. Defendant stopped his truck next to a dumpster behind the officer's club; however, upon seeing the military police car approaching his truck, defendant began to drive away. This evidence alone is not enough to warrant an instruction on flight.

Defendant argues that the evidence, when coupled with the prosecution's summation, is enough to require an instruction on flight. During summation, the prosecutor stated that once the defendant noticed the officer approaching his truck, he started to drive away. The prosecutor argued, "when they were pulled over, {defendant} had his driver's license in his hand." The defendant contends that this argument by the prosecutor was the equivalent [*20] of an argument that defendant was taking steps to avoid apprehension and thus required an instruction on flight. The State contends that the prosecutor's argument was made to show the jury that the behavior of the defendant when stopped suggested that he knew the consequences of his acts. Having reviewed the transcript of the jury argument, we agree with the State. Nowhere in the prosecutor's argument do we find any contention that there was flight by the defendant.

Defendant's next assignment of error is that the trial court erred in failing to give the following requested jury instruction:

While the intentional use of a deadly weapon may, in and of itself, give rise to a presumption that a killing was malicious, this fact alone is insufficient to sustain a finding of premeditation or deliberation. This language is taken almost verbatim from State v. Zuniga, 320 N.C. 233, 258, 357 S.E.2d 898, 914 (1987). In Zuniga, this Court made that statement while conducting appellate review of the legal sufficiency of the evidence to support the jury's finding of premeditation and deliberation. The statement was not intended to be a jury instruction. It is confusing [*21] and not helpful to instruct a jury in terms of what an appellate court will consider sufficient to sustain a jury finding. The proposed instruction is so couched, and it is therefore not an appropriate jury instruction.

In any event, a trial court is not required to give a requested instruction verbatim even when it is a correct statement of law, so long as the requested instruction is given in substance. State v. Monk, 291 N.C. 37, 229 S.E.2d 163. In the present case, the trial court gave defendant's requested instruction in

substance by giving instructions on malice, intentional use of a deadly weapon, premeditation and deliberation, and second degree murder. The trial court also instructed the jury that if it found malice and unlawfulness the defendant would be guilty of second degree murder. Only upon an additional finding of premeditation and deliberation could the jury find defendant guilty of murder in the first degree. The instructions given by the trial judge accomplished the same result as the one-sentence statement from Zuniga which was requested by defendant. This assignment of error is without merit and rejected.

Defendant next contends that {*22} the trial court committed reversible error in denying defendant's motion to exclude or limit the number of photographs of the victims' bodies introduced into evidence and repeatedly shown to the jury, and allowing the jury to view all the photographs again at the close of the State's evidence. It is defendant's contention that no relevant fact concerning the numerous insults to the bodies of the victims could be gleaned from the photographs that was not or could not otherwise have been testified to or presented by documentary evidence. Defendant argues that given the number of exhibits offered, their extraordinary gruesomeness, their detail, the fact that they were in color, and the fact that a number of them were close-ups of grotesquely distorted faces of the victims mandates a finding that most of the photographs admitted possessed little probative value relevant to the extraordinary prejudice to the defendant engendered by such admission.

Photographs of homicide victims are admissible at trial even if they are "gory, gruesome, horrible, or revolting, so long as they are used by a witness to illustrate his testimony and so long as an excessive number of photographs are not used {*23} solely to arouse the passions of the jury." State v. Murphy, 321 N.C. 738, 741, 365 S.E.2d 615, 617 (1988); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987). The use of photographs and slides of a victim to illustrate testimony of a witness for the State, if excessive and for the purpose of inflaming the jury, is prejudicial error necessitating a new trial. State v. Hennis, 323 N.C. 279, 372 S.E.2d 523 (1988) (State presented ninety-nine photographs, trial court allowed thirty-five photographs into evidence, which were shown on a large screen behind defendant's head).

In this case, we find that the ten photographs presented by the State were properly admitted into evidence. Although some of the photographs may be considered gruesome, they were relevant to illustrate the testimony of two State's witnesses and were not excessive or repetitious. Also, the trial court gave cautionary instructions on the use of the photographs for illustrative purposes, thus limiting the likelihood of unfair prejudice from use of the photographs. This assignment of error is rejected.

In defendant's next assignment of {*24} error, he contends that the trial court erred during sentencing on the burglary and robbery convictions by finding as a nonstatutory factor in aggravation that the burglary and robberies were planned, premeditated and deliberate. Defendant argues that allowing the sentencing court to increase sentences for these offenses on the basis that the defendant planned, premeditated, and deliberated them would violate the rule that a factor should not be used to aggravate a sentence unless it makes the defendant more blameworthy than he already is as a result of committing the crime. State v. Hines, 314 N.C. 522, 335 S.E.2d 6 (1985).

Pursuant to N.C.G.S. § 15A-1340.4(a), a sentencing judge may consider any nonstatutory aggravating factor which is reasonably related to the purposes of sentencing and is proven by the preponderance of the evidence. One who commits a burglary or robbery which is meticulously planned, with substantial time and opportunity for the offender to change his mind, is arguably more blameworthy than one who commits the same crime on the spur of the moment. It is the degree of planning and deliberating that makes the crime more blameworthy. {*25} A factor that increases an offender's culpability is reasonably related to the purposes of sentencing. N.C.G.S. § 15A-1340.3 (1988).

Defendant further argues that since burglary and robbery are specific intent crimes, a certain amount of planning is inherent in the offenses; therefore, a finding in aggravation that defendant planned the crime is improper. The State

relies upon State v. Chatman, 308 N.C. 169, 301 S.E.2d 71 (1983), in which this Court upheld the finding of a nonstatutory aggravating factor that the offense was planned in a burglary and rape case. In Chatman, the defendant was convicted of first degree rape, first degree sexual offense, and first degree burglary. Id. at 171, 301 S.E.2d at 73. There was evidence presented that the defendant would drive around in his car at night and break into homes for the purpose of raping women. Id. at 180, 301 S.E.2d at 77. The defendant in Chatman argued that the evidence was insufficient to support a factor in aggravation that the offense was planned. This Court stated, "We reject defendant's position that in order to find that the {26} offense was planned it was necessary to show that defendant methodically surveyed . . . houses or carefully chose a particular night before entering. The argument is specious. We find plenary evidence to support {a} finding {that the offense was planned}." Id.

In the present case, it is clear that defendant took extraordinary steps to prepare for the commission of the crimes. There was ample evidence apart from that presented to prove robbery and burglary to support the trial court's finding that defendant planned, premeditated, and deliberated the crimes. Here, defendant and Meyer were looking for an elderly couple who lived in a rural area to assassinate and rob in accordance with their game of dungeons and dragons. They had purchased Ninja clothing and a butterfly knife to be used when they found suitable victims. Defendant and Meyer followed Mrs. Kutz, an elderly woman, home from the grocery store. They found the Kutz home to be similar to the house described in the game of Dungeons and Dragons because the house had something like a moat around it. Later that night, defendant and Meyer drove near the Kutz home, parked the truck away from the house, approached the house on {27} foot, entered and killed both victims by stabbing them to death.

The State has shown by a preponderance of the evidence the meticulous planning that preceded the actual commission of these crimes. It is apparent that what the sentencing judge actually found was that the extraordinary planning in this case exceeded that which is ordinarily present or inherent in the crimes of first degree burglary and robbery with a dangerous weapon. Thus, we find no error in the trial court's finding as a nonstatutory factor in aggravation that the burglary and robberies were planned. We treat the additional finding that the offenses were premeditated and deliberate as surplusage.

In defendant's last assignment of error, he contends that the trial court erred at sentencing on the burglary and robbery charges by finding in aggravation that defendant took advantage of the victims being helpless and defenseless. It is defendant's contention that the trial court made no additional factual findings supporting this nonstatutory aggravating factor. Defendant contends that the only two conceivable explanations for this finding in aggravation would have to be the age of the victims and the fact that they were {28} sleeping when the defendant entered their home. Defendant notes that the Court of Appeals held in State v. Underwood, 84 N.C. App. 408, 352 S.E.2d 898 (1987), that the fact that the victim was asleep when defendant committed an assault with a deadly weapon inflicting serious injury was not a proper aggravating factor because the victim was in no worse position than any other unsuspecting victim.

In the present case, the evidence showed that defendant told his psychologist that he and Meyer had followed Mrs. Kutz home from the grocery store, found the characteristics of the house to their liking and decided to rob it. The evidence also showed that the defendant had been playing a game of Dungeons and Dragons which involved going into the house of an elderly couple living in a rural area and assassinating them. Mr. and Mrs. Kutz were both in their sixties and lived in a rural area. Mrs. Kutz was asleep when defendant and Meyer broke into the Kutz home and robbed them. This evidence supports a finding that the victims were vulnerable and helpless and that the defendant took advantage of their situation.

"Pursuant to the Fair Sentencing Act, the trial court {29} is not confined to consideration of statutory factors only, but may consider nonstatutory factors to the extent they are 1) related to the purposes of

sentencing and 2) supported by the evidence in the case." State v. Taylor, 322 N.C. 280, 287, 367 S.E.2d 664, 668 (1988). In Taylor, this Court held that a trial court could properly find as a nonstatutory aggravating factor that a defendant used information gained as a result of his inquiry to determine whether the victim would be alone and defendant's use of keys surreptitiously copied while they were entrusted to his wife. In the present case, defendant knew that Mrs. Kutz was elderly, and he followed her home one evening, thus discovering that she lived in a rural area. The State contends that the victim being asleep is a particular vulnerability because it is a circumstance not inherent in most crimes, whereas lack of warning or lack of provocation is inherent in most crimes. We agree with the State. We believe that a person who is attacked while asleep is in a more vulnerable position than one who is conscious of his surroundings. The sentencing judge did not err in considering the age of the victims, {*30} the location of their home in a rural area, and the fact that one of the victims was asleep at the time of the crime, in determining that defendant took advantage of the victims being helpless and defenseless. To the extent the Court of Appeals' decision in Underwood conflicts with this decision, we overrule it.

We conclude that defendant has had a fair trial, free of prejudicial error.

NO ERROR.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARK L.
PATRICK, Defendant-Appellant

No. 90-3602

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
1991 U.S. App. LEXIS 11414

March 1, 1991, Argued
June 5, 1991, Decided
June 5, 1991, Filed

PRIOR HISTORY: {*1}

On Appeal from the United States District Court for the Northern District of Ohio; No. 89-00205; Alice M. Batchelder, District Judge.

COUNSEL: For Plaintiff - Appellee, Samuel A. Yannucci, Asst. U.S. Attorney, ARGUED, Office of the U.S. Attorney, Cleveland, Ohio.

For Defendant - Appellant, Mark L. Patrick, Federal Correctional Institution, Milan, Michigan, Debra M. Hughes, ARGUED, Office of the Federal Public Defender, Cleveland, Ohio.

JUDGES: Keith and Boyce F. Martin, Jr., Circuit Judges; and Contie, Senior Circuit Judge.

OPINIONBY: MARTIN

OPINION: Mark L. Patrick appeals his jury conviction for kidnapping in violation of 18 U.S.C. § 1201(a). Patrick raises two issues in his appeal: (1) did the district court's failure to advise him of the nature of the charge and the potential penalties upon conviction render his waiver of the right to counsel invalid; and (2) did the district court err in departing upward under Federal Sentencing Guidelines § 5K2.0. For the following reasons, we affirm the judgment of the district court.

In March of 1986, Mark Patrick moved into the house that Larry and Pamela Wise shared with their two daughters. The Wises asked Patrick to sit with the two girls and keep the house while they worked; {*2} for this they sought no rent. The Wises and Patrick had become friends in the early 1980's through a common interest in the game of Dungeons and Dragons. Soon after moving in with the Wises, Patrick developed a strange obsessive relationship with their daughter, Crystal. He spoke of raising her and someday marrying her. At the time, Crystal was less than one year old.

Needless to say, Larry and Pamela became distraught over Patrick's obsession with Crystal. They tried unsuccessfully to move him out of their house, and in 1989, they decided the solution was to move out themselves and leave Patrick. In late May or early June, the Wises told Patrick of their resolution. Just before the Wises moved, in the early hours of June 15, Patrick went to Crystal's bedroom and took her from her bed and headed for West Virginia. At the time, Crystal was only three years old. Patrick moved among various members of his family in West Virginia before being arrested at the home of a cousin, Cynthia Tansey. Patrick told the arresting officers that Crystal was not the daughter of Larry and Pamela Wise but that she was his daughter, Krystal Anne Patrick. He also told them that he was a druid priest.

Patrick's {*3} brief here begins with the attestation that he was living as a druid priest in the Virgin Islands "awaiting orders from {his} superiors," before moving in with the Patricks. Patrick testified at trial that he was "ordered" to go to Ohio to guard, protect, and educate the new born child of Larry Wise. In his defense at trial he testified that in May of 1989 he received further "orders" to take Crystal "posthaste to England no later than the

thunder moon so as she may be installed in office, then transported to Europe for education."

At the trial a letter was introduced that Patrick wrote to a friend on June 15, 1989, at 12:30 A.M., immediately before he took Crystal to West Virginia. The letter stated in part:

By the time you are reading this, I will be with the Inner Circle and the High Druids. Believe me, this is the most devastating thing I have ever done. My name as well as my reputation is down the tubes, but the age of peace is saved and will manifest itself.

I have had my traveling orders and documents since the new moon. Don't be offended, but secrecy was of the utmost importance as a strategist well-knows. . . I have no words to say or excuses. I obeyed my orders to {*4} the letter, since St. Thomas {the Virgin Islands}, i.e. my return from there.

Because of Patrick's absolute insistence that he represent himself, the court granted the United States' motion for a psychological examination. The examiner from the prison medical center in Springfield, Missouri stated:

In regard to the question asked by the court, Mr. Patrick is not suffering from a mental disorder or defect which would adversely affect his ability to understand the nature and consequences of the proceedings against him or to assist properly in his own defense. Mr. Patrick has expressed a desire to act as his own attorney . . . His determination to go pro se is considered to be volitional and not due to mental illness. It is this examiner's opinion that Mr. Patrick is competent to stand trial.

The district court arraigned Patrick on November 30. Patrick expressed his desire to waive legal counsel at his arraignment. After the court told Patrick of his right to counsel and the right to have appointed counsel, stated, "in the fact that this crime carries a life sentence, and if that is the sentence to be imposed upon a finding of guilty, I wish that blame to fall upon my head rather {*5} than someone else." Despite Patrick's expressed desire to do all of his own advocacy, the court appointed an Assistant Federal Public Defender to assist Patrick in an advisory capacity.

At Patrick's request, and with advance notice to advisory counsel, the Assistant United States Attorney met with Patrick to discuss various concerns including representation, the nature of the charges, the constitutional right to trial, and the sentencing procedure.

At a December 20 pre-trial, the court again addressed the issue of self-representation, concluding, "it is, of course, your right not to have counsel and to represent yourself, and I respect that right, but I urge you to rethink that position carefully." At another pre-trial meeting on January 22, 1990, the court went through a question and answer sequence addressing the potential disadvantages of self-representation. Patrick expressed his understanding and maintained his desire to proceed pro se. Immediately thereafter, a jury was empaneled and on January 24 the jury found Patrick guilty of kidnapping Crystal Wise.

The court sentenced Patrick on June 21, finding that a sentence "substantially greater" than the 87-108 month guideline range {*6} was appropriate. The court departed upward under Federal Sentencing Guidelines @ 5K2.0 to arrive at a total sentence of 180 months or 15 years.

Patrick first asserts the district court failed to advise him of the charge and the potential penalties, thus making his waiver of the right to counsel invalid. The legal standard for the waiver of the right to counsel is well settled, it must be knowingly and intelligently made. Carnley v. Cochran, 369 U.S. 506, 513 (1962). This circuit has determined that a sufficient inquiry by the court is necessary before a waiver of the right to counsel can be made. United States v. McDowell, 814 F.2d 245, 250 (6th Cir.), cert. denied, 484 U.S. 986 (1987). The record in this case details such an inquiry. The record

contains numerous explanations and cautions by the court to Patrick regarding the hazards of self-representation. The record establishes Patrick's understanding of the charges against him and the possible penalties. Patrick expressly stated in a pre-trial meeting that he did not want a lawyer because of the risk of a life sentence. Throughout the proceedings, Patrick repeated his {*7} desire to represent himself. His assertion that these waivers were invalid because he did not know of the charges against him or the possible penalties is not supported by the record. Indeed, on this record he was informed.

Patrick also asserts that the court erred in departing under Federal Sentencing Guidelines @ 5K2.0. This section allows for departure when "there exists an aggravating or mitigating circumstance of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" United States Sentencing Commission, Guidelines Manual, @ 5K2.0 (Nov. 1990). It addresses situations where the nature of the offence is so rare that the Guidelines do not take into account all the relevant culpable behavior involved. See United States v. Joan, 883 F.2d 491 (6th Cir. 1989).

When departing under this section, a district court must "identify clearly the aggravating factors and its reasons for connecting them to the permissible grounds for departure." United States v. Rodriguez, 882 F.2d 1059, 1066 (6th Cir. 1989) (quoting United States v. De Luna-Trujillo, 868 F.2d 122, 124 (5th Cir. 1989), {*8} cert denied, 110 S. Ct. 1144 (1990)). Here, the district court identified two aggravating factors as its basis for departure. First, the court noted "this is a crime of kidnapping of a specific victim for a specific purpose," i.e. "the defendant intended to have this child to himself and eventually . . . when the child reached about the age of thirteen, {he} intends to marry her so that she would be the mother of his children." Second, the court determined it is "absolutely clear that this defendant, whether for the religious reasons stated by him at various times, or for other reasons, intends to complete the crime . . . no matter what the period of incarceration might be, he intends to find this child and complete facilitating her reaching her destiny, at least her destiny as he sees it."

Federal kidnappings "generally encompass three categories of conduct: limited duration kidnapping where the victim is released unharmed; kidnapping that occurs as part of or to facilitate the commission of another offense (often, sexual assault); and kidnapping for ransom or political demand." Guidelines Manual, @ 2A4. 1, comment. (backg'd.). Patrick's conduct does not fit into {*9} any of these general kidnapping categories; his admitted purpose in kidnapping Crystal was to possess her and keep her from her parents for her entire life. Patrick's purpose and conduct are indisputably rare and sufficiently aggravating to warrant departure under @ 5K2.0. See Guidelines Manual, @ 5K2.8, p.s. (court may increase sentence for unusually heinous conduct).

Thus, there being no error, the judgment of the district court is affirmed.

JMK

Compiled by a role-
playing game

This is a provisional listing as of 8 April 1991. There has been no verification of the citations from Independent, Toronto Star, Newsday, United States Law Week, Gannett, American Lawyer Newspaper Group, EMAP. AP and UPI are the copies sent out and may have appeared in various sources in an edited form. NSH means no suggested headline.

LEXIS

APPELLATE COURT DECISIONS

- Missouri v. Molitor, 729 S.W.2d 551 (1987)
Wisconsin v. Dower, 412 N.W.2d 902 (1987)
New York v. Ventiquattro, 527 N.Y.S.2d 137 (1988)
Remata v. Florida, 522 So.2d 825 (1988)
State of North Carolina v. Mark Edward Thompson, (1991). Accomplice of Meyer, citation not yet assigned.
Watters v. TSR, 715 F.Supp. 819 (1989)
Watters v. TSR, 904 F.2d 378 (1990)

NEXIS

BANNING, SCHOOLS

- Gibbs, Judy (1980, April 29). School discontinues use of "Dungeons and Dragons" game. AP. Heber City, UT.
AP (1981, December 10). School board overturns dice game ban. AP. Roseburg, OR.
UPI (1982, March 10). NSH. UPI. Masterpiece of attack on censors by board president. Tell City, IN.
AP (1983, February 9). Students petition to restore "Dungeons" to after school program. AP. Alamogordo, NM.
AP (1983, February 16). School board rules out children's game. AP. Alamogordo, NM.
UPI (1983, February 23). NSH. UPI. Shreveport, LA Parkway high school. "Died out" on own.
AP (1983, March 9). NSH. AP. Akron, OH Copley-Fairlawn middle school; banned.
Latimer, Leah Y. (1983, August 19). "Dungeons and Dragons" banned by Arlington school board. Washington Post, B-5. Arlington, VA.
Washington Post (1983, August 25). School board actions. author, VA 5. D&D only extra-curricular activity not approved.
Washington Post (1983, September 22). Scool board actions. author, VA 5. Ban protested.
UPI (1983, October 27). NSH. UPI. Oakdale, LI; game only with written permission.
Hamilton, Robert A. (1985, May 26). Game is target of fight in Putnam. New York Times, 11 CN 4. Putnam, CT.
Youngblood, Ruth (1985, July 23). Firm says Dungeons and Dragons is safe. UPI. TSR fights back in Putnam case.
UPI (1985, July 22). Quote of the day. UPI. Creme (leader of Putnam ban).
Brooke, James (1985, August 22). Suicide spurs town to debate nature of a game. New York Times, B-1. Putnam.
UPI (1985, October 8). NSH. UPI. Faculty-advisor quits D&D group, killing it.
UPI (1987, March 10). NSH. UPI. State level protest of Albuquerque school use of "mental techniques" such as RPG and computer games.
UPI (1987, March 12). NSH. UPI. Albuquerque support for state ban.

BANNING, OTHER THAN SCHOOLS

- UPI (1981, June 12). Fundamentalist Christians fear "Dungeons and Dragons". UPI. Cordova [Covina?] Parks ban.
UPI (1981, June 13). Another look at "Dungeons and Dragons." UPI. Covina Parks to reconsider, no results stated.
AP (1981, October 30). College revokes club charter over Dungeons & Dragons. AP. Ricks College (Mormon), Rexburg, ID.
UPI (1982, March 13). NSH. UPI. Slidell, LA city councilman demands YWCA ban D&D.
Shales, Tom (1983, October 22). New war on kids TV; violence and the hard sell are back. Washington Post, C-1. ACT protest distorted by NCTV getting into the act.
Austin, Beth (1985, January 18). Dungeons & Dragons controversy. UPI. NCTB/B.A.D.D. petition to FTC.

Information Access (1985, January 28). FTC asked to require warnings before TV show; Dungeons & Dragons. Broadcasting, vol. 108, page 88.

UPI (1985, January 18). Dungeons & Dragons" linked to suicide. UPI. By B.A.D.D./NCTV.

Mitternight, Helen L. (1985, March 22). Groups blame fantasy game for several deaths. AP. B.A.D.D./NCTV petition support.

Sherwood, Tom & Moore, Molly (1985, May 31). Virginia GOP assembling; second spot race may steal the show. Washington Post, C-1-2. Game-bashing platform.

Chicago Tribune (1985, June 16). TV, kids and war toys forming an unholy trinity. author, III-3. Radecki tries again.

UPI (1985, July 11). NSH. UPI. Kenosha library board refuses to ban D&D after Dower case.

Zimmer, Robert Lee (1985, August 17). Researcher zaps TV-show violence. Los Angeles Times, V-11. Radecki finally attacks Donald Duck - for fighting with nephews.

Adler, Jerry & Doherty, Shawn (1985, September 9). Kids: the deadliest game? Newsweek, page 93. NCTV strikes again.

UPI (1985, September 21). NSH. UPI. Collection of anti-game references.

Young, Gayle (1987, July 18). Fantasy games linked to real deaths. UPI. NCTV front group.

Bloch, Peter (1989, June 8). Pictures made them do it? Newsday, page 88. Penthouse editor joins the battle.

Tooley, Jo Ann & Schrof, Jeannie M. (1989, July 24). For mature audiences only. US News, page 66. Considers AD&D a comic book.

Waterhouse, Rosie (1990, October 21). Evangelists campaign against Hallowe'en. Independent, page 3. Doorways to Danger targets RPG, among others, as occult.

Strickland, Sarah & Waterhouse, Rosie (1990, October 28). Witch-hunt is launched over books and TV. Independent, page 3. Censorship groups, British style.

BURGLARY

anonymous

AP (1984, September 28). NSH. AP. Burglary to outwit alarm systems, detective sole source of D&D connection.

Coprock

UPI (1990, April 23). Police begin to doubt girl's story. UPI. Very confused grave robbery case.

Thompson, Womack, Cox, Pottgen, Day

AP (1990, June 20). Grave robbery tied to Dungeons and Dragons game. AP. Sheriff source of connection.

UPI (1990, July 9). Grave robberies may be fantasy game gone awry. UPI.

MURDER

anonymous

Seiser, H.E. (1987, September 12). Youth to be charged Monday. UPI. D&D mentioned as evidence of normalcy, played "a year ago".

Beach

Witt, Howard (1985, July 17). Fantasy game probed in teen killings; young suspect an avid player. Chicago Tribune, II-1, 6. Claims "insanity curse" part of game.

Witt, Howard (1985, August 1). Boy charged as adult in 2 slayings. Chicago Tribune, IV-1.

Witt, Howard (1985, October 6). Wheaton teen: a troubled youth, a preoccupation with death. Chicago Tribune, II-1, 2.

Dower

Chicago Tribune (1985, June 10). Dungeons & Dragons expert held accountable for murder. author, C-6. Heavy coverage of Redecki testimony, claims he is with University of Illinois. [This item was not found.]

UPI (1987, July 8). NSH. UPI. Court of appeals upholds verdict.

Gates & Rossney

AP (1987, January 31). Two held after arraignment for slaying of family. AP.

UPI (1987, August 15). Cellmate snitches on insanity defense. UPI.

Hans

AP (1986, December 5). Students say failing grade may have prompted shootings. AP. D&D mentioned as evidence accused was "different".

Harpur

Hudson, Kellie (1990, November 6). Murder suspect living a "game", court told. Toronto Star.

Humphrey

Martinez, James (1990, September 12). Slayings suspect: history of mental illness, fondness for knives. AP. D&D merely found in possessions; Eagle Scout.

Justice

Hammer, Joshua (1985, November 18). Driven by his long-buried rage, a 17-year-old student lethally lashes out at his family. Time, page 127. D&D mentioned only in context of B.A.D.D.-indoctrinated rumors. [This item could not be found. 108 is last page.]

Kasten

Smith, Don (1988, June 18). Defendant was loner, his brother tells court. Newsday, page 6.

Colwell, Carolyn (1988, June 21). Tape contradicts "dungeon" defense; jury hears defendant tell of killing parents. Newsday, page 19.

Colwell, Carolyn (1988, June 23). Psychologist supports "dungeons" defense. Newsday, page 23.

Colwell, Carolyn (1988, June 29). Kasten murder case goes to the jury; last arguments focus on mental state. Newsday, page 23.

Longman, Henry G. (1988, June 29). Student convicted in "Dungeons and Dragons" murder case. UPI.

Colwell, Carolyn (1988, June 30). Guilty in parents' murders; jurors reject Kasten's fantasy-game defense. Newsday, page 3.

Smith, Don (1988, October 7). 25 years for killing parents; judge declines to give Kasten maximum term. Newsday, page 3.

Lampasi

Hicks, Jerry (1985, May 9). Role-playing game may have played role in slaying, D.A. says. Los Angeles Times, II-1. [This item was not found.]

Hicks, Jerry (1985, June 7). Lampasi convicted of shooting parents; man guilty of murding father, attempting to kill mother, Los Angeles Times, II-1. [This item was not found.]

Hicks, Jerry (1985, October 18). Lampasi gets 25 years plus for shootings. Los Angeles Times, II-1. 25 to life, judge denies D&D connection. [This item was not found.]

Levens

AP (1987, July 1). Man charged in Dungeons and Dragons death. AP. Game found in possessions, therefore accused and victim were playing at time of crime! Russian roulette; game confused with Killer.

UPI (1987, July 1). Manslaughter indictment in Russian roulette game. UPI. Mentions alcohol; D&D mentioned only by police lieutenant. Nexis source pointed out extreme contrast of two articles.

Meyer

AP (1986, December 6). "Dungeons and Dragons" book found in truck of soldiers charged with murder. AP.

UPI (1986, December 7). Authorities continue to probe fantasy game's connection to slaying. UPI.

UPI (1986, December 14). Families struggle to understand slayings. UPI. Ohara book also found.

UPI (1988, November 16). Meyer gets stay of execution set for January. UPI.

UPI (1988, May 18). Soldier given life sentence for burglary that led to two murders. UPI.

Molitor

UPI (1987, March 31). Court affirms "Dungeons and Dragons" slaying. UPI. Text overwhelmingly states that court rejected any game connection; contrast with headline.

Moore, Davis, & White

Jones, Tamara (1985, July ?). Tragedy mingles lives of popular young mother, three boys. AP. Macon murder. UPI (1987, September 1). NSH. UPI. Trial of Moore. UPI (1987, September 2). NSH. UPI. Trial continues. Harwell, Hoyt (1987, October 8). Youth gets life in prison in fantasy-game killing. UP.

Novak

UPI (1991, March 11). Teen charged in slayings makes first court appearance. UPI. Total D&D connection: friend mentioned that accused talked about the game. Wire Dispatches and staff Reports (1991, March 12). Norfolk student named in slashing deaths. Washington Times, B-2. Pesce, Carolyn (1991, March 22). Mother returns from war to bury slain son, 7. Gannett. UPI (1991, March 12). Murder suspect's hearing open to media. UPI. LaFay, Laura (1991, April 26). Bored to death; the children of a navy community confront murder, bare scars. Washington Post, B1. USA Today (1991, April 26). NSH. Author, 10A. Novak ruled adult. Lucas, Edward (1991, April 27). Killing charge highlights army misery. Independent, page 10.

Rameriz

Noffsinger, Loretta (1983, December 12). Junior high drug ring cited in murder, AP. Only mention of RPG is victim wrote paper claiming to like game while stoned. Abramson, Pamela (1983, December 26). Fast times at the junior high. Newsweek, page 20.

Remeta

UPI (1985, February 15). Crime spree suspect called "disturbed". UPI. Knight-Ridder (1985, February 15). Pieces missing to deadly puzzle; unlikely foursome tied to killings. Chicago Tribune, I-16. Kloss, Kevin (1985, February 17). Trio allegedly motivated by money: murder charges filed in rampage. Washington Post, A-4. Chicago Tribune (1985, March 11). Accused serial killer "couldn't stand people". author, C-3. UPI (1985, March 29). Prosecutor says April meeting planned to exchange information. UPI. UPI (1985, April 5). NSH. UPI. UPI (1985, April 27). NSH. UPI. UPI (1985, May 13). Michigan man pleads guilty to northwest Kansas murders. UPI. UPI (1985, June 14). Jury begins deliberations in double-murder trial. UPI. UPI (1986, June 2). Jury to consider fate Tuesday. UPI. UPI (1986, June 3). Jury deliberating Remeta's fate. UPI. UPI (1987, September 18). Condemned Michigan man wants to die. UPI.

Sellers

Green, Michelle, & Tamarkin, Civia (1986, December 1). Boy's love of Satan ends in murder, a death sentence, and grisly memories. Time, page 154. [this item could not be found; 86 was the last page.]

Underwood, Ervin, Mays, Holley, & Capps

UPI (1989, March 8). Witness describes cult killing. UPI. Conspirators had played. UPI (1988, December 15). Cult slaying victim pleaded with killers, court records show. UPI. Demon possession after game claimed. UPI (1990, January 3). Man faces murder charges in slaying of friend's step-father. UPI.

Upchurch

UPI (1990, January 17). Co-conspirator testifies in textile executive slaying. UPI. D&D connection strictly how conspirators originally met.

Ventiquattro

AP (1986, November 20). Teen convicted of murdering friend in Dungeons and dragons game. AP. AP (1986, December ?). Teen-ager sentenced in slaying linked to game. AP. D&D connection denied by judge. AP (1988, May 20). Youth pleads guilty before retrial in fantasy game murder. AP.

Berliner, Robin, and Bornhoeft, Mary-Agnes (1988, My3 - My 9). Other Courts. American Lawyer Newspapers Group, page 30. Summary of People v. Ventiquattro, March 4, 1989.
Appellate decision in Lexis.

Witte

Chicago Tribune (1985, November 13). Mother told me to murder grandmother, boy tells jury. author, C-8.
[This item was not found.]
UPI (1985, November 14). NSH. UPI.
UPI (1985, November 19). Defense rests at crossbow muder trials. UPI.

SUICIDE

Boyd

UPI (1985, November 20). Police seek motive for boy's death jump. UPI. Had "scorecards" in possession at time.

Egbert

Hilts, Phil (1979, September 8). Mystery of the missing whiz kid: police search tunnels for MSU student; Dungeons and Dragons and a mysterious disappearance at MSU. Washington Post, C-1,3. Mother claims he played but denies he acted out game.
Gavin, Jennifer (1979, September 9). NSH. AP.
Dzwonkowski, Ron (1979, September 10). NSH. AP.
Stroop, Joe (1979, S 14). NSH. AP.
Hilts, Phil (1979, September 15). Michigan mystery; secrecy shrouds whiz kid's return. Washington Post, D-1,4.
AP (1980, August 12). "Missing genius" apparently tried suicide, police say. AP.
AP (1980, August 17). NSH. AP. obit.
AP (1980, August 18). Investigator says he will never tell the story. AP. Dear lies.
Robbins, William (1980, August 25). Brilliant student's troubled life and early death. New York Times, A-20. Suicide was under drugs, Egbert's psychologist says Dear contributory.
Hall, Carla (1984, November 28). Into the dragon's lair; detective William Dear's story of a student suicide. Washington Post, F-1, 18-19.
Mills, Robert (1984, December 23). Game as real as life. New York Times, 7-14. Dungeon Master review.
UPI (1982, October 7). NSH. UPI. Dear in danger of losing license.
UPI (1982, October 19). NSH. UPI. Dear vows fight to save license.

Erwin

AP (1984, November 5). Fantasy game blamed for murder-suicide of young brothers. AP. Police blame game, Henry Copolillo, University of Colorado psychology professor denies it.
UPI (1984, November 5). NSH. UPI. Quotes from Copolillo.
AP (1985, September 17). Police chief: game's company key reason motive of teens' deaths changed. AP. Stallcup blames TSR.
AP (1985, September 18). Dead youths mother: no connection with Dungeons & Dragons game. AP. Crime reason.

Pulling

Isikoff, Michael (1983, August 13). Parents sue school principal; game cited in youth's suicide. Washington Post, A-1, 8. Main material on Bink Pulling's problems.
AP (1983, October 27). NSH. AP. Bracey not liable.
Zibart, Eve (1983, October 27). Judge rejects suit tying suicide to fantasy game. Washington Post, B-7.
Washington Post (1984, June 16). Parents sue game's maker. author, B-2. Pulling v. Bracey.
AP (1983, October 26). Fantasy game lawsuit against principal dismissed. AP.
UPI (1984, September 18). Dungeons and Dragons suit dismissed. UPI.

Stailey

UPI (1985, January 19). School stunned by student's classroom suicide. UPI.

OTHER
anonymous

UPI (1989, October 26). Teens arrested in church vandalism. UPI. Owned D&D books.

Morgan

UPI (1988, June 8). Vagrant allegedly lured children into sex with game. UPI

Patrick

Barnett, Thomas M. (1990, January 23). Bizarre testimony in kidnapping case. UPI. Father of victim claimed to have brought accused back from hell after D&D game.

Schmidt & Gras

Chicago Tribune (1989, March 12). Chief blames cults in teens' bombings. author, C-3. Chief claimed D&D and horror movies "motivation". [This item was not found.]

Williams & others (minors)

UPI (1987, December 3). Fantasy game linked to vandalism. UPI. Detective claimed connection.

SATANIC PANIC

UPI (1981, June 23), NSH. UPI. D&D is evil. Hutchinson, KS.

UPI (1982, January 27). NSH. UPI. Book-burning planned, Udall, KS

Keys, Laurinda (1982, February 26). NSH. AP. Los Angeles Christian Research Institute attacks Covina, CA G/T program.

UPI (1985, July 23). Fantasy game not linked to violence, maker says. UPI. TSR defends.

Zorn, Eric (1986, April 27). Satan worship called dangerous, growing. Chicago Tribune, C-1. Pulling quoted, debate on D&D cited. [This item was not found.]

Vanderknyff, Rick (1987, April 6). Lyrics panned; evangelist sees Satan in rock 'n' roll. Los Angeles Times, 6-15. Glory Ministries (Pennsylvania) headline grab.

Kuykendall, Marsha (1987, October 22). Human sacrifice part of ritual among some cult groups, police say. UPI. Pulling quoted extensively; murders attributed to cult activity, child abuse, particularly day-care, attributed, slight refutation.

AP (1988, February 14). Murder and suicide among teens caught up in dark world of satanism. AP. General satanic panic allegations.

Anderson, Jon (1988, April 18). Satanic crime; police say the devil made some people do it. Chicago Tribune, V-1, 4. Chicago police detective, Robert Simandl, spreads witch-hunting message to mental health professionals.

UPI (1988, August 17). Official warns of rise in satanism. UPI. Paul Banner, Criminal Justice Academy, SC, sees satanists.

UPI (1989, May 4). Expert witness links rock music, occult. UPI. Pulling is "expert".

Thomas, Pierre & Digilio, Alice (1989, February 8). Prince William devil-buster aims to nip satanism in bud. Washington Post, D-3. Gary Lupton, police witch-hunter.

Riordan, Kevin (1989, February 7). NSH. Gannett. Satanic groups abound, and RPG is "dabbling".

Zorn, Eric (1990, June 12). Who's defending rock lyrics now? Chicago Tribune, II-1, 2. Mary Morello, Parents for Rock and Rap; D&D also supported.

Leavitt, Carrick (1990, June 7). Satanism draws nation's youth. UPI. Concord, CA. Standard satanic-panic line from Jerry Johnston, seminar instructor.

Ostling, Richard (1990, March 19). No sympathy for the devil; a cardinal decries satanic influence. Time, page 55-56. O'Connor's hit in the headlines, exorcism revelation. Dale Trahan, Chicago social worker brought in D&D.

Armstrong, Kiley (1990, March 5). Theologians surprised by exorcism disclosure. AP. Reaction to O'Connor's revelations. Simon Harak, theology professor, Fairfield CT, brought in D&D connection.

GENERAL ARTICLES ON RPG

- Weathers, Diane & Foote, Donna M. (1979, September 24). Beware the Harpies! Newsweek, page 109
- Shulins, Nancy (1979, September 19). NSH. AP.
- Smith, Geoffrey (1980, September 15). Dungeons and Dollars. Forbes, page 137-138, 142.
- New York Times (1980, November 2). Dungeons and Dollars. author, 3-19. Condensed Forbes article.
- New York Times (1980, November 9). Dungeons. author, F-24. LTE correcting Dungeons and Dollars.
- UPI (1981, February 2). NSH. UPI. Description of Killer.
- Austin, Mary (1981, February 9). Assignment: find out about Dungeons and Dragons. Christian Science Monitor, page 15.
- Parsons, Cynthia (1981, February 9). Dragons, deities, demigods, evil spirits, and obsession. Christian Science Monitor, page 17. Bashing, but not banning.
- Oman, Anne H. (1981, February 20). Dungeons & Dragons: it's not just a game, it's an adventure. Washington Post, Weekend, page 1,9.
- Ohland, Gloria (1981, May 1). Doers; high priestess of Mistigar. AP.
- UPI (1981, July 14). NSH. UPI. Wiccan priestess sues TSR and anti-gamers, including Torell, for defaming Wicca.
- UPI (1981, October 27). NSH. UPI. Killer and problems with police confrontation.
- Gottlieb, Annie (1981, November 8). Family Affairs. New York Times, 7-12, 40-41. Review of Triplets and Mazes and Monsters.
- Clark, Kenneth R. (1982, January 15). NSH. UPI. Review of Mazes and Monsters.
- Warner, John G. (1982, February 25). NSH. UPI. Williams Atlanta-murder story; witness was fired for playing D&D on job.
- Fadiman, Anne (1982, March). Teenage master of wizardry and enchantment. Life, page 17.
- Blaustein, Mike and Jeremy, Greene, Jay (1982, May). Dungeons & Dragons. Life, page 18: LTE protesting inaccuracies in Teenage master.
- Phillips, David (1982, May). Dungeons & Dragons. Life, page 18: LTE commending Teenage master.
- Stotz, Tim (1982, May). Dungeons & Dragons. Life, page 18: LTE commending Teenage master.
- Rothenberg, Fred (1982, December 28). DBS Movie "Mazes and Monsters" on Tonight. AP. TV review.
- AP (1983, January 19). NSH. AP. Tunnelling at University of Wisconsin.
- New York Times (1983, January 19). Playing games. author, A-22. D&D product of stressful times.
- Comegys, Lee (1983, April 29). Dungeons and Dragons encourages the misfits. UPI.
- McCombs, Phil (1983, June 27). Games people play: unconventional warfare at the Fantasy Fair. Washington Post, B-1.
- Zito, Tom (1983, June 27). Dungeons and Dragons: in this fantasy land of power and treasure, you don't play around. Washington Post, B-1-9.
- New York Times (1984, January 8). Selection of classes for gifted children. author, 11 WC 14. Directory of program offered, including D&D.
- AP (1984, December 6). Christian toys enjoy spirited sales. AP. Includes Dragon Raid and Narnia computer game.
- Witt, Howard (1985, January 27). Fantasy game turns into deadly reality. Chicago Tribune, I-3. Biggies of game-bashing quoted, a few lines from Dieter Strum.
- anonymous (1985, February 14). Dungeons and Dragons in real life. author, I-26. LTE. Light look at games.
- anonymous (1985, February 16). Defense of Dungeons & Dragons. Chicago Tribune, I-8. LTE.
- anonymous (1985, February 16). Dungeons & Dragons and its "dangers" seduction? Chicago Tribune, I-8, LTE.
- Macaulay, Ian T. (1985, June 23). Summer program for gifted. New York Times, 11 WC 12. Use of D&D in G/T camp.
- Neiman, Janet (1985, November 18). Dangers of fantasy world transported from playing tables to corporate lair. Adweek. [no page]. TSR attempt to oust Gygax. [This item was not found.]
- Newton, Miller (1985, December 1). New Jersey opinion: some "experts" only obscure problems of teen suicide. New York Times, 11 NJ 40. Drugs main cause, games not cause.
- US News (1986, March 31). Radical changes in behavior may signal overwhelming stress, says Dr. Cynthia Pfeffer. author, page 66. Interview with psychiatrist.
- Maharaj, Davan (1988, June 16). Defense based on game hasn't won many juries. Newsday, page 27. Radecki claims get most of space, headline only real counter.
- Schissel, Eric (1988, June 30). D&D is not a violent game. Newsday, page 89. LTE.

- McRoberts, Flynn (1988, August 28). Role playing: is it good or evil? Chicago Tribune, V-6. mostly Radecki.
- McRoberts, Flynn (1988, August 28). Fantasies come true; game fair leads players through a labyrinth of fun. Chicago Tribune, V-1, 6. Gen-Con.
- Walsh, Darryl, Coste, Fred, Chase, Mike & Marino, Anthony (Kidsday) (1988, September 25). Mixed nuts. Newsday, II-2. Miscellaneous statistics; D&D mentioned in passing.
- Seaman, Ann (1988, November 25). What's hot, what's not: "interactive" toys spur new worry about violence. Los Angeles Times, 4-1,8-10. Radecki usual v. UCLA professor, Patricia Marks Greenfield, on beneficial aspects; using properly and improperly. Video games get brunt of criticism.
- Lewis-Meilus, Silas & Smith, Darrik (Kidsday) (1988, December 4). Is it Dungeons and Dragons? Newsday, II-4. Defense of game editorial.
- Tax, Meredith (1988, December 5). Raising Attila the Hun. New York Times, A-23. Problem of violent toys; D&D mentioned in passing.
- Pollack, Richard (1988, December 19). Videoetic maniacs; violence in video games. Nation Enterprises, 247,19, page 673. Attack on Video games, Radecki claims 116 D&D deaths in this one.
- Boehm, Helen (1989, September). Toys and games to learn by. Psychology Today, page 62-64. RPG in Strategic Abilities. Actually would fit in most of the categories discussed.
- Brennan, Claran (1989, December 20). Deadly games: interactive computer games. EMAP Business & Computer Publications, page 48. D&D in passing.
- UPI (1990, March 21). NSH. UPI. Kenneth McClure, Washington state prisoner sues over D&D ban.
- Watson, Carol (1990, May 17). Father says son enjoyed taking risks. Los Angeles Times, B-1. Accident victim played game. [This item was not found.]
- United States Law Week (1990, July 3). Children's Games. author, 59 USLW 2012. Watters case.
- Green, Steve (1990, August 13). Escapee known for odd lawsuit against the state. UPI. McClure escapes - temporarily.
- AP (1991, January 27). Prosecutors; white supremacists targeted news media, minorities. AP. Only mention of RPG refers to defendants code names "like in D&D".
- Kelly, Marguerite (1991, February 24). Parent reads a lot into son's love for Stephen King novels. Chicago Tribune, C-6. Advice columnist says fantasy fan normal.
- Tooley, Jo Ann (1991, February 25). Calendar. US News, page 12. Trivia on games: D&D in 13 languages and 9 million play. Both figures doubtful.
- Spencer, Jim (1991, March 28). Staying ahead of the games. Chicago Tribune, C-1. General column on RPG apropos the Novak case.
- Macdonald, Victoria (1991, April 7). Holy crusader on the trail of Satanism. [London] Daily Telegraph. Maureen Davies, Beacon Foundation.
- Johnson, John & Padilla, steve (1991, April 23). Satanism: skeptics abound; worry about devil worship has spread rapidly. But many lurid claims of ritual abuse and human sacrifice by cults do not stand up, some experts say. Los Angeles Times, A1.
- UPI (1991, April 29). Police tactics are questioned by legal experts. UPI.