

1954

State of Utah v. Paul Buddy S. Clair : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH

Plaintiff and Respondent

-vs-

Case

No. 8166

PAUL BUDDY ST. CLAIR

Defendant and Appellant

FILED

JUL 15 1954

Clerk, Supreme Court, Utah

APPELLANT'S BRIEF

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IN THE SUPREME COURT
OF THE STATE OF UTAH

- - - - -

STATE OF UTAH,

Plaintiff and Respondent,

-vs-

Case

PAUL BUDDY ST. CLAIR,

No. _____

Defendant and Appellant.

- - - - -

APPELLANT'S BRIEF

- - - - -

STATEMENT OF FACTS

An information charging Paul Buddy St. Clair with the crime of murder in the first degree was filed on September 14, 1953. A motion for change of venue was filed with the Court on September 14, 1953, on the grounds that a fair and impartial trial could not be had in Tooele County. This motion was, by the court, denied, and a plea

of not guilty was entered by the defendant, and the case came on for trial on January 12, 1954.

The jury was duly impanelled and sworn to try the case, 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 Paul St. Clair went to the home of the deceased, Vesta Wittke, at about 1:15 A. M. on the morning of July 6th, 1953. There is a conflict of testimony as to just what occurred there, but it is certain that Mrs. Wittke was shot two times and died from these wounds at about 11:05 P. M. that same day.

Mr. Sam J. Walters testified for the State that the defendant had come to his home the night before the shooting, borrowed a gun and shells from him, telling him he was going to go target shooting with a friend.
(R. 10)

Patricia Wittke testified that she had known defendant about one year, that he had

boarded with the Wittke family for some time, the last time being about Thanksgiving of the previous year. She further testified that on the night of July 5th, 1953, she had a date in the early part of the evening. She returned home about 11:30 P. M., talked with her mother for awhile (R. 20), and she went to bed in the room where she and her mother usually slept. She was later awakened by her mother saying "My God, Paul, don't." She then saw defendant shoot from the foot of her mother's bed (R.22). She went over to him and grabbed his hair, and her mother, the deceased, got out of bed and started hitting Paul. Patricia's older brother, Dayton, responded to Vesta's call, and took the gun from defendant, holding in on him. Dayton told her to go get the ".22, the shot gun". This she did, loaded it, and took it to Dayton. Dayton told her to go get Bruce Sagers, the next door neighbor, and to tell him to call Fay Gillete, the sheriff. This she did, and

the front porch. The defendant was gone. She went in to her mother, now in bed, who asked her if she had called the ambulance or doctor. Upon being told no, Vesta, the deceased, asked her to go call them (R. 29). She ran again over to Sagers, and Mr. Sagers informed her that the sheriff had taken care of that. Her mother then told her not to go to pieces, that she had to take care of Don, and told her to kiss her, and "she said good-bye."

Dayton Wittke testified that about two days before the shooting his mother came in and got him out of bed during the night, and told him to go call the sheriff, as Paul was there. He went into the kitchen, where his mother and Paul were. Paul kept asking for the keys to his car, which Vesta had taken, and Vesta told him she could not give them to him until the sheriff got there. A scuffle ensued, during which Mrs. Wittke hit Paul two or three times over the head with a poker. (R. 40)

On the night of July 5th, 1953, Dayton retired about 11 P. M. He was awakened about 1:30 A. M. by Patricia's screaming. Upon entering his mother's bedroom, he saw his mother and Patricia crouching with the defendant, who then sat down in a rocking chair. He took the gun from defendant, who then said, "Go ahead and shoot me." Dayton pointed the gun at him, pulled the trigger, but the gun mis-fired. He told Patricia to get the .22, held this on defendant after getting it, during which time the defendant repeatedly kept saying, "Go ahead and shoot me." (R. 41) Defendant finally walked out through the kitchen. A brother of Pat and Dayton then came in, and Dayton instructed him to get the shotgun; he then followed Paul with both guns, and took a shot at the car in which Paul was pulling away with the .22 (R. 42).

At this time Patricia returned from Sagers', and then informed Dayton that his mother had been shot. Dayton had not known

went in to her, tried to comfort her, and found a bullet hole in her chest and abdomen (R. 42).

Dr. Wallace Johnson testified on behalf of the State that he examined Mrs. Wittke early in the morning of July 6th, 1953; that he found two wounds having the appearance of bullet holes; and that she was then in critical condition. She expired that same day at 11:05 P. M. He stated in his opinion that death resulted from gunshot wounds. (He later removed the two bullets from the body and turned them over to the sheriff.) (R.55)

Jack Wittke, a minor son of deceased, testified that he frequently went hunting and shooting with the defendant. (R. 58)

Mr. Bruce Sagers, a next door neighbor of the Wittke's, testified that he heard what he thought were firecrackers, early in the morning of July 6th, 1953. He then heard screaming, and saw Patricia running over to his house. She called out, "Mr. Sagers, Paul has shot mother." (R.60) He

called the sheriff, and then went over to the Witke home. When he went in to Vesta's bedroom, she said, "Bruce, before I pass out, I would like you to know what Paul said to me. He came in, flashed on the light and said, 'Vesta, this is pay day', and began firing at me." (R. 63) She also asked Mr. Sagers to call the doctor and ambulance (R. 63), and to try to quiet the children.

Mr. James W. Park, deputy sheriff of Tooele County, testified that he examined the back screen door of the Witke home, and found that it had been cut near the latch.

Mr. Fay Gillete's testimony ran to three different occasions. First, he testified that he picked up the defendant shortly after he had been beaten over the head by the deceased with a poker, and that in his opinion he was drunk at the time. He further testified that while he was taking the defendant in to Tooele to have his head stitched and bandaged, that defendant said he would get even with that smart little son of a b----,

for Vesta. Defendant said Vesta owed him some money, that he had done a favor for her and Dayton, and that there would be a pay day. (R. 72)

He also testified that Vesta has communicated to him of threats being made upon her by the defendant, and that she was worried about her and her children's welfare (R. 73). This testimony was stricken out, but it remains important for the purposes of this appeal, which will be discussed later.

Upon arriving at the Wittke home the night of the shooting, he found Vesta in bed with two bullet holes in her body. There were also bullet holes at the head of the bed and in the east wall of the bedroom. He found a gun on the bed with five shells in it, three having been fired; and the one under the firing pin having been hit by the firing pin, but remaining intact. (P. 79)

Dr. Jack Tedrow, called by the defense, testified that he examined defendant on October 14, 1953, and that he found a large

being asked what the effect of such a blow might be, he replied, "From the intellectual standpoint it could result in poor ability to concentrate, a poor memory, and poor judgment. From the emotional standpoint it could result in hyper-irritability so the person doesn't have his emotional control he ordinarily has." (R. 86)

The defendant took the stand in his own behalf, and testified that he went to the Wittke home, in response to a telephone call from Mrs. Wittke telling him she wanted to see him. Upon arriving there, he went in through the unlocked back screen door, didn't find Mrs. Wittke in the kitchen on the love seat where she usually met him, so went in to her bedroom. He switched on the light, and Mrs. Wittke said, "I see you finally arrived". (R. 111) He asked what she wanted to see him about, and she informed him that she wanted to forget about the beating on the head, and go back on the conditions they had previously. (R. 118)

Defendant informed her that he wouldn't do

this; that everything was finished; that he didn't want anything more to do with her. He informed her that she could add the \$15.00 it took to sew up his head to what she already owed him. She asked if he was coming back (R. 112), and he said "No, Vesta, I think this is pay day for us. I think we are settled." To this she said, "I don't owe you a thing, Paul, you have been completely paid up - do you remember?" (R. 112) Defendant then testified that he gathered from that that he had been buying his favors, and from then until he found himself sitting on the edge of the chair, with Dayton standing over to the right of him, and the gun lying on the bed, he remembered nothing. (R. 113) He testified that he doesn't remember Dayton's picking the gun up, pointing it at him and pulling the trigger, nor Pat's pulling his hair, nor Vesta's hitting him. (R. 114) He left in his car, and later that afternoon was apprehended by the sheriff, having returned to the vicinity after being to Wendover, Utah, and

STATEMENT OF ERRORS

I.

The Court erred in allowing witness Fay Gillete to testify concerning an alleged conversation containing threats, made by defendant to deceased.

II.

The Court erred in allowing the witness, Bruce Sagers, to testify concerning statements the deceased made to him shortly after the shooting.

III.

The Court erred in failing to recognize the inadmissibility of the testimony given by sheriff Fay Gillete, concerning statements the deceased made to him shortly after the shooting.

IV.

The evidence was insufficient to support the verdict of the jury.

ARGUMENT

I.

THE COURT ERRED IN ALLOWING WITNESS FAY GILLETE TO TESTIFY CONCERNING AN ALLEGED

CONVERSATION CONTAINING THREATS, MADE BY
DEFENDANT TO DECEASED. (Specification of
Error No. 1)

The Court erred in admitting over defendant's objection certain hearsay evidence offered by the State, viz., statements attributed to the deceased in an alleged conversation with Sheriff Fay Gillette on the night of July 5th, 1953 (R. 73). After such hearsay evidence was admitted, the Court further erred in failing to admonish the jury to disregard it, and later, in refusing to give a special instruction concerning it, as requested by defense counsel, to which exception was taken (R. 181).

The State questioned Sheriff Fay Gillette (R. 73), as to a conversation he had with deceased on the night of July 5, 1953. The Sheriff was asked, "Why did she call you?" He answered, "She was worried, worried about her welfare and her children's welfare." The State then asked, "Why was she worried?" At this point objection was made as to the question and motion was made to strike the conversation. This objection and motion the Court denied.

The sheriff was allowed to continue as follows: "She told me that she had been called at work several times from Paul St. Clair, at least once from Salt Lake by Paul St. Clair, and other times in which she had been threatened and she was agitated and worried, - - and she was worried quite a great deal."

Defense counsel moved to strike this testimony, and the State joined in the motion, stating that it joined also in defendant's preceding motion to strike. The Court made no comment concerning this motion or the preceding motion or the testimony against which the motions were directed, and the State then continued its examination of Sheriff Gillete. Thus, the Court erred, first in admitting Sheriff Gillete's testimony as to his alleged conversation with deceased; and second, in failing then to admonish the jury to disregard that testimony.

In the case of State v. Nichols, 106 Utah 104, the Court granted a new trial

because error was committed by admitting hearsay evidence in a second degree burglary prosecution. Hearsay evidence was introduced as to a conversation police officers had with a certain party regarding cartons of cigarettes which with a .32 calibre long revolver were the subject of the burglary. The officer testified that his informant told him about defendant's getting the cigarettes, and then getting him to sell them. After the sale the proceeds were split with the defendant. On the basis of the identity given in that conversation, the police located the defendant in a hotel room with a woman and another man, and found there also the gun which with the cigarettes constituted the burglary. Objection was made to this testimony and was overruled by the Court. At the conclusion of the testimony the Court did sustain the objection and granted a motion to strike. This Court held, at page 108:

"The damage was already done by this incompetent testimony as evidenced by detailed examination of all testimony and the verdict of the jury. Even had

the trial court explained this incompetency to the jury, and instructed them expressly to disregard it, it is doubtful that the injurious effect could have been overcome."

It will be noted that the prejudice which has resulted to the appellant in this case is greater by far than that which resulted to the defendant in the last cited case, since here a capital punishment is involved.

This testimony not only prejudiced a substantial right of the defendant; the weight which must have been given to it by the jurors obviously affected any consideration which they gave as to a recommendation of imprisonment rather than the death penalty. Such evidence of threats allegedly made by the defendant to the deceased could have acted in no other way than to incite the passions and prejudice of the jury against the defendant.

Counsel here urgently contend that this testimony has wrongfully and greatly prejudiced the rights of the defendant, and the only remedy available to him is the granting of a new trial.

II.

THE COURT ERRED IN ALLOWING THE WITNESS, BRUCE SAGERS, TO TESTIFY CONCERNING STATEMENTS THE DECEASED MADE TO HIM, SHORTLY AFTER THE SHOOTING. (Specification of Error No. 11.)

The trial court permitted witness Bruce Sagers to testify concerning statements the deceased allegedly made shortly after the shooting had occurred. The defendant objected to the presentation of this evidence (R. 82), on the grounds that the proper foundation for dying declarations had not been laid; but the Court allowed the testimony in as a dying declaration.

The testimony to which objection was made is as follows: "Bruce, before I pass out I would like you to know what Paul said to me. He came in, flashed on the light and said, 'Vesta this is pay day' and began firing at me." (R. 83) This statement was alleged to have been made by deceased shortly after the shooting, just after Bruce Sagers, the next door neighbor was sum-

deceased's daughter.

It is fundamental to our system of jurisprudence that a dying declaration, in order to be admissible into evidence, must meet certain rigid and exacting tests. Unless such tests and requirements are fully met, the courts universally hold such evidence non-admissible, since it is hearsay, with no adequate safeguard for admission. The tests to be met are as follows: (1) The statements must be those of deceased (in a homicide case where the death of the declarant is the subject of the charge); (2) the circumstances under which the statements were made must be shown; (3) the condition of the injured person must be shown; (4) It must be shown that the declarant was conscious at the time the statement was made; (5) The statements must have been made while the declarant was under a sense of impending death and while entertaining no hope of recovery.

Counsel for appellant contend that requirement number five has not been met, and, therefore, the statement did not meet the requirements

for a dying declaration. In this respect, counsel for appellant further contend that the admission into evidence of this testimony was prejudicial to the appellant, since the only other evidence concerning what happened while the deceased and appellant were in deceased's bedroom, came from appellant's testimony, which is materially different from deceased's testimony and which could not have upheld a verdict of first-degree murder.

The dying declaration exception to the hearsay rule was first born because it was considered that a person about to die, and who knew he was going to die, is less likely to falsify his statements than a person having a hope of recovery. It has been said that this acts the same as an oath, and gives the statement made a degree of truthfulness.

Much litigation has arisen over the question as to whether or not there was a sense of impending death; whether or not the declarant knew the "finger of death" was upon him; whether or not the declarant had any hope, whatsoever, of recovery.

Warren on Homicide, Vol. 3, P. 7, states the universal rule in this area:

"But something more must appear than mere fear on his part that death might be the result of his injuries, or a mere belief that he would ultimately die therefrom. He must have believed that death was impending and certain; that is, that it would certainly come from the effects of the injury inflicted upon him, that it was near at hand, and might at any moment seize him."

In the same volume at P. 13, Warren further states the rule to be:

"To render dying declarations competent as evidence, it must appear that the person making them did so not only under a sense of impending death, but while entertaining no hope of recovery."

To this statement, Warren cites supporting cases from twenty-nine jurisdictions.

The courts have strongly emphasized the urgent need for this requirement of a knowledge of impending death in the declarant at the time of the making of the statement, in order to qualify it as a dying declaration. The California case of *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30, is typical of all the well-decided cases on this point.

In this case, the alleged dying declaration was reduced to writing, and the writing offered as evidence. The court held it not to be admissible, since the statement said, "Believing I am very near death * * *". The court pointed out that a mere belief would not suffice. The case of *Smith v. Commonwealth*, 113 Ky. 19, 23 Ky. L. Rep., 227, 67 S. W. 32, further substantiates this doctrine by saying that an expression by deceased of belief that he would not recover, is not admissible. The following cases support the doctrine that the belief of the declarant requisite to the admissibility of his statement as a dying declaration must reach the point of certainty that all hope of recovery is gone:

- a. *Com. v. Pallon*, 268 Mass. 494, 193 N. E. 68;
- b. *Wilkinson v. State*, 143 Miss., 324, 108 So. 211;
- c. *State v. Johnson*, 118 Mo. 491, 24 S. W., 299.

It is of necessity very difficult to determine what viewpoint a now deceased person took of his condition at a given time.

If the deceased person has made an affirmative statement as to his certain belief of impending death, such as, "I am a dead man", or "I know I will not recover from this wound", the problem is over. But too often as is the case here, the view that the deceased did take must be ascertained from other statements and acts, which all too often are ambiguous and capable of diverse interpretations. It is when dealing with such a situation that the problem becomes acute. Such a condition did exist in the case of *People v. Sanchez*, 24 Cal. 17, wherein the deceased made no statement as to his view of his condition. There the facts surrounding all the deceased said and did had to be looked at to determine the admissibility of the statement. True, the court held the statement admissible, after pointing out that the wounds were evidently mortal; that he was unable to converse except at intervals, and then with such difficulty and pain; that his physician unequivocally told him he had absolutely no hope of recovery; and that he

had sent for a priest to receive the last offices of his church, appointed for the dying only. But in receiving this, the court emphatically points out the conclusiveness of the requirements which must be met; the necessity for an appearance that the deceased knew he was about to die, and could not recover. The court points out the danger of such testimony if the requirements are not all present at page 24:

"This species of testimony should always be received with the greatest caution, and too much care can not be observed by the court in scrutinizing the primary facts upon which its admissibility is granted. No person is entirely exempt from a disposition to excuse and justify his own conduct, or to inflict vengeance upon one at whose hands he has suffered a grievous wrong; and in the eye of the law, this proclivity is presumed, in cases like the present, to be overcome and silenced only by the presence of almost immediate death. An undoubting belief existing in the mind of the declarant, at the time the declarations are made, that the finger of death is upon him, is indispensable to that sanction which the law exacts; and if it shall appear in any mode that there was a hope of recovery, however faint it may have been, still lingering in his breast, that sanction is not afforded, and his statement can not be received."

It will be noted here that the deceased, Mrs. Wittke, did not make any statement as to even a belief that she might die from the wounds inflicted upon her. She apparently had some view, some opinion of her condition, and it is this opinion that must now be determined. What view did she take of her condition? The court said, in State v. McNair, 53 Ut. 99, 178 P. 48, that this view must be determined to enable the court to discover whether the statements actually were made while the declarant was under a sense of immediate death. In the last cited case the court said:

"We think the rule is correctly stated by the Supreme Judicial Court of Mass. in Commonwealth v. Roberts, 108 Mass., 296, as follows: "The admissibility of such declarations does not depend upon any particular form of expression, for these will vary indefinitely, but it depends upon the view which the deceased took of his own case when in imminent danger of death."

Mrs. Wittke, the deceased, said: "Bruce, before I pass out, I want you to know what Paul said * * * " (R. 63) It is inconceivable that by the words, "Before I pass out" can be interpreted to mean, "I know I am going to die

interpretation has seemingly been given to this very general and ambiguous statement by the trial court, to qualify the statement as a dying declaration. The popular interpretation of such a statement, as it is used in almost daily conversation, means "Before I lose consciousness". It is difficult to conceive how any other interpretation can be given to such a statement. Counsel for appellant contend that if this statement was used as a foundation for the rest of the statement which followed, concerning the manner in which she was shot, that the wrong interpretation was given it by the court; that the proper interpretation could not mean "I am about to die, and know I can not recover", and therefore this statement, "Before I pass out" lends nothing toward any opinion or view that deceased allegedly had as to being in extremis.

The following question then presents itself Is there anything else in the record which would give any indication of any view deceased may have had concerning the plight of her condition?

We find that she told Patricia, her daughter, not to go to pises, that she had to take care of Don, and told her to kiss her, and told her goodbye (R. 29). It is quite apparent that this statement too has been used to attempt to show that deceased knew she was in extremis. But a proper analysis of this testimony will also fail to show any indication that deceased knew she was about to die, and had no hope of recovery. Undoubtedly the little girl was extremely upset; she had just witnessed a shooting. It would be quite natural for her mother to call her to her side and attempt to calm her, to quiet her; and in doing so, she told her she had to take care of Don, the younger brother, to give her a sense of responsibility. Now, what did the deceased mean by telling Patricia she had to take care of Don? Did she mean, "Patricia, I am going to die soon, I can't possibly recover, so I am going to ask you, my fifteen year old daughter, to take care of Don for me". Or did she mean, "Patricia, I've been hurt badly and will probably be away in the

hospital for some time (deceased had previously sent Patricia to call for a doctor and ambulance), and while I am gone I want you to take care of Don for me". And with this thought in mind, she kissed the little girl and told her goodbye. It would be a narrow interpretation of the above statement, and indeed an erroneous interpretation, to say that this could only indicate the woman knew she was going to die and could not possibly recover.

There is affirmative evidence available to this Court to show that the deceased did have a hope of recovery. It will be noted that she sent Patricia over to Bruce Sagers to have him call a doctor and ambulance (R. 29), and that she asked Bruce Sagers if he had called the when he arrived on the scene (R. 63). There is only one interpretation that can be given to deceased's repeated requests and inquiries for a doctor and ambulance. That interpretation is that she had a hope of recovery, and that she in the sooner the doctor arrived to examine her and

the sooner the ambulance arrived to take her to the hospital where she could receive proper care, the better her chances of recovery were. According to all of the decided cases and the authorities on the subject, such a view of one's own condition, that is, that there did exist hope of recovery, makes the entire statement non-admissible since the requirements to make the statement a dying declaration do not exist. The case of *Katherly v. Commonwealth*, 14 Ky. L. Rep., 182, 19 S. W., 977, illustrates this point. In this case, defendant gave deceased some wine which allegedly had arsenic in it. Deceased immediately went into great pain and convulsions, and was dead in fifteen minutes. He sent for a doctor and told someone else to go tell his family he was going to die. He also said that accused had poisoned him. The court said, in holding that the trial court committed error by allowing these statements in as dying declarations:

"The testimony of the Freemans and the Calvins as to what was said by the deceased should have been excluded from the jury. There were not dying declarations."

sent for indicates clearly that the deceased had hope of living, although he stated at the same time that he was going to die. The statements were not made under a sense of impending dissolution, that under the well recognized rules of evidence is necessary to make such statements competent."

Counsel for appellant contend that this testimony shows conclusively that deceased did entertain a hope of recovery at the time she allegedly made these statements, and thus, it is impossible for them to be dying declarations. And counsel further contend that even if deceased's statements as to her passing out, and her statements to Patricia, could possibly be interpreted as meaning she knew she was about to die and could not recover, that this interpretation is contradicted by the hope of recovery she did have, as shown by her request and inquiry several times concerning a doctor and ambulance. In *Bilton v. Territory*, 99 P. 163 (Oklahoma), the court held that contradictory statements as to expectations of impending death may prevent the admission of a statement as a dying declaration.

III.

THE COURT ERRED IN FAILING TO RECOGNIZE THE INADMISSIBILITY OF THE TESTIMONY GIVEN BY SHERIFF FAY GILLETE, CONCERNING STATEMENTS THE DECEASED MADE TO HIM SHORTLY AFTER THE SHOOTING. (Specification of Error No. III)

Now it is true that the deceased allegedly made an almost identical declaration to sheriff Gillete, after having made no additional statements which would qualify as a dying declaration (R. 80). This was not objected to. However, counsel for appellant here earnestly urge that the mere technicality of an objection being interposed to the introduction and admission of this testimony be overlooked in this case. Defendant's counsel at the trial, Mr. Robert Hansen, had been overruled twice before on the same testimony given by Bruce Sagers, and he apparently did not object to the sheriff's testimony since he knew it too would be allowed. Since the appellant is presently subject to a capital punishment, and for the reasons above stated, counsel here urgently

request that justice will only be done if this testimony is viewed in the same light the testimony given by Bruce Sagers is viewed, and thus be declared to have been wrongfully admitted as a dying declaration, for the same reasons as have been discussed above.

IV.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY. (Specification of Error No. IV)

In the absence of the erroneously admitted evidence, there is and was not sufficient evidence before the Court to sustain the verdict of the jury. None of the evidence properly before the Court, taken separately or together, could show that the defendant had any premeditation as to the shooting; that he had any specific intent to take the life of the deceased; that he wilfully took her life at the time of the shooting; or that he had any malice aforethought. It is impossible to show these elements that were required under Instruction No. 1 of the Court to the jury, by the properly admitted evidence.

Not only did this erroneously admitted evidence prejudice a substantial right of the defendant, but also, the weight which was obviously given to this testimony by the jurors prejudiced the right of the defendant to have the "careful and conscientious considerations" of the jury in determining whether or not a recommendation for life imprisonment should be given.

The State placed great emphasis on the fact that the defendant had a gun in his possession at the time he went out to the Wittke home on the night in question. There is evidence by the conduct of Dayton Wittke that the defendant had this gun on his person for the purpose of self-protection.

Dayton Wittke testified that as soon as he came into his mother's bedroom after hearing Patricia scream, he took the gun from the defendant, pointed it at him, and shot. He only shot once with this gun, and it misfired. Then while defendant was driving away in his car, Dayton took a shot at defendant with his .22

rifle. This bullet struck defendant's car. All of this took place before Dayton knew his mother had been shot, before he knew that anything out of the ordinary had happened other than hearing his sister scream. (R. 43)

Dayton must have been harboring a terrific feeling of animosity and hatred for defendant. He must have, indeed, intended harm and bodily injury to him, to shoot at him twice before ever even attempting to discover what, if anything, had taken place.

Now, it is inconceivable to see how one man can have such a feeling of hatred toward another man, whom he has associated with very recently, without the other man having some realization of his danger; some knowledge of the other person's feelings toward him. Defendant testified that he had some "fear" at the time he went into the house since a couple of days before "they" (meaning deceased and Dayton) had severely beaten him over the head with a poker, and he felt that taking a gun in with him "would be as good proof as anything to stop another

Counsel for appellant contend that the above evidence throws grave doubts on any premeditation, malice aforethought, or specific intent that must necessarily be proved before a verdict of guilty of murder in the first degree can be found. Defendant had been severely beaten by deceased and Dayton, and Dayton attempted to take his life at a time when he had no knowledge that defendant had harmed his mother. We believe this evidence raises a question of reasonable doubt as to several of the required elements of the crime charged, since the testimony supports the supposition that defendant took the gun with him for his own protection. Since such is the case, the State failed to show the elements required by this part of their case.

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,

CLAIR G. ANDERSEN

SIDNEY C. BAUCOM

Attorneys for Defendant

Receipt of copies of the above and foregoing
ief of the defendant and appellant acknowledged
is _____ day of July, 1954.

Attorneys for Plaintiff and Respondent.