

1949

# The State of Utah v. Joe G. Trujillo : Brief of Respondent

Utah Supreme Court

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Clinton D. Vernon; Attorney General; Allen B. Sorensen; Assistant Attorney General; Attorneys for Plaintiff Respondent;

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# In the Supreme Court of the State of Utah

STATE OF UTAH,

*Plaintiff and Respondent,*

vs.

JOE G. TRUJILLO, also known as

JOE GARCIA TRUJILLO,

*Defendant and Appellant.*

Case No. 7269

## RESPONDENT'S BRIEF

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*Defendant and Appellant.*

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## RESPONDENT'S BRIEF

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### STATEMENT OF CASE

The defendant and appellant, Joe Garcia Trujillo, appeals from a verdict of guilty of murder in the first degree without recommendation, entered in the Seventh Judicial District Court in and for Carbon County, Utah. The defendant stood charged with unlawfully taking the life of Max Lopez on or about May 26, 1948, in Carbon County,

There was some conflict in the testimony at the trial. Counsel for the defendant, in his statement of facts, reviewed

the testimony of each principal witness, indicating these conflicts. However, we feel he has fairly and adequately presented the facts as adduced at the trial, and it would, therefore, serve no purpose to re-state them here.

The defendant has made thirteen assignments of error. We shall discuss them in order, though not in each instance separately.

## ARGUMENT

### I

THE CONTENTION THAT THE DISTRICT COURT HAD NO JURISDICTION AND THAT THE DISTRICT ATTORNEY HAD NO AUTHORITY TO FILE THE INFORMATION BECAUSE THE INFORMATION WAS FILED IN A DISRICT COURT BEFORE THE PROCEEDINGS BEFORE THE COMMITTING MAGISTRATE WERE FILED IS WITHOUT MERIT.

The record shows the following regarding the commitment of the defendant.

The preliminary hearing was held June 29th, June 30th, and July 1st, 1948, (JR, pages 7 and 8). The order of commitment was made and signed by the committing magistrate July 1, 1948, (JR. 3). The information was filed in the district court July 2, 1948, (JR. 9). The transcript of proceedings before the committing magistrate was signed by the committing magistrate July 6, 1948. (JR. 8), and the order of commitment together with the transcript of proceedings before the committing magistrate were actually filed in the district court

July 6, 1948. The defendant's plea to the information was made by a motion to quash, entered July 12, 1948. (JR. 11).

Defense counsel contends that the district court acquired no jurisdiction over the matter until the order of commitment and the transcript of proceedings before the committing magistrate were filed in the district court; that the information was filed by the district attorney prior to the filing of the order of commitment; that the district court thus had no jurisdiction, and that the defendant's motion to quash should have been sustained on grounds two and three contained therein. (JR. 11).

The record shows that the order of commitment was actually made and entered of record by the committing magistrate on July 1, 1948, (JR. 3).

It is the state's position that the jurisdiction of the district court attached upon the making and entering of an order of commitment, and that the subsequent acts of filing the transcript of proceedings before the committing magistrate and the order of commitment are ministerial acts which, at least in the absence of prejudicial error, have no effect whatsoever upon the jurisdiction of the district court or the authority of the district attorney to file the information therein.

These questions, the validity of the information filed in the district court before the order of commitment, and the jurisdiction of the district court thus acquired, arose in the case of *People v. Tarbox*, 115 Cal. 57, 46 P. 896. The Supreme Court of California had this to say:

“The question \* \* \* is when is the defendant legally committed? We think that occurs when the magistrate has acted judicially, and has made and signed the order of commitment. His judicial functions then cease, and the return of the depositions and order of commitment is a mere ministerial duty. In *People v. Wallace*, 94 Cal. 499, 29 P. 950 it was said: ‘It is doubtless true that the order holding to answer must be in writing; but when, as a result of an examination, such an order has in fact been made and entered upon the docket of the justice, it would seem that no further action on his part is necessary to authorize the district attorney to file an information against the defendant for the offense named in the order.’ In that case—as in the case at bar—the order holding the defendant to answer before the Supreme Court was entered upon the justice’s docket, but was not endorsed on the complaint or depositions.”

The California court has consistently held that a motion to set aside the information on the ground that it was filed before the record of the preliminary examination and the order of commitment by the magistrate was received by the clerk of the district court should be overruled where such information was filed after the preliminary examination in fact had been held and the order of commitment had been made and entered of record by the magistrate and where prior to the trial the record of the preliminary examination and the order of commitment are duly filed with the clerk of the district court. *People v. Bettencourt*, 64 Cal. App. 243, 221 P. 403. *People v. Sacramento Butchers Protective Ass’n. et. al.*, 12 Cal. App. 471, 107 P. 712, 716, *People v. Tanner*, 28 Cal. App. 766, 154 P. 34. *Tanner*



Furthermore, this rule has been followed elsewhere. In the case of *Williams et. al. v. State*, 6 Okla. Cr. 373, 118 P. 1006, 1007, the court stated that:

“It is the fact that there was a preliminary examination or a waiver thereof and a judicial determination thereon by the examining magistrate that a felony has been committed and that there is probable cause to believe the defendant guilty thereof, that authorizes the county attorney to file an information in the district court charging the crime committed according to the facts in evidence on such examination or for the offense charged in the preliminary information when such examination has been waived by the defendant, and such an adjudication is necessary to confer jurisdiction upon the district court.”

The cases of *People v. Thompson*, 84 Cal. 598, 24 P. 384, and *People v. Bomar*, 73 Cal. App. 372, 238 P. 758 are distinguishable under the rule cited above, in that the order of commitment in each case was itself defective. There is nothing in the case at bar which indicates any defect in the order of commitment itself.

Counsel for the defendant urges that the California statutes are distinguishable from those of this state. A comparison of section 105-15-19 *Utah Code Annotated* 1943, and *California Penal Code* section 872 will show that they are practically identical. Defense counsel attempts to distinguish them in their headings, but it will be noted that headings to sections of the Utah Code are not a part of the legislative enactment but rather are merely editorial.

Defense counsel further contends that the phrase “as provided in this code” from section 105-17-1 *Utah Code Annotated* 1943, means “that all acts required to be done by the committing magistrate must be done to confer jurisdiction on the district court.” (Appellant’s brief P. 16). With that general proposition we have no quarrel. However, it is our position that when the committing magistrate made and entered the order of commitment, he exercised the judicial function which conferred jurisdiction on the district court under the provision of 105-17-1; the subsequent filing of the order and transcript of proceedings with the clerk of the district court was ministerial merely, and the district attorney had authority to file the information. The acts precedent to the conferring of *jurisdiction* on the district court—the making of the order of commitment, reducing it to writing and its signature by the committing magistrate—were all done July 1, 1948, one day *prior* to the filing of the information.

The order of commitment is regular on its face (JR. 3). The transcript of proceedings before the magistrate shows that:

“The Court found that the offense of Murder in the First Degree had been committed; that there was sufficient cause to believe the Defendant, Joe G. Trujillo, also known as Joe Garcia Trujillo, guilty thereof; and *it was ordered by the Court* that said Defendant be held to answer to said charge; and that he be committed to the Sheriff of Carbon County without bail.” (JR. 8, *italics added*).

It is true that the affidavit of the magistrate (JR. 50) indicates that the order of commitment was not actually prepared and signed in the presence of the defendant. It does

indicate that this was done later on the same day, July 1, 1948. However, the affiant does state "That at the conclusion of the preliminary hearing as aforesaid affiant herein made an Order holding the defendant for trial in the District Court on the offense set forth in the Complaint on file in the City Court of Price, Utah." (J.R. 50). The order was made "at the conclusion of the preliminary hearing," and it is submitted that the reduction to writing is ministerial. If this delay in reducing the order of commitment to writing be error, there is nothing in the record to show that the rights of defendant were prejudiced thereby, and as set forth above, such error would not be jurisdictional.

Defense counsel's entire argument under points one and two of his brief shows nothing that was prejudicial to the rights of the defendant. Nor does the record indicate that the defendant was prejudiced in any manner by the procedure followed in making the order of commitment and in filing the information. Section 105-43-1 *Utah Code Annotated* 1943, provides as follows:

"After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment."

It is submitted that the defendant has shown nothing, in or out of the record, that would indicate prejudice to the defendant in any manner by the method used in his commitment and the filing of the information.

## II

THE TRIAL COURT, IN INSTRUCTION NO. 2, PROPERLY DISTINGUISHED BETWEEN MURDER IN THE FIRST AND SECOND DEGREES.

In its instruction on murder in the first degree, the trial court submitted two theories to the jury:

“ \* \* \* the slayer must before the commission of the act or acts resulting in the death of the deceased have *deliberately* and *premeditatedly* formed a specific intention or design to kill the person slain; or, must have *deliberately* and *premeditatedly* formed a specific intention or design to kill another and in the attempt to kill such intended victim kill the person slain instead.” (JR. 15 italics added).

The court then instructed on the element of time for reflection and consideration prior to delivering the fatal blow.

In paragraph 5 of instruction No. 2, which instructs on murder in the second degree, the trial court stated that the jury must, in order to find the defendant guilty of murder in the second degree, find that:

“ \* \* \* The slayer before the commission of the act resulting in death has a specific design or intention thought out before hand to cause great bodily injury to the deceased, or an intention or design thought out beforehand to do an act knowing the reasonable and natural consequences thereof would be likely to cause great bodily injury to the deceased.” (JR. 16).

The instruction on murder in the first degree contains the words “deliberately” and premeditatedly;” the instruction on murder in the second degree does not. Paragraph 2 of the instruction defines these words:

“ \* \* \* The terms, ‘aforethought, premeditation, and deliberation’ mean to think out, plan, or design beforehand. The term ‘deliberation,’ has the additional quality or meaning of planning or designing in a cool state of the blood or mind.” (JR. 15).

We submit that the trial court adequately distinguished between murder in the first degree and murder in the second degree. *State v. Russell*, 106 U. 116, 145 P. (2d) 1005, and *State v. Thompson*, 110 U. 113, 170 P. (2d) 153.

### III

THE TRIAL COURT DID NOT COMMIT ERROR IN INSTRUCTION NO. 6 IN THAT IT DID NOT INSTRUCT ON “MALICE AFORETHOUGHT,” OR “MINIMIZE THE REQUIREMENT OF PLANNING, DESIGNING, OR THINKING OUT BEFOREHAND.”

Defense counsel urges that the instruction in the first paragraph of instruction No. 6 is erroneous in that it does not spell out the equivalent of “malice aforethought,” that it “minimizes the requirement of planning, designing and thinking out beforehand.” (Appellant’s brief p. 24).

It will be noted that the second and third paragraphs of instruction No. 2 (JR. 15) define aforethought, premeditation, deliberation, and malice, and that these definitions are clear and complete. In those paragraphs the requirement of planning, designing and thinking out of the homicide is thoroughly set out.

We believe the rule to be that jury instructions must be construed as a whole, and if, construed all together, they give

the necessary elements of the crime, then it is not error that one instruction taken alone, is not complete. *State v. Evans*, 107 U. 1, 151 P (2d) 196, 198.

#### IV

THE TRIAL COURT DID NOT, IN THE LAST PARAGRAPH OF INSTRUCTION NO. 6, LEAVE THE JURY TO DECIDE ON ANY THEORY OF THE EVIDENCE.

The paragraph in question is quoted:

“OR. If, from any theory of the evidence in this case your minds are satisfied beyond all reasonable doubt that the defendant fired one or more shots into the body of Max Lopez and that before doing so he formed a design or intent wilfully, deliberately, and premeditatedly to kill either of the persons there present and that such shot or shots were fired pursuant to such intent and that a wound or wounds inflicted from the firing of any shot or shots so fired caused or contributed to the death of Max Lopez, then you should find by your verdict that the defendant is guilty of murder in the first degree.” (JR 22).

It will be noted that, in the second paragraph of instruction No. 2, (JR 15) the court submitted to the jury two theories, or as they are designated in the *Russell* case, *supra*, categories for murder in the first degree — deliberate, premeditated, specific intent to kill the particular person slain, or deliberate, premeditated, specific intent to kill another, in the attempt of which the particular person slain is killed. The last paragraph of instruction No. 6 combines these in the words “to kill either of the persons there present.”

It is submitted that the phrase, “any theory of the evidence,” is limited by that which follows in the quoted paragraph. Further, under the rule that jury instructions are to be construed as a whole, *State v. Evans*, supra, this phrase is limited by the second paragraph of instruction No. 2, and its use is not prejudicial error.

## V

UNDER THE RULE THAT JURY INSTRUCTIONS ARE TO BE CONSTRUED AS A WHOLE, THE TRIAL COURT COMMITTED NO ERROR IN ITS SPECIFIC INSTRUCTIONS ON THE DEGREES OF HOMICIDE.

Defendant’s assignments of error Numbers VI, VII, and VIII are based on the theory that an instruction on one element or another is omitted in the specific instructions on murder in the second degree, voluntary manslaughter, and involuntary manslaughter. That is, defense counsel urges that in the specific instructions, wherein the law is applied to the evidence adduced on the trial, the court in each instruction must set forth all essential elements of the particular offense on which it is instructing. We do not take this to be so.

Instruction No. 2 (JR. 15, 16, 17) is the general instruction on murder in the first degree and included offenses. We believe that this instruction spells out the essential elements of each offense, and that, when read in connection with the specific instructions Numbers 7, 8 and 9, which apply the law of the included offenses—murder in the second degree, voluntary manslaughter, and involuntary manslaughter—to the



evidence in the case, the jury was properly instructed, and no error was committed. Instructions to the jury must be considered as a whole. *State v. Evans*, supra.

## VI

### THE COURT COMMITTED NO ERROR IN ITS INSTRUCTIONS ON THE EFFECT OF INTOXICATION.

Defense counsel assigns as error the fact that the trial court, in instruction No. 12, did not include a separate paragraph instructing on intoxication in connection with voluntary manslaughter.

It will be noted that the court did instruct regarding the consideration to be given intoxication where the actual existence of intent is necessary to a crime.

“But, whenever *the actual existence of any particular motive or intent is a necessary element to constitute any particular species or degree of crime* you may take into consideration the fact, if it is shown to be a fact, that the defendant was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act.” (Instr. 12, JR. 29, italics added). The trial court then instructed specifically on intoxication in connection with murder in the first and second degrees.

We submit that the instruction quoted above, together with the general instruction on voluntary manslaughter contained in instruction No. 2, (JR. 16) sufficed.

Defense counsel also assigns as error the fact that the trial court, in its instruction on intoxication, did not instruct on premeditation and deliberation.



In the first paragraph of instruction No. 12, (JR. 29) the trial court, in instructing on intoxication in connection with murder in the first degree, used the phrase, "to think out and form the specific design or intent to take the life of Max Lopez." In the second paragraph, instructing on intoxication in connection with murder in the second degree, the trial court used the phrases, "to form a design," and "to form an intention or design thought out beforehand."

In instruction No. 2, the trial court defined, among other terms, the words "premeditation" and "deliberation," stating that these terms "mean to think out, plan or design beforehand." We submit that when these instructions are read together, the jury is properly instructed concerning the ability to deliberate, meditate, and form an intent to kill when the defendant is intoxicated.

## VII

### THE JURY WAS PROPERLY INSTRUCTED ON EVIDENCE OF PRIOR CONVICTION OF A FELONY.

Defense counsel further urges error by the trial court, in its instruction on evidence of prior conviction (Instruction No. 19, JR. 36). The instruction is as follows:

"Evidence has been elicited from the Defendant to the effect that he has prior hereto been convicted of a felony. You are instructed that such evidence should be considered by you *only so far as it may affect the credibility of the Defendant as a witness in his own behalf.*" (Italics added).

Defense counsel cites as error the failure of the trial court to instruct that prior conviction of a crime is not evidence of guilt, and to define credibility.

We respectfully submit that the portion of the instruction italicised above sufficiently limits the jury in its consideration of the evidence of prior conviction of the defendant.

Counsel cites no authority which requires a definition of credibility be given, and we have found none. We believe the trial court need not define every material word in an instruction, that the court need not define credibility, and that the above quoted instruction is accurate and complete.

## VIII

DEFENDANT'S RIGHTS WERE IN NO WAY PREJUDICED BY THE EMPLOYMENT OF AN INTERPRETER IN THE TRIAL.

Defense counsel assigns as error the facts (a) that the court did not control and supervise the interpreter, (b) that the court did not instruct the interpreter properly, (c) that the court did not control counsel in their employment of the interpreter, and (d) that the court did not dispense with the services of the interpreter during the direct and cross examination of the witness, Herrera.

We shall first consider the contention that the court should have dispensed with the services of the interpreter during the examination of the witness, Herrera. We preface

our argument with a citation to an annotation "Use of Interpreter in Court Proceedings," 172 A. L. R. 923, which presents a rather thorough and complete discussion of the cases on the subject. The need for use of an interpreter in a trial rests in the sound discretion of the trial court. Annotation 172 A. L. R. 930, and cases there cited. This is the rule also where the witness speaks "broken English." This rule is based on the principle that the trial court, being present and observing the witnesses, is in a better position than a court of review to judge whether or not an interpreter is needed, and if so to what extent his use is necessary.

In the case of *People v. Santos*, 134 Cal. App. 736, 26 P. (2d) 522, where the accused was charged with the crime of rape and an interpreter was used for one of the state's witnesses, the court stated:

"The further claim is made that the trial court erred when it ordered an interpreter for the witness Enriquita Valenzuela. It is stated that said witness testified in English before the grand jury, wrote letters in English, and on the trial volunteered certain answers in English. The record on appeal discloses neither the testimony of the witness before the grand jury nor any letters written by the witness. It does appear that on the trial the witness answered certain simple questions without the aid of the interpreter by saying, 'Yes' or 'Si.' But even assuming that the witness could read, write, and speak some English, it does not appear that the trial court abused its discretion in ordering an interpreter. *The propriety of calling an interpreter is a question addressed to the discretion of the trial court and its action will not be disturbed unless it clearly appears that such discretion has been abused.* *People*

v. Lecang, 213 Cal. 65, 1 P. (2d) 7; 8 Cal. Jur. 225. There are authorities indicating that it may be an abuse of discretion to refuse to call an interpreter under some circumstances, but our attention has not been called to any case in which it has been held to be an abuse of discretion to call a properly qualified interpreter." (Italics added).

In the case of *People v. Lecang*, 213 Cal. 65, 1 P. (2d) 7, a prosecution for murder, wherein a witness began testifying in English and later an interpreter was employed in order to facilitate matters, the court held that this was a valid exercise of the discretion of the court and did not prejudice the interests of the defendant. On this point, the court stated as follows:

"It is equally clear that there was no abuse of discretion on the part of the court in permitting the witness Emoto to testify through an interpreter. His examination was commenced without an interpreter, and though he understood English to quite an extent, it soon became apparent that the calling of an interpreter would facilitate matters, as it later proved. *This was a matter within the discretion of the trial court, and to our mind the record shows that here there was a wise use rather than an abuse of such discretion.*" (Italics added).

The exercise of this discretion is subject to appellate review, 172 A. L. R. 932, and the appellate court may consider the witness' testimony from the record to decide the question of abuse of discretion. 172 A. L. R. 934. However, in order to reverse on the grounds of abuse of discretionary powers, there must be a positive showing of prejudicial error. That is, it must be shown that the party complaining was injured thereby. In the case of *State v. Inich*, 55 Mont. 1, 173 P. 230,

234, in a prosecution for murder wherein an interpreter was used, the Montana court stated:

"The statute (section 7894, Rev. Codes) provides, 'When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him.' *Whether an interpreter is necessary for a particular witness must be determined by the trial court, and its conclusion is not subject to review by this court except for a manifest and gross abuse of discretion.* People v. Salas, 2 Cal. App. 539, 84 Pac. 295; People v. Ramirez, 56 Cal. 535, 38 Am. Rep. 73. Even so error in this particular will not justify setting aside a conviction fully sustained by the evidence, when the defendant has apparently suffered no prejudice by reason of it. Of course, as counsel say, an interpreter should not be called if the witness can understand and answer the questions put to him. But it is often the case that a person who understands and speaks with reasonable ease the language of the street or of ordinary business encounters difficulty and embarrassment when subjected to examination as a witness during proceedings in court. As we read the record, such seems to have been the case with the witness here. We therefore do not think the court manifestly in error in calling the interpreter." (Italics added).

In the case of *State v. Lee*, 116 La. 607, 40 So. 914, the court held that, the defense counsel having accepted an interpreter and the interpreter having served throughout the trial without objection, the defense could not then be heard to object to the appointment of the interpreter.

It is submitted that the record in the instant case shows no abuse of discretion by the trial court in the use of the interpreter for the witness, Herrera. It is true, as indicated in

the defendant's brief (p. 41) that the witness, Herrera, understood some English. However, the extent of his knowledge and command of the English language is not shown in the record.

At no time during the trial of the cause did counsel for the defendant object to the use of an interpreter or of this particular interpreter. On the contrary, at least twice in the trial when the witness replied in English, defense counsel urged him to reply in Spanish. (R. 59, 65). Furthermore, the witness indicated on cross-examination that he was confused, and answered incorrectly at the inquest, where he had no interpreter. (R. 123).

The interpreter was used from the beginning of the direct examination of the witness, Herrera, with no objections from defense counsel. We submit that, in order to obtain a reversal for the use of an interpreter where it is claimed he is incompetent, counsel must make a definite objection to a selection or continuance of that interpreter. This question arose in the case of *State v. Sauer*, 217 Min. 591, 15 N.W. (2d) 17, and the court stated as follows:

"Defendant insists that a new trial should have been granted on the ground that it was error to permit Florence Jakkula, the executive secretary of the county welfare board, to act as interpreter, in that she was interested in the case and did not interpret fairly and impartially. The decision of the competency of an interpreter rests in the sound discretion of the court. No objection was made to her appointment nor to her continuing to act. Near the very close of the case, when the state was offering rebuttal testimony, counsel

for defendant stated: 'I insist in order to have regularity here that they use this interpreter as long as they have her here.' The trial court found no basis for considering seriously the objection now being made to the interpreter, and we find none."

Defendant contends "that the whole examination and cross examination of the witness is impeded, dulled and made inaccurate when had through interpretation." However unfortunate, the use of interpreters is sometimes necessary, and express provision is made for their service by statute. 105-46-7 *Utah Code Annotated* 1943. The trial court apparently felt the necessity in this case. Counsel must also have felt the necessity. Nowhere in the record did counsel for the state or for the defendant object to the use of an interpreter. Nowhere in the record did either counsel object to the use of the particular interpreter. Defense counsel expressly approved the service of this particular interpreter (R. 4) and raised no objection to his serving during examination of the witness Herrera.

With defense counsel's claim of error by the trial court "in permitting the interpreter to dictate, dominate, control, intrude or participate in the examination of the witnesses and proceedings of the court," we respectfully disagree.

We submit first that no objection to the procedure followed was raised by defense counsel on the trial. On the contrary, several times defense counsel engaged in conversation with the interpreter (R. 124, 163, 169) and in directing questions to the interpreter. (R. 134, 135, 136).

We further submit that the interpreter did not "dictate, dominate, control, intrude or participate" in the trial. The entire problem of translating is most difficult, and the interpreter appreciated this (R. 138, 150, 153). As a matter of fact, the record shows a sincere effort by the interpreter to do a complete and accurate job of translating ideas (R. 138, 150, 153), and an effort on his part to get an accurate statement of the questions from counsel before putting them to the witness. (R. 118, 119, 120).

Whether or not the interpreter dictated, dominated, controlled, intruded or participated in the trial in such manner as to constitute error can be determined only by a careful consideration of the entire record. It is our position that he did not; that the record shows he did not; that on the contrary, the record shows a careful and thorough job of interpreting, and nowhere does it show that defendant was prejudiced in the interpretation.

Defendant, in his motion for a new trial, set forth nothing indicating error by the court regarding the use and conduct of the interpreter except, perhaps, the general allegation "that the court \* \* \* has done and allowed acts in the trial of said action that are prejudicial to the substantial rights of the defendant." (JR. 49). Nothing is set forth regarding the appointment, employment, or conduct of the interpreter.

In the case of *State v. Cabodi*, 18 N. M. 513, 138 P. 262, cited and quoted in Annotation 172 A.L.R. 923, 952, the court in considering what is required for granting a new trial on grounds of misinterpretation, stated:



“Upon the trial no objection was interposed by appellant to the interpretation of the evidence, and in the motion for new trial no attempt was made to show that the interpretation was incorrect by affidavit or otherwise, except the mere allegation of such fact in the motion. The trial court decided the question adversely to appellant, by a denial of the motion, and this court cannot go into the question of fact as to whether the interpretation was, or was not literal. The record fails to disclose any inability of the interpreter, or that the interpretation was not literal. In such a case where it appears that the complaining party is aware at the time that the interpretation of the evidence is not correct, it is incumbent upon him to call the court’s attention to such erroneous translation and ask to have it corrected, and where he has not such knowledge at the time, but afterward becomes aware of the fact, he must set out all the facts in his motion for a new trial, pointing out therein specifically the evidence erroneously translated, and support such contention by affidavit of proof, so that the trial court can intelligently pass upon the question.”

We believe this rule should apply generally to objections to appointment and conduct of an interpreter.

The record does not show that formal instruction by the court was given to the interpreter. On the other hand, the record shows no objection by counsel for the state or for the defendant on this ground. Furthermore, the record we submit, shows no prejudicial error because of the lack of such instruction, and we believe that this matter is therefore not subject to review.

There being nothing in the record showing abuse or discretion or prejudicial error by the trial court in selection, use, or conduct of the interpreter, those assignments of error are, we submit, groundless.

## IX

### THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

This court has said that it is not its province, on appeal from a conviction of a crime, to judge credibility of witnesses whose testimony conflicts, but that the court is concerned only with questions of sufficiency of the evidence to sustain the conviction. *State v. Laub*, 102 U. 402, 131 P (2d) 805, *State v. Aures*, 102 U. 113, 127 P (2d) 872.

We agree that there is conflict in the evidence. Defense counsel urges that "the testimony of the defendant provides the only clear and complete version of the incident that reconciles every inconsistent aspect," (Def.'s brief 50) and "The testimony of the defendant is direct, clear, complete, logical and inclusive on all points." (Def.'s brief p. 51). It is further urged that the other witness' testimony is "of doubtful probative value," because they were drunk, had an interest in the matter, or their testimony conflicted in some aspect. We submit that it is the province of the jury to determine credibility of witnesses and the weight to be accorded the evidence.

The court submitted the case to the jury on two theories as set out in title 103-28-3, *Utah Code Annotated*, 1943:

“Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing; \* \* \* or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; \* \* \* is murder in the first degree.” (See par. 3, instruction 2, JR. 15, and related instructions.)

The evidence would appear to clearly support either theory.

The testimony for the State is lengthy; little purpose could be served by setting it forth here. It will be noted that this alleged error was one of the grounds for motion for a new trial (JR. 49). Apparently it was argued to the trial court, and that court saw no basis for it. We submit that the evidence amply supported the verdict.

## CONCLUSION

We respectfully submit that the record shows the trial court had jurisdiction of the offense as set out in the information; it committed no error in its charge to the jury; it committed no error in the selection and employment of an interpreter on the trial; and that the evidence adduced on the trial amply supported the verdict. The defendant had a speedy and fair trial; his rights were not prejudiced, and the verdict should not be upset.

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