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State of Utah v. Don Jesse Neal : Brief of Appellant

Utah Supreme Court

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Edw. M. Morrissey; Arthur A. Allen, Jr.; Attorneys for Defendant and Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

JUN 12 1962

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

DON JESSE NEAL,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case
No. 7813
000

Appellant's Brief

EDW. M. MORRISSEY
ARTHUR A. ALLEN, JR.
*Attorneys for Defendant
and Appellant.*

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

DON JESSE NEAL,

Defendant and Appellant.

Case
No. 7813

Appellant's Brief

STATEMENT OF FACTS

An information charging Don Jesse Neal with the crime of murder in the first degree was filed on June 23, 1951 (R. 10). A motion to dismiss the information charging defendant with first degree murder was filed on October 15, 1951, alleging as grounds for dismissal of the information that the State failed to prove on the preliminary hearing that the crime charged in such information was a willful, deliberate, malicious, and premeditated killing. The motion was, by the court, overruled (R. 17) and a plea of not guilty entered by the defendant and the case came on for trial on October 2, 1951.

The Jury was duly impanelled and sworn to try the case (R. 33) and the State proceeded to offer testimony in support of the charges of first degree murder as alleged in the information. Such testimony disclosed that on the 23rd day of May, 1951, at about two o'clock P.M. the defendant, Wilma Lenoma Tully and Officer Owen T. Farley were proceeding north on the east side of State Street immediately north of the intersection of Third South Street in Salt Lake City, Salt Lake County, Utah, in a DeSoto sedan automobile driven by Owen T. Farley, the defendant and Wilma Lenoma Tully having been taken into custody by Officer Farley a few moments before at or near the east entrance on State Street to Auerbach's Department Store. As the automobile proceeded north on State Street and across the intersection at Third South and immediately in front of No. 261 South State Street at which place the automobile collided with a parked automobile and immediately prior to such collision a shot was heard. Officer Farley was found lying on the street. Wilma Lenoma Tully left the scene by the right hand door of the automobile and was later apprehended at Wendover, Utah. The defendant left the automobile from the opposite side and was later apprehended several blocks from the scene. Officer Farley was removed to the hospital and died several hours later.

Dr. Milton Pepper testified that he attended and examined Officer Farley upon his arrival at Holy Cross Hospital on May 23, 1951; that he found a penetrating wound of the abdomen to the right of the navel and an

exit wound in the back to the left of the middle just above the hip and from such wound Officer Farley died about 3:45 P.M., May 23, 1951 (R. 36-37). Dr. John Marshall, Assistant City Physician, testified that he performed an autopsy on the body of Officer Farley May 25, 1951, and in his opinion the officer died from excessive loss of blood; that he found a perforating wound in the abdomen measuring 1½" in diameter, the point of entry being 2" above the navel and 1" to the right of the middle line, the point of exit 2" to the left of the middle line at the level of the second lumbar vertebra; that in his opinion the missile that entered Officer Farley's body went straight through and came out the back and that the gun that fired the shot was pointed directly at Officer Farley (R. 41-43).

Officer Hunsaker testified that on May 21, 1951, the Salt Lake City Police Department received a telegram from the Chief Probation Officer of the State of California requesting that the defendant be picked up and described the automobile he was driving (R. 46). Officers Longson and Olson testified that the car described in the telegram was located early on the morning of May 23, 1951 on the west side of State Street just south of the intersection of Third South; that the automobile was watched until approximately 2 P.M. on May 23, 1951, at which time the officers were relieved by Officer Farley after having had a conversation with him near the Center Theater on Third South and State Street, at which time the car was pointed out to him. Officer Farley proceeded in the direction of the automobile shortly

thereafter and Officer Olson observed that the car had been moved. He got into his automobile and proceeded south on State Street where the automobile had been parked and observed that it had been moved. He then made a turn on State Street and started north immediately behind the DeSoto automobile driven by Officer Farley. Shortly after the car crossed the intersection of Third South and State Street it struck the parked car and immediately stopped. Officer Olson got out of his car. He heard no shots or observed any disturbance in the automobile driven by Officer Farley. He next saw Officer Farley lying on the street between two cars and heard him say, "Call the police," which were the only words uttered by Officer Farley who immediately became unconscious. (R. 63). He remained with him until the ambulance arrived.

Three witnesses produced by the State (R. 67-87) all testified in substance that they were in the close proximity of the DeSoto automobile parked on the west side of State Street at or near the entrance to Auerbach's Department Store. All observed a man and woman approach the automobile from the south and Officer Farley approach from the north; that the woman entered the car and sat down, and Officer Farley with his gun drawn approached the man and after a conversation proceeded to search his person. The search occupied from ten to fifteen minutes and they observed Officer Farley completely search the defendant from his shoes to his head, inside and outside, removing from the inside of his coat pocket certain papers. At the completion of the search

Officer Farley placed the man's hands behind him and put his handcuffs on him with his hands to his back and then assisted him into the automobile. The woman remained in the automobile throughout the entire search and had in her hands magazines, a package and a handbag and at no time did Officer Farley search the woman or engage in conversation with her. Officer Farley placed the defendant in the front seat between himself and the woman, started the automobile, made a "U" turn after backing out and proceeded north on State Street in the direction of the Police Station (R. 67-87).

Glen A. Pratt testified that shortly after 2 P.M. on May 23, 1951, he was crossing the intersection of Third South and State Street in the direction of the Center Theater and observed a DeSoto automobile proceeding north through the intersection, saw the automobile crash into a parked car after it had passed him and observed that the occupants in the automobile were struggling. He observed a woman leave the car, step over the curb and disappear into the crowd. He saw Officer Farley lying on the street with his head in the lap of a person wearing a Postman's uniform. He observed Officer Farley and did not hear him talk or speak to anyone. (R. 91) He saw a man running across the street to the west with his hands behind him and his coat over them.

Witness Joseph M. Anderson stated that he was a mail carrier; that he was in front of 261 South State Street and had just come out of the Rogerson's Music Company as the DeSoto automobile struck a parked car.

He observed that there were three occupants in the front seat of the car. The woman left the car first by the right hand door, then one of the occupants fell from the car to the street and just before the fall he heard words to the effect, "Do you want another one?" or to the effect, "If you want another one I'll give you one more." (R. 98-99). The witness lifted the head of Officer Farley into his arms and while holding him Officer Farley stated, "I am a police officer." "He shot me." "Call the Department." No one else was assisting Officer Farley and the witness did not see Officer Olson. He was standing on the sidewalk and did not get out into the street until the woman had left and Officer Farley was out of the car (R. 108). He heard the statements made while standing on the sidewalk 18 or 20 feet away and 3 feet from the door of Rogerson's Music Company. There was a string of automobiles parked along the street between the witness and the DeSoto car and at the preliminary hearing he testified that he was 24 feet away from the car when he heard the utterances testified to (R. 110). Robert H. Jensen, Sr., Postman, testified that he was in Rogerson's Music Store and heard two cars hit together, and immediately stepped outside and observed a scuffle in the automobile. He saw the right door of the car open and a man come out head first rolling partly under a parked car. There were three occupants in the car. The woman left the car first and proceeded north on State Street. He was about 10 feet from the car and heard the man in the car say, "Do you want another?" The man in the car got out on the west side and

ran west across State Street with his arms behind him. This he observed as he was standing near the curb and on the sidewalk and was never in the street.

Wilma Lenoma Tully, a witness called by the State testified that she met the defendant in Reno, Nevada on Sunday, the 20th of May about 7 o'clock A.M. She had not known him before and they decided to come to Salt Lake City where they arrived on Monday the 21st day of May, and registered at a motel and on Tuesday, May 22, they both went to Ogden where she purchased some shells for a gun at the request of the defendant. They spent most of the day in and around Ogden and decided to remain there for the night, but later changed their plans and proceeded to Salt Lake City, arriving about 11 P.M. and registering at the St. George Hotel. After removing all of their belongings from the automobile which had been parked on the street, the defendant having informed the witness that they would not return to Reno in the automobile but would attempt to obtain passage on the air lines. On May 23, both spent the morning shopping and visiting various taverns in Salt Lake City. After eating lunch about 1 P.M. it was decided that they would return to Reno in the automobile and obtained a cab for the purpose of locating the same which was parked the previous night. The automobile was located on State Street south of Third South and both alighted from the cab and proceeded in the direction of the automobile. The witness got into the car on the right hand side and defendant proceeded around the front of the automobile to get in on the left hand or

driver's side. He was immediately accosted by Officer Farley who was standing near the car and questioned as to his identity. He was then searched by Officer Farley which was observed by the witness. She stated that the search was from the defendants armpits to his knees (R. 138). The defendant was then handcuffed with his hands behind him and assisted into the car sitting next to the witness. Officer Farley sat next to the defendant in the driver's seat, started the automobile and made a "U" turn and headed toward the Police Station. Some conversation took place between Officer Farley and the defendant, immediately after crossing the intersection at Third South Street it appeared to the witness that the defendant was moving closer to the officer and was locking shoulders with him (R. 139). She then heard a shot and the officer lost control of the automobile which crashed into a parked car. As soon as he lost control of the automobile and while slumped the officer called to a postman on the street requesting him to call an ambulance (R. 140). She then left the car by the right hand door and ran to the sidewalk, entered the Regis Hotel where she registered and remained there until 10 P.M. and was then driven to Wendover where she was arrested the following day.

K. Robert Tschaggeny testified that he was driving his automobile south on State Street the afternoon of May 23, 1951. He saw the automobile in which the defendant was riding and saw the defendant leave the automobile and as he passed his car he observed that the defendant was handcuffed and had a revolver in his

hands. The defendant boarded a Salt Lake City Lines bus at Third South and State Street. The witness followed the bus and at Fourth South he picked up Officer Simonson and they followed the bus to Fifth South where the defendant left the bus and disappeared. (R. 195). Officer Simonson testified that he accompanied Mr. Tschaggeny in his automobile and attempted to apprehend the defendant (R. 209). Mrs. Ronnie Charlot testified that she was sitting in her automobile at the A & W Root Beer Stand at Fifth South and State Street and the defendant approached her automobile stating, "I have a gun here lady and I'll shoot you if you don't do what I say." (R. 214). That the defendant left immediately and the witness observed that he had a gun and his hands were handcuffed behind his back. R. W. Fish testified that he was an employee of the Streater Chevrolet Company and on May 23, 1951, shortly after 2:30 P.M. he saw the defendant in the shop where he was working. His hands were handcuffed in front of him and he observed a gun in his hand and defendant threatened him (R. 220). Harry Jones testified that he found a gun in the paint shop in a sink, which gun was offered and received in evidence. (R. 224).

Officer Hunsaker identified the clothing worn by Officer Farley and the same was received in evidence (R. 233), together with the handcuffs. Officer Clark was called as a witness and demonstrated to the jury the movability of his hands after being handcuffed with his hands behind him and while sitting on a chair in

front of the jury box and in the presence of the jury (R. 237-242).

The defendant, called as a witness on his own behalf, testified that he obtained the DeSoto automobile in San Francisco, California and left San Francisco for Reno, Nevada on May 18. While in Reno he met Wilma Lenoma Tully who accompanied him to Salt Lake City where they arrived on Monday, the 21st day of May, and went to Ogden arriving there about noon. While in Ogden Mrs. Tully purchased a box of shells which were the type and caliber which fit the gun owned by defendant, which gun was carried by Mrs. Tully in her handbag from the time both left Reno for Salt Lake City. Both defendant and Mrs. Tully participated in a robbery of a motel in Ogden after which they returned to Salt Lake City and registered at the St. George Hotel, leaving their automobile on State Street below Third South after removing all their clothing and belongings from such automobile. At about 2 P.M. they attempted to locate the automobile and were approaching it when the defendant was accosted by Officer Farley who placed him under arrest after searching his person and proceeded to the Police Station. The car stopped at the intersection of Third South and State and after crossing the intersection Officer Farley pushed the defendant back in the seat and reached across the defendant's lap. There was a crash and a shot and Officer Farley went out the right side of the car immediately after Mrs. Tully and the defendant went out the left side and across State Street.

He stated that at no time did he have the gun in his hands and did not shoot Officer Farley.

On cross examination over defendant's objections he testified that he had been convicted of three or four felonies, the first in 1945. He was a parole violator from the State of California, was wanted for stealing payroll checks in California (R. 290) and if he was returned to California he was going to have to serve from 5 years to life (R. 290). He had cashed and forged 47 checks stolen by him (R. 294). The defendant denied that before leaving California he had robbed Fulton's Food Shop and denied that he had committed a robbery of the Boulevard Pharmacy in California (R. 295) or robbed a grocery store in San Francisco. (R. 295)

STATEMENT OF ERRORS

I.

The court erred in refusing to recognize that the State failed to prove the commission of the crime of first degree murder, the evidence disclosing that:

(a) The verdict and judgment were contrary to law.

(b) The verdict and judgment were contrary to the evidence.

(c) The evidence was insufficient to support the verdict of the jury.

II.

The court erred in allowing the witnesses, Norman R. Cortsen and Mrs. Ronnie Charlot to testify over defendant's objections relative to statements made by the defendant after the homicide.

III.

The court erred in allowing the witness Harold W. Clark over defendant's objections, to demonstrate to the jury the movability of his hands and body with a gun in his hands handcuffed behind him.

IV.

The court erred in allowing the District Attorney, over the objection of the defendant, to interrogate the defendant relative to the commission of crimes by him which in no way were connected with the crime for which he was being tried.

V.

The court erred in allowing the District Attorney, over the objections of the defendant, to interrogate the defendant respecting the commission of crimes which the defendant had not been charged with or convicted.

VI.

The court erred in denying defendant's motion for a new trial.

VII.

The court erred in denying defendant's motion for a new trial in the absence of defendant's counsel.

VIII.

The court erred in imposing sentence on the defendant in the absence of defendant's counsel.

IX.

The court erred in denying defendant's motion for a rehearing of defendant's motion for a new trial.

X.

The court erred in denying defendant's motion for an order of examination of designated physical evidence received at the trial.

XI.

The defendant was denied the right to a fair and impartial trial.

ARGUMENT

I.

THE COURT ERRED IN REFUSING TO RECOGNIZE THAT THE STATE FAILED TO PROVE THE COMMISSION OF THE CRIME OF FIRST DEGREE MURDER, THERE BEING A LACK OF EVIDENCE TO SUPPORT THE INSTRUCTION GIVEN BY THE COURT. (Specification of Error No. I, (a) (b) (c).

At the close of the State's evidence, the defendant filed his motion to dismiss the information as to the offense of first degree murder as set out in such information, said motion being based on the grounds that the State had failed to prove that the crime charged in such information was the wilful, deliberate, malicious and premeditated act of the defendant. (R. 17) Such motion was by the court denied. (R. 18)

It is a well recognized and undisputed principle of law in this state that in order for a person to be convicted of murder in the first degree and in order to warrant an instruction defining this degree of murder, there must be some evidence which would indicate that the crime was premeditated and that at the exact time of the commission of the crime there was in the mind of the accused a specific intent to take the life of the victim. This court has consistently, in a long line of decisions, adhered to such rule and to cite the numerous decisions of this court would be of no benefit or advantage to the court. The evidence offered on behalf of the state was that the shooting occurred during a scuffle between the defendant and the deceased and there is wholly a lack of evidence that the defendant, if the shooting was done by the defendant, had any preconceived design to shoot the deceased or that there was any deliberate or premeditated design to kill.

The evidence produced on behalf of the State is wholly insufficient to support the verdict of the jury and counsel for the defendant, under their statement of

facts, have considered it necessary and essential to narrate the evidence and further to solicit the court's attention to their contention that under the evidence produced it would have been impossible for the defendant to have fired the shot that killed the deceased.

The undisputed evidence testified to by three witnesses for the state was that the defendant was thoroughly searched by the deceased before being placed in the automobile a few moments before the shot was fired, the other occupant of the car was not searched, in her hands were her purse and a package, the defendant's hands were handcuffed behind him, all three persons occupied the front seat of the automobile, one shot was fired immediately after the car crossed the intersection at 3rd South and State Streets, and the assistant city physician testified that the bullet that killed the deceased entered the body at a point two inches above the naval and one inch to the right of the middle line, the point of exit being two inches to the left of the middle line of the second lumbar vertebra.

From such evidence it cannot be disputed that the deceased was shot from the front, which act, under the circumstances, could not be done by a person with his hands handcuffed behind his back. Witnesses produced by the State testified to statements alleged to have been made by the defendant at the time of the shooting. (R. 98-99, 110.) Such statements, according to the witnesses, were heard by them while standing on the sidewalk from 10 to 20 feet away from the automobile in which the

defendant and the deceased were sitting. Such evidence should be entitled to little or no weight considering the circumstances under which such statements were alleged to have been made.

Counsel for defendant is well aware that the answer to the foregoing is that the jury believed otherwise and there is not a lack of evidence upon which their verdict could be sustained. However, we deem it worthy of attention by the court and meriting consideration in connection with error hereinafter to be called to the attention of the court.

II.

THE COURT ERRED IN ALLOWING THE WITNESS NORMAN R. CORTSEN, AND THE WITNESS MRS. RONNIE CHARLOT TO TESTIFY OVER DEFENDANT'S OBJECTIONS RELATIVE TO STATEMENTS MADE BY THE DEFENDANT AFTER THE HOMICIDE. (Specification of Error No. II.)

The trial Court permitted witness Norman R. Cortsen to testify concerning a statement he claimed the defendant made to him on a Salt Lake City Lines Bus after the shooting of Officer Farley. This testimony was admitted over the objection of defendant's counsel (R. 203) and after an examination into the question of its admissibility in chambers out of the presence of the jury (R. 202).

The testimony to which objection was made is as follows: "Keep moving, I just shot a man". (R. 204) This statement was alleged to have been made by the defendant as the bus approached the intersection of 4th South and State Streets, the defendant having boarded the bus at 3rd South and State Streets.

Counsel for the defendant moved to strike the statement of Cortsen about what the defendant had said to him on the grounds that it was hearsay and incompetent. The motion was denied (R. 205).

It is significant that the statement "Keep moving, I just shot a man", was, according to the witness Cortsen, not made until the bus reached the intersection of 4th South and State Streets. Although Cortsen claimed certain other statements were made by the defendant, he could not remember what they were (R. 208).

Counsel for the defendant contend that the statements of the defendant testified to by Cortsen were made at a time and place sufficiently remote from the shooting as not to be part of the *res gestae*, nor admissible under any other recognized exception to the hearsay rule.

It should be borne in mind that after the shooting the defendant left the car in which he and officer Farley had been riding, ran west across State Street, then South to 3rd South and State Streets, boarded a crowded bus and rode a block through normal midday traffic before the statement attributed to him was made. (R. 282-283.)

The same considerations are applicable to the state-

ment the witness Mrs. Ronnie Charlot testified the defendant made to her. They were, however, more remote in point of time and distance than those made to Norman Cortsen.

After riding the bus from Third to Fifth South Street on State Street the defendant entered a parked car at the A. & W. Drive In which was occupied by Mrs. Ronnie Charlot. (R. 214, R. 253) Mrs. Charlot stated the defendant said to her, "I have a gun here lady, and I'll shoot you if you don't do what I say". (R. 214)

It is the position of counsel that the statement is unrelated to the crime which was committed by reason of the lapse of time between the commission of the crime and the alleged statement, and further, and more important, it makes no reference to the shooting, nor to any of the circumstances connected with it, or even that it occurred. Counsel therefore urge that the statement, obviously damaging to the defendant was not part of the res gestae and was wholly inadmissible.

The theory upon which counsel for the State offered the testimony of witness Cortsen was that the statement alleged to have been made by the defendant to Cortsen constituted an admission against interest, and admissible as part of the res gestae, although hearsay. (R. 202)

This Court has frequently discussed the considerations governing what may or may not be received as part of the res gestae. The general rule has been applied by this Court in both criminal and civil cases. A state-

ment of these general considerations is found in *Jackson v. Utah Rapid Transit Co.*, 77 U. 21, 290 P. 970.

The case involved a collision between an auto and a street car. A question arose as to the admissibility of statements made by the motorman after the accident. Mr. Justice Staup says at page 976 as follows:

“... the general limitations of the *res gestae* rule so far as are here necessary, are stated to be that the declaration or utterance must be spontaneous or instinctive; that it must relate to or be connected with the main or principal event or transaction itself material and admissible in evidence; and that it must have been the result or product, the outgrowth, of the immediate and present influences of the main event, or preceding circumstances to which it relates, and must be contemporaneous with it and tend to explain or elucidate it. It is further stated that the word ‘contemporaneous’ is not taken literally, and that time is not the real governing factor in the determination, but is an important element in determining whether the statement was spontaneous and immediately connected with the main transaction and prompted or produced by its immediate and present influences.”

We believe this fairly states the general rule laid down in numerous Utah cases and in well reasoned decisions from other jurisdictions, and it remains only to apply the rule, or rules to the testimony in question here. The position of counsel for the defendant is that all the testimony received which is covered by this specification of error was too remote in time and distance, and did not amount to spontaneous or instinctive utterances.

The case of *People v. Wong Loung*, 114 P. 829, decided by the Supreme Court of California was a prosecution for murder. The state introduced evidence of certain statements made by the defendant to apprehending officers shortly after the shooting, during which time the defendant had run one block. The court held that these statements were improperly admitted in evidence. At page 833 the court says:

“Error is assigned relative to the conversation between the arresting officers when they took Wong Loung into custody. One of them said, ‘This is the man’, or ‘This is the Chinaman’, and the defendant exclaimed, ‘I haven’t anything’, or ‘I haven’t done anything. I haven’t got any gun’. The Attorney General insists that this conversation was part of the *res gestae* and properly admitted as such. We cannot agree with that contention. The officers had run some distance from the scene of the crime, turning a corner and proceeding along another street from that upon which the wounded Chinaman fell, and had finally apprehended Wong Loung near the end of an alley. What there occurred was no more a part of the *res gestae* than it would have been if their pursuit had covered a mile rather than a distance of about a block.”

We submit that this is a proper application of the considerations which determine what is part of the *res gestae*, and the application which should be made to the evidence under discussion in this specification of error.

The question of admissibility of what was claimed to be part of the *res gestae* was discussed by this Court in the recent case of *State v. Peterson*, 240 P. (2d) 504.

A purported confession to the commission of a burglary was made an hour after the crime was involved. The trial court excluded the purported confession, and was affirmed by this Court. Mr. Justice Wolfe in the opinion refers to a concurring opinion in *State v. Rasmussen*, 92 Utah 357, 68 P. (2d) 176, 183 and quotes from it as follows:

“... the so-called *res gestae* is in fact simply another exception to the hearsay rule, based on the fact that there are assurances sufficient to make it reliable even though there is no opportunity to cross examine. But that assurance based on the spontaneity necessary to make it the automatic result of the excitation engendered by the occasion and to eliminate any probability that it was the product of reflection or rationalization must be present. It should be noted that since the sole basis for admitting statements of this kind depends on what we have chosen to call their ‘automatic’ nature, the court should be fairly well convinced that such basis exists; otherwise, statements of witnesses in regard to which there may be no opportunity to cross-examine will be admitted to the great prejudice of the opposite party”.

The opinion in the main case states:

“It is readily apparent that the extra-judicial purported confession of Olmsted cannot meet this prescribed test. Because of the time and the circumstances surrounding its making, it lacks the characteristics which allow the relaxation of the hearsay rule. The trial court properly excluded from evidence the ‘confession’ of Olmstead”.

We submit that the testimony offered by these two witnesses was damaging to the defendant, and that upon proper application of the rules prescribed by this court for the determination of what may be admitted as part of the *res gestae*, the testimony objected to should have been excluded by the trial court.

III.

THE COURT ERRED IN ALLOWING THE WITNESS HAROLD W. CLARK, OVER DEFENDANT'S OBJECTIONS, TO DEMONSTRATE TO THE JURY THE MOVABILITY OF HIS HANDS AND BODY WITH A GUN IN HIS HANDS HANDCUFFED BEHIND HIM. (Specification of Error No. III.)

During the trial Police officer Harold W. Clark was permitted to make a demonstration for the jury concerning his ability to point a gun at an imaginary person at his left while his hands were cuffed behind him. This purported demonstration was objected to by counsel for the defendant (R. 238-239).

The witness Wilma Lenoma Tully testified that as officer Farley, the defendant and she drove from the scene of the arrest toward the police station they were all seated in the front seat of the defendant's rented car. Officer Farley was in the driver's seat, the defendant in the middle, and Wilma Tully on the right hand side opposite the driver. (R. 180, 181) This seating arrangement is corroborated by the testimony of Mrs. Jasmine

G. Lym. (R. 75, 77) Other witnesses to the arrest also testified that Officer Farley, the defendant, and Wilma Tully were all seated in the front seat as the officer drove away.

In his demonstration Officer Clark was permitted to use a folding chair with no arms. There were no persons seated on either side of him. He was permitted to swing his legs to the right of the chair so that he was facing sideways on it. (R. 239) No one was seated to the left of Officer Clark to demonstrate what part of the body of a person there seated (the position Officer Farley occupied in the car) would have been in the line of fire of the gun, or at what angle the gun would have been pointed at the body of a person so seated. (R. 239)

There was a complete and absolute lack of similarity between the conditions existing at the time when Officer Farley was shot, and those which were present during the demonstration offered by the State to show how the defendant might have shot officer Farley from the position he occupied in the car. The failure of the State to have someone seated in the position to the left of the witness Clark during the demonstration is important when it is considered that the bullet which killed officer Farley entered his body at a point one inch above and one and one half inches to the right of the umbilicus, and emerged two inches to the left of the midline of the back at the level of the second lumbar vertebra. This is found in the testimony of Dr. John Marshall who performed an autopsy (R. 40). It is apparent from this

testimony that the bullet passed almost directly through officer Farley's body from front to back, and it makes the angle at which the gun was pointed at him of extreme importance. No effort was made whatever by the State to simulate the conditions which existed at the time of the shooting so that the jury could see during the demonstration whether it would have been possible for the defendant from the position in which he was sitting to have shot officer Farley at the angle from which he was shot, or in fact to have shot him at all.

The general rule announced by numerous decisions with respect to the admissibility of demonstrative evidence, or experiments is that to render experiments permissible the conditions need not be identical with those existing at the time of the occurrence, but that it is sufficient if there is a *substantial similarity*. The rule appears to obtain in civil as well as in criminal cases. *State v. Copenbarger*, Idaho, 16 P. (2d) 383, *State v. McKenna*, California, 79 P. (2d) 1065; *Cooper v. State*, Okla., 67 P. (2d) 981; *People v. Crawford*, California, 106 P. (2d) 219; *Hamby v. People*, Colo., 129 P. (2d) 993.

The case of *Hall v. Brown*, Oregon, 202 P. 719, states the general rule above contended for. The case involved an action by a lessee of farming land for recovery for loss of the property at the hands of the lessor, damage to crops, and for money spent in sowing and cultivating. A witness for plaintiff was permitted to testify he had seen the land in question and that he assumed the method of cultivation by the plaintiff was like his own.

At page 721 the court makes the following statements:

“Such testimony is very closely analogous to evidence of experiments and is governed by similar rules. Similar occurrences, like experiments are admissible under certain circumstances for the purpose of showing the probable result of the transaction in question, but to be admissible it must be shown that the conditions are substantially like those in the matter in dispute.”

The court at page 721 quotes from an earlier Oregon case, Leonard v. Southern, 21 Ore. 555, 28 P. 887, as follows:

“Experiments and demonstrations used in evidence should be made under conditions similar to those attending the fact to be illustrated; and when this rule is observed, the discretion of the trial court in allowing the result of such experiments to go to the jury will not be reviewed, in the absence of abuse thereof.”

The Court then comments upon when the trial court has discretion and uses the following language:

“The principle is that at best it is within the discretion of the court to admit any testimony whatever about experiments or similar occurrences. But in any event the conditions must appear to be substantially the same. *It is not within the discretion of the court to admit evidence about experiments, unless the conditions are substantially alike.*”

It is the position of counsel for the defendant that the conditions present at the demonstration in court by

officer Clark were so completely dissimilar to those which existed at the time of the shooting that the trial court was without discretion to admit the demonstration, and further that if it could be presumed that the nature of the demonstration lay within the area of discretion of the trial court that the permission to make the demonstration by Clark was clearly an abuse of such discretion. It seems manifest, that the demonstration was highly damaging and prejudicial to the defendant in view of the way in which it was conducted.

In *People v. Halbert*, Cal., 248 P. 969, the following comment appears at page 972 bearing upon the degree of similarity of conditions necessary to permit the introduction of experimental evidence:

“In order that experimental evidence in corroboration or disproof shall be of any value, it must be shown that the conditions affecting the result are, as near as may be identical with those existing at the time of and operating to produce the particular effect. *An absolute identity is, of course, impossible, but a substantial identity must exist to give the evidence value.*”

We submit that in the trial of this case the substantial identity is wholly lacking and the evidence should not have been received under any theory of similar occurrences or experiments.

In *Harper v. Blasi*, Colo., 151 P. (2d) 760, an action for assault and battery, the trial court permitted a witness to testify as to an experiment conducted by him with a mask, an artificial eye and rimless glasses to

determine whether a blow struck as plaintiff testified could have produced the injury complained of. The Supreme Court of Colorado in the opinion held that the admission of such evidence was error, and at page 761 of 151 P. (2d) uses the following language:

“We think the experiment and its description improper. There was no similarity of conditions, no way of establishing equality of strength or skill, and no indication that, accepting the conclusions of the witness, this evidence was even helpful. There was no compliance with the rules under which similar experiments are held admissible . . .”

The case of *Martin v. Angeles City Baseball Ass’n*, California, 40 P. (2d) 287 has some important comment upon the care which must be exercised by the trial court in determining the admissibility of demonstrative evidence where bodily movements are sought to be simulated. The case was a damage suit for injury arising when the plaintiff fell while going down a stairway owned by the defendant ball club. The defendant offered evidence of experiment by a witness in approaching and descending the stairway in the manner the plaintiff had testified she had done it. At page 288 of 40 P. (2d) the court had the following to say:

“While it is the general rule that experimental evidence is admissible if it substantially tends to establish the fact it is offered to prove, it is nevertheless discretionary with the trial court to limit the extent to which such evidence may be received; *and it is the duty of the court to refuse its admission when it is doubtful whether it is*

likely to tend more to confusion than to justify or certainty. (citing cases) The results of experiments made by an individual chosen for the purpose to demonstrate bodily movements in walking or in approaching and descending a stairway are so likely *in the nature of things to be what the mind of the individual suggests that it is extremely doubtful whether such personal experiments are safe as proof.* Clearly there was no abuse of discretion in denying admission of such proof under the circumstances of this case.”

It is strenuously urged that the demonstration of officer Clark was of that kind and depended largely if not entirely for its execution on “what the mind of the individual suggests”. Such evidence should be received with caution even where some similarity of conditions is shown, and certainly should not be received in a case of this kind where no similarity exists at all.

This Court’s attention is invited to a recent California case, *People v. Sherman*, 217 P. (2d) 715. This was an arson prosecution wherein there was attempted to be demonstrated the relative inflammability of certain materials which were claimed to have been burned in the building damaged. The trial court was affirmed for denying admission of such evidence even though the materials were the same, the same conditions did not exist in the court room as in the upholstery shop which was burned.

The case of *R. D. Clancy v. State of Texas*, 247 S.W. 865, was a prosecution for aggravated assault. The defendant allegedly while sitting in a motion picture theater

unauthorizedly placed his hand on the leg of a young woman sitting near him. At the trial evidence was offered by the sheriff as to certain experiments he had conducted with the theater seats to determine if the touching could have been done by the defendant in the manner claimed. The evidence was received and the Court of Criminal appeals held that it was error for want of a showing of similarity of conditions between the actual occurrence and the experiment. A report of this case appears in 27 A.L.R. 857, and at page 859 the opinion states as follows:

“Complaint is made of the admission of the testimony of the sheriff as to experiments made by him with certain chairs in the theater building in question. It is made to appear as a result of such experiment the sheriff found that the hand of a person sitting in a seat could be thrust under the seat beside him, under certain conditions, in such manner as to be able to reach and touch the leg of a person sitting to the rear. The general rule in regard to testimony of experiments is that same must be made under conditions similar, or approximately similar, to those which surrounded the original transaction, and when there is objection made, proof must appear of substantial similarity. We find nothing in the record which shows that all the seats in the theater in question were similarly constructed, and the proof as to the fact that the chairs examined by the sheriff were similar to those occupied by appellant and the young woman in question seems to fail. It was a material question as to whether a hand could be reached under the seat and placed upon the leg of the prosecuting witness, between her ankle and her knee. The testimony as to the experiment, if

of a similar situation, was material. In the absence of a showing of substantial similarity the evidence of the experiment should not have been received.”

IV.

THE COURT ERRED IN ALLOWING THE DISTRICT ATTORNEY, OVER THE OBJECTIONS OF THE DEFENDANT TO INTERROGATE THE DEFENDANT RESPECTING THE COMMISSION OF CRIMES WITH WHICH THE DEFENDANT HAD NEITHER BEEN CHARGED NOR CONVICTED. (Specification of Error IV.-V.)

The defendant testified in his own behalf at the trial (R. 245-288) and was subjected to extensive cross examination by counsel for the state. It is the belief of counsel for the defendant that in the commission of the errors referred to in these specifications the greatest injustice was done to this defendant at the trial. Nothing could be less fair or more completely prejudicial to this defendant than the questions the District Attorney was permitted to ask the defendant under the guise of testing his credibility. The questions asked the defendant and called to this court's attention in these two specifications of error clearly show that an unqualified effort was made to try this defendant upon the basis of his past record, and not upon the facts which might be adduced by the prosecution tending to show that the defendant committed the crime with which he was here charged.

The line of questions put to the defendant on cross examination respecting his previous criminal record began with the District Attorney asking whether the defendant had been convicted of a felony, to which he answered that he had. (R. 288) The District Attorney then asked how many, to which an objection was made, and overruled. (R. 289) The defendant was then asked to state the kind and number of felonies. (R. 289) The defendant was asked if he didn't know at the time of the arrest that he was wanted by the state parole officer of California. This was objected to and the objection overruled. (R. 289)

The defendant was then asked if he didn't know he was wanted in California for four robberies. (R. 290) This was objected to and again the objection was overruled. It is significant to note that nowhere in the record is there any offer to show that the defendant was wanted for any robberies anywhere.

Upon further cross examination the defendant was extensively questioned about his violation of parole, and the possibility that he would be returned to California to serve additional time. All this was objected to and the objections were overruled. (R. 289-290) Still later the defendant was questioned, over the objection of his counsel which was overruled, about the perpetration of certain forgeries. (R. 294)

Still later in cross examination the District Attorney was permitted over the objection of counsel for the

defendant (R. 294) to ask the following specific questions:

“Q. Now, and before you left California you robbed the Fulton Food Shop at 1801 Fulton Street in San Francisco, didn't you? (R. 295)

A. No sir. (R. 295)

Q. And before you left California and on May 17, you committed a robbery at the Boulevard Pharmacy at eight twenty-three P.M. on May 17, didn't you? (R. 295)

A. No sir. (R. 295)

Q. And before you left California you committed a robbery at a grocery store on May 17 at eight forty-five P.M., the grocery store being at 3740 Irving Street in San Francisco, California? You pulled that robbery, didn't you? (R. 296)

A. No sir. (R. 296)

The damaging and meretricious aspect of these questions which the prosecution was permitted to ask is that there is not a shred of evidence in the record, and none was ever offered that this defendant was ever charged with such robberies, or in fact that such crimes had ever been committed.

It is the position of counsel that if the prosecution is permitted to ask questions of that sort without ever laying any kind of foundation, or introducing any evidence whatever that the defendant has been charged, or that the crimes have been committed, that a District

Attorney can accuse a defendant of the commission of any crime, or any number of crimes whether they are connected in any way with the defendant. This puts the defendant in the position of having to deny something with which, as in this case, he has never been charged. It gives, and is designed to give, the jury the impression that the defendant is an habitual criminal, and that none of his testimony is to be believed. It is difficult to imagine any type or line of questions which could be more completely prejudicial to this or any defendant, and we submit that such questions were put to the defendant with no other purpose than to prejudice him with the jury.

The general rule is that the commission of the offense for which a person is on trial cannot be proved by evidence that such person committed another but independent offense.

“* * * evidence which shows or tends to show that accused has committed another crime wholly independent of, and unconnected with, that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible, and such evidence of an independent crime is inadmissible for the reason, among others, that it ordinarily does not tend to establish the commission by accused of the offense charged, that accused must be tried for one offense at a time, and that, in accordance with the more extensive general rule, which applies to all cases, civil or criminal, the evidence must be confined to the point in issue. Questions regarding the admissibility of such evidence have been said to be within the wise discretion of the trial court, whose rulings thereon should not be

interfered with on review except where such discretion is abused, or unless it is clear that the questioned evidence has no bearing on any of the issues involved in the charge.”

22 C.J.S., Criminal law, Sec. 682.

The case of *State v. Owen*, Kansas, 176 P. (2d) 564, in discussing the general rule as to the admissibility of such evidence, notes as follows:

“Evidence of a similar offense is competent only, under the exceptions to the general rule, as tending to show the elements of the offense for which a person is on trial. A majority of this court believes that the conviction of the former offense had no probative value with reference to any element of crime for which appellant was on trial. The evidence was prejudicial and its admission over appellant’s objection constituted an abuse of sound judicial discretion. Counsel for the state also placed too much emphasis on the former offense in his cross-examination of appellant. In view of this conclusion we need not determine whether the former offense was a similar offense or whether the instruction requires a reversal. It is sufficient to say the instruction did not cure the erroneous admission of the testimony.”

This court has held in numerous cases that if facts constituting collateral offenses are relevant and tend to establish any of the necessary elements of the crime charged, other than by merely showing defendant’s bad character and propensity to commit similar crimes, proof of such facts are admissible even though showing that defendant has committed other offenses. *State v. Nemier*,

et al., 106 Utah 307, 148 P. (2d) 327, and cases therein cited. At page 329 it is stated:

“Very frequently there is found in the cases some form of rule like the following: ‘Evidence of similar offenses are never admissible except to prove some fact in issue.’ Now obviously this form of statement is substantially the original rule, putting the substance of the old into the form of the new. * * * See e. g., 8 R.C.L. (1914) 199: ‘The rule against admitting proof of extraneous crimes is subject, however, to certain exceptions. In making proof it is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constitutive elements of the crime of which the defendant is accused.’ This was adopted by the court in *State v. Anderton*, supra, and other cases.”

The court reviewed the evidence in the cases of *State v. Anderton*, 81 Utah 320, 17 P. (2d) 917, and *People v. Coughlin*, 13 Utah 58, 44 P. 94, in *State v. Nemier*, supra, and concluded that the evidence of prior crimes was admissible under an exception to the general rule, and stated that the evidence objected to was admissible as indicating a purpose or design to kill or do great bodily harm to anyone who attempted to interfere with the defendant’s escape.

In the case of *State v. Nemier*, supra, the evidence of the defendants’ escape from the prison can be consistently connected with the assault on the guards committed in connection with the escape and was no doubt one of

the elements which constituted the crime for which the defendants were on trial.

It is respectfully submitted that the cross examination of the defendant as herein referred to and the inferences drawn therefrom by the District Attorney were matters incapable of proof, were not attempted to be proven, was not evidence of a similar offense and cannot be admissible to prove other similar offenses committed by the accused and did not tend to establish any of the necessary elements of the crime charged.

V.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL, SUCH MOTION HAVING BEEN DENIED AND SENTENCE IMPOSED IN THE ABSENCE OF COUNSEL FOR THE DEFENDANT. (Specification of Error Nos. VI, VII, VIII.)

A motion to set aside the verdict of the jury and grant the defendant a new trial was filed on October 9, 1951 (R. 338-339), and an order of the court sentencing the defendant and denying such motion was entered on October 16, 1951 (R. 340). Neither of defendant's counsel was present when the motion was denied and sentence imposed, the record is silent as to the date of sentence or hearing on the motion for a new trial, and counsel for the defendant were not apprised of such hearing and date of sentence.

Article 1, Section 12, of the Constitution of the State of Utah provides in part:

“In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel * * * to have a speedy public trial by an impartial jury of the County or district in which the offense is alleged to have been committed. * * *”

Section 105-1-8, Laws of Utah 1943, provides:

“Rights of defendant; (1) to appear and defend in person and by counsel.”

This court, in *State v. Aikers*, 87 Utah 507, 51 P. (2d) 1052, stated:

“There is no doubt but that the constitutional right to appear and defend in person and *by counsel* is a sacred right of one accused of crime which may not be infringed or frittered away, and is one which may not be denied by the court or be waived by counsel.”

VI.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A REHEARING OF DEFENDANT'S MOTION FOR A NEW TRIAL AND IN DENYING DEFENDANT'S MOTION FOR AN ORDER FOR AN EXAMINATION OF DESIGNATED PHYSICAL EVIDENCE. (Specification of Error, Nos. IX, X.)

Defendant's motion for a rehearing on his motion for a new trial was filed on November 3, 1951 (R. 341),

and a motion for an order requiring examination of physical evidence received at the trial was filed on November 3, 1951 (R. 342). Both motions were supported by affidavits, one by counsel for the defendants, and the other by Ed Jackson, a member of the Salt Lake City police department. Both motions were by the court denied (R. 345-346).

The theory advanced by the prosecution and argued to the jury was, among other things, that the defendant at the time of the shooting, had concealed in the automobile, presumably behind the front seat, the gun which was fired and caused the death of Officer Farley. No police officer at any time testified that the automobile had ever been searched, even though such was a fact and within the knowledge of the officers who had the automobile under constant surveillance for a long period of time. Officer Jackson, after the trial of the case and after the imposition of sentence and the denial of defendant's motion for a new trial, disclosed such information.

During the course of the trial the coat worn by Officer Farley at the time of the shooting was introduced in evidence. Such coat contained a perforation with powder burns. The coat was taken by the jury at the time of their deliberation and was no doubt examined by the jury and influenced them in arriving at their verdict. No evidence was offered by the State of a scientific character to establish the distance from which a shot

would have to have been fired to produce the powder burns on the coat worn by deceased.

The affidavits were the basis of defendant's motion for a rehearing and defendant's motion for a new trial, which motion was by the court denied (R. 346). It is the contention of counsel for the defendant that the court erred in such denial, that the requests were not unreasonable and that the newly discovered evidence was a vital factor in determining the guilt or innocence of the defendant.

VII.

THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR AND IMPARTIAL TRIAL. (Specification of Error No. XI.)

The jury was impaneled on October 2, 1951, and the trial proceeded throughout the day. On the evening of October 2nd there appeared in a local newspaper the names and addresses of the jurors, together with a statement that police records show that the defendant was wanted for three robberies, a larceny, and on 47 counts of passing bad checks, for a robbery in Ogden and driving a stolen automobile across a state line. This was called to the attention of the court on the morning of October 3, 1951, the court at that time informed counsel that if it was their desire the court would order a mistrial. Counsel did not request a mistrial and the court admonished the jury regarding the newspaper article. (R. 99)

Counsel does not at this late date complain of the action of the court that was acquiesced in. It is, however, a circumstance worthy of mention in connection with the contention of counsel that the defendant was denied the right to a fair and impartial trial. This incident, when taken into consideration and in connection with error argued herein, should be given consideration when a defendant has been convicted and sentenced to be executed for an offense which under the circumstances as disclosed by the evidence could not have been committed by him.

It is submitted that the verdict of the jury and the sentence of the court should be set aside and the defendant granted a new trial.

Respectfully submitted,

EDW. M. MORRISSEY

ARTHUR A. ALLEN, JR.

*Attorneys for Defendant
and Appellant*

Receipt of copies of the above and foregoing Brief of the defendant and appellant acknowledged this day of June, 1952.

Attorneys for Plaintiff and Respondent.