

1954

State of Utah v. Charles Lee Mitchell : Brief of Appellant

Utah Supreme Court

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D. H. Oliver; Attorney for Appellant;

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CASE NO. 8226 U.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Respondent,

vs

CHARLES LEE MITCHELL,

Appellant.

* * * * *

BRIEF OF APPELLANT

* * * * *

FILED

AUG 18 1954

D. H. OLIVER

Attorney for Appellant

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

STATE OF UTAH,)	
	:	
Respondent,)	
	:	
vs)	Case No. 8226
	:	
CHARLES LEE MITCHELL,)	
	:	
Appellant.)	

* * * * *

APPELLANT'S BRIEF

HISTORY

The following editorial from the March 21, 1954 issue of the Logan Herald Journal reflects the setting, background and atmosphere in which the defendant was tried:

"Impressions at Cache County's first murder trial in about 50 years . . . We see--

The fellow who comes day after day out of morbid curiosity . . . the citizen who comes because he's never heard a criminal trial before, and figures this is a good one to begin with . . .

The man who happens to drop in and remains to listen . . . the workmen of the case--deputy sheriffs (some with their nerves a bit overworked, the attorneys, and witnesses (many with their frights and anticipations); the

judge, with his ear alert to testimony and his eyes reviewing tome after tome . . . and, if you please, the newspapermen . . .

The clerk, pinning identification numbers on every exhibit and trying conscientiously to hear the words she should hear, and making neat shorthand notes in neat notebooks . . .

The court reporter, taking down every word on a Stenotype machine, on which he can write up to 200 words a minute, and can catch the conversations of at least two people talking at the same time . . .

The Defendant, impassive always, as a spectator--Americans probably call his look poker-face. Charlie stares straight ahead, once in a while shifting his gaze from the witness to the exhibits. But never concentrating on the jury . . . Never staring at the judge . . .

When Tom Rowley, deputy sheriff, walks toward Charlie during a recess, the defendant rises respectfully and goes along with Tom--to the water fountain, to a place where Charlie can smoke, to a rest room.

Defense counsel D. H. Oliver, saying: 'We're not claiming this man to be an angel; he has drunk liquor and played dice and poker--but he didn't kill the deceased . . . ' And again impressing his watchers that he is adroit in the field of law . . .

The district attorney, Curtis E. Calderwood, handling his first big case . . . Winning respect of the audience for the extent of work he has done . . . cool most of the time . . . gentleman all of the time . . . Refusing to take up the super-caustic remarks, or the loud voice, or the harsh attack . . . and, insisting that evidence strongly points to the man's guilt.

The high school student who visited the trial, reportedly as the part of an assignment, and fainted after quite a while standing on his feet . . .

The court was recessed while he was carried to the judge's chambers, and when he came to, while a deputy sheriff and police officer were bent over him, he said: 'I'm all right'.

Jury men leaning forward to hear soft-spoken words of some witnesses . . . Jury men filing silently from the courtroom after Judge Jones has declared a 10-minute recess--usually to give defense counsel or prosecutor a chance to summon witnesses, or for the pure American opportunity of 'taking five.' . . .

George Parker, court reporter, operating his Stenotype, sitting erect, being alert. And when the witness, or the jury, or anyone asks a readback, he picks up the tape and reads it as he would a notebook.

The spectators (or audience, whichever is most appropriate), as they sit or stand, engrossed in the question-answer exercise of attorney and witness . . .

Their heads move from side to side, as each man in the front of the room does the talking . . .

In their minds, always (presumably) is the question: 'Is the man guilty of murder?'

So they listen, and study, and at recess talk: What do you think now? Will his alibi hold up? How strong is evidence? What will the jury say? How long will the trial last?

One lady, present at most of the sessions, punctuates every comment of the witness (state or defense) with a lusty chew of her gum . . .

There are, in the courtroom crowd, students from college, students from high school--some of them filling a class assignment, some interested in America's processes of justice, some inquisitive about criminal trials . . .

There are elderly folks to whom a trial is intriguing . . . A young boy with his parents . . . some pretty coeds, perhaps there on a dare . . . Some citizenship scholars who feel it the duty of a good U. S. citizen to attend such functions and check on the performance of public servants . . .

So crowded is the courtroom that one spectator is sitting on the judge's wastebasket, having pocketed spent flash-bulbs used and discarded by photographers . . . Several spectators are draped across window sills . . . Some crouching on steps . . . many standing, and scores not being able to enter the courtroom. Says a longtime courthouse employee: 'More life here today than if the entire colony of Shortcreek had come up for marriage licenses a few months ago.'

STATEMENT

No wonder the Clerk did not number the pages of her Record and prepare an index thereto as required by law. This is not intended to criticize the Clerk but on the contrary, she is to be congratulated for doing as well as she did.

We have numbered the Clerk's Record, in ink, at the bottom of each page, from 1 to 297, and in this brief the same will be referred to as "R". The Reporter's transcript will be referred to as "B".

- 3 -

About 10:30 A.M., October 28, 1953, one Wayne Yonkers found the body of a dead man laying by the side of a lonely road in North Logan, Cache County, Utah, R 154.

On October 30, 1953, one Bernell Toombs signed a Complaint before City Judge, Jesse P. Rich, accusing the defendant of murdering Fred Martin, R 2. This Complaint was approved by Curtis E. Calderwood as District Attorney and thereupon a warrant was issued, R 4. This warrant was dispatched to Montana by wire and the defendant arrested pursuant thereto, (see back R 4).

On December 1, 1953, the defendant appeared with counsel before the City Court and objected to the holding of a preliminary hearing and moved to quash the Complaint on the grounds that the same was not approved by the County Attorney as provided by law, R 150. This motion was denied, R 152.

At the close of the preliminary hearing this motion was renewed and again denied, R 295-6, and the defendant was bound over to the District Court for trial, R 296.

On December 17, 1953, the District Attorney filed his information accusing the defendant of murder, R 19.

The defendant moved the court to quash this information, R 17, which was denied, R 26.

During the course of the trial numerous errors were committed, some of which will be pointed out and discussed in this brief, but all of which are relied on for reversal and are not waived.

At the close of the State's case and after the State had rested, the defendant moved for dismissal, B 253-4. This motion was denied, B 258 to 260. After both sides had rested, this motion was renewed and denied, B 698.

The defendant requested the court to direct his acquittal, which request was refused, R 92 and 93.

On March 22, 1954, the jury returned its verdict finding the defendant guilty of second degree murder, R 119. Immediately, thereupon, the defendant filed a motion in Arrest of Judgment, R 121. On March 27th the defendant filed an Amended Motion in Arrest of Judgment together with a Motion for a New Trial, R 124 and 125. On April 6th these motions were denied and the defendant sentenced to a term of from 10 years to life in the Utah State Prison, R 126.

From the verdict and sentence, the defendant prosecutes this appeal.

STATEMENT OF POINTS

1. The Court erred in refusing to quash the complaint.

2. The Court erred in refusing to quash the information.

3. The Court erred in refusing to direct an acquittal.

4. Errors of law occurring at the trial.

To sustain this appeal the defendant relies on the following:

PROPOSITIONS OF LAW

I.

A PRELIMINARY COMPLAINT ISSUED BY A DISTRICT ATTORNEY IN UTAH IS VOID.

II.

IN A CRIMINAL PROSECUTION, THE BURDEN IS ON THE STATE TO PROVE THE VENUE OF THE COURT IN WHICH THE TRIAL IS HELD.

III.

THE PRESUMPTION OF OWNERSHIP ARISING FROM POSSESSION CANNOT BE INDULGED IN A CRIMINAL PROCEEDING IN

OPPOSITION TO THE PRESUMPTION OF INNOCENCE.

IV.

COLLATERAL OFFENSES, NOT DIRECTLY CONNECTED WITH THE SUBJECT UNDER INVESTIGATION, ARE INADMISSIBLE IN A CRIMINAL PROSECUTION.

V.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VERDICT AND JUDGMENT.

ARGUMENT

I.

A preliminary complaint issued by a District Attorney in Utah is void.

Utah Constitution, Art. I, Section 7
XIV Amendment, U. S. Constitution
Utah Code, Section 77-12-1
State vs Beddo, 63 P 96
State vs Morrey, 64 P 764
State vs Burkner, 64 P 1118
State vs Merritt, 247 P 497
Connors vs Pratt, 112 P 399
State vs Morse, 75 P 739
State vs Green, 6 P 2nd 177
Beasley vs State, 224 P 376
Jones vs Comm. 108 SW 2nd 816
Fullingin vs State, 123 P 558

Article I, Section 7, of the Utah Constitution provides that no person shall be deprived of his liberty without due process of law, and the XIV Amendment to the United States Constitution forbids any

State from depriving any person within its jurisdiction of his liberty without due process of law or to deny to such person the equal protection of the law.

In Jones vs Commonwealth, supra, it is said:

"Due process of law can not mean less than a prosecution instituted and conducted according to the forms and solemnities prescribed by the legislature for ascertaining the guilt of the accused."

Section 77-12-1, Utah Code 1953, provides the first step to be taken in ascertaining the guilt of an accused in Utah. This section provides, in substance, for the filing of a complaint before a magistrate. Section 77-10-4 defines a magistrate as: "An officer having power to issue a warrant for the arrest of a person charged with a public offense." Section 77-10-5 enumerates magistrates as follows: (1) Justices of the Supreme Court, (2) Judges of the District Courts, (3) Judges of City Courts, (4) Justices of the Peace.

If the complaint so made is not made by the County Attorney himself, it must be submitted to the County Attorney for his approval before a warrant shall issue.

In this case the complaint (R 2) shows on its face that it was not made by the County Attorney. It also

shows on its face that it was approved by the District Attorney.

The defendant made timely objections to this procedure, R 150.

The County Attorney attempted to justify this procedure by stating, R 151.

"Your honor and counsel, I don't believe that there's been a technical violation at all in the issuing of the complaint. It's true I did not sign the complaint when it was made out, for the reason that I was not here, I was in Montana at the time where the defendant was apprehended, and I telephoned-- If you so wish, I can put the testimony of the District Attorney on to show I telephoned him to make the complaint, and the District Attorney, upon my authorization, made the complaint out and signed it. And a warrant was issued and also, your honor, I also appeared over there at the arraignment and appeared before the court, and I think that in itself is an approval by the County Attorney of the complaint issued at the time. But it was primarily issued at my direction and the direction not of the District Attorney. Mr. Calderwood is here if you desire to have him testify to the conversation.

MR. OLIVER: The statute does not authorize any such procedure. I'll submit it."

The magistrate seems to have ruled on the theory that the County Attorney's procedure was justified under the circumstances, R 151.

The statute in question does provide that when it appears from the complaint or evidence is submitted to

the magistrate that the accused is likely to escape from the county before such approval can be had, a warrant may issue without such approval. But we submit that the complaint does not disclose the whereabouts of the defendant or that he was likely to escape. Neither is there any evidence in the record which discloses such fact. In fact the statement of the County Attorney discloses that at the time the complaint was made, the defendant was in the State of Montana, and thus the exception in the statute was not applicable.

This question was squarely before this Court in the case of Green vs State, supra, and this Court held that the defect was waived because not timely objected to. In Morse vs State, supra, this Court held that prohibition was not the proper remedy to reach this question.

The other Utah cases cited in support of this proposition are cases decided by this Court at the time when informations were required to be filed and prosecutions conducted in the District Courts, by the County Attorneys. In the cases cited the District Attorney filed informations for the prosecution of the defendants involved and in each case, this Court held that an information signed by the District Attorney was a complete nullity, and

could not give the court jurisdiction of the offense.

In State vs Buker, supra, this Court said:

"The record shows that the District Attorney did file the information. This that officer had no authority to do, and therefore the court acquired no jurisdiction of the cause and its judgment is void."

Since those decisions were rendered the Legislature amended the statutes placing the duty to prosecute crimes in the District Courts on the District Attorneys and there is no provision in the present statutes which authorizes the District Attorneys to file complaints in inferior courts.

In the case of Fullingin vs State, supra, it appears that the County Attorney was going to be absent for a while and signed a number of complaints and left them with the Clerk of the Court to be filled in as need may arise. One of these complaints was filled in by the Clerk and a warrant issued thereon for the arrest of the defendant. The defendant moved to quash the complaint for this reason, which motion was denied, and the defendant convicted. In reversing the conviction, the Court said, at page 559:

"...the motion should have been sustained, and the county judge should have then and there issued a legal warrant for his arrest. In Bowen vs State, supra, it was said, 'We have no discretion, except to hold that the court had not

acquired jurisdiction of the person of defendant, and that his trial was therefore illegal. This is the plain statute law of this state, and by it we are bound, whether we like it or not."

When the instant case reached the District Court, the defendant filed his motion to quash, R 17. This motion was repeated at the close of the state's case, B 353, and again after both sides rested, B 698, and in his motion for Arrest of Judgment, R 124.

With reference to this question, the trial court said, B 358:

"As to the other matters, I want to state something for the record. The signature of the District Attorney on the complaint, I think, is a nullity. However, the statute, as I recall it, permits a City Judge to issue a complaint without the approval of the County Attorney, and if that statute is constitutional, then it's this court's opinion that the attack on the complaint is not well taken."

There is no mention of a City Judge, as such, in the statute, but as pointed out above, the statute does provide that a magistrate may issue a warrant without the approval of the County Attorney under certain conditions, as herein pointed out.

Even if the statute did authorize the issuance of the complaint and warrant without such approval, in this case, Judge Rich did not attempt to exercise that

prerogative. His own version of the matter, as pointed out herein, seems to be that the County Attorney could issue the complaint and approve the same by remote control.

As pointed out by the Court in the Oklahoma case, and by Judge Jones in this case, it would have been a simple matter for the County Attorney to have dismissed this questionable complaint and started all over again in a constitutional manner without doing violence to the constitutional rights of the defendant, but for reasons best known to him, the County Attorney takes the position that in this case, he may disregard the statute and proceed in his own way at his own personal convenience, and in this we respectfully submit that under the Constitution of this State and the Constitution of the United States, this procedure is a complete nullity and that neither the City Court nor the District Court acquired jurisdiction over the defendant or the subject matter.

In *Beasley vs State*, *supra*, the Oklahoma Court repeated:

"Under the rule announced in the cases above cited, the plaintiff in error was not properly before the court, and no jurisdiction to hear and determine the matter presented had been acquired of the person of the plaintiff in

error. We therefore respectfully suggest that this case should be reversed."

II.

In a criminal prosecution the burden is on the State to prove the venue of the Court in which the trial is held

Utah Constitution, Art. I, Section 12
Utah Code, 1953, Section 77-8-5
Criminal Law, 22 C.J.S., Secs. 108 and 127
Nichols Applied Evidence, Vol. 4, p. 3170
State vs U. P., 130 NW 277
State vs Davis, 115 NW 150
Leonard vs State, 93 SO 56
Britton vs State, 74 SO 721
O'Neal vs State, 188 P 1092
State vs Rigley, 240 P 859
Brockway vs State, 138 NE 88
State vs Harvey, 242 P 440
State vs Ducolon, 201 P 627
State vs Wheaton, 99 P 1132
Tate vs People, 247 P 2nd 665
Brunson vs State, 115 P 606
State vs Siepert, 225 P 135
Mullikin vs State, 163 P 1113
Young vs State, 232 P 447
People vs LeBeau, 187 NW 252
State vs Erwin, 101 U. 365

Section 77-8-5 of the Utah Code provides:

"The jurisdiction of a criminal action for murder or manslaughter, when the injury which caused death was inflicted in one county and the party injured dies in another, or out of the state, is in the county where the injury was inflicted."

In this case there were 148 pages of testimony taken at the preliminary, R 149 to 297, and at the trial in the District Court there were 714 pages of testimony, and in all of this evidence, I hereby challenge the Attorney

General to point out one scintilla of evidence wherein it can be said that the bullet that killed the deceased was fired in Cache County, Utah. There just isn't any such evidence in the entire record.

The only witness produced by the State that was qualified to express an opinion on this subject was Dr. C. J. Daines, who examined the body of the deceased at the point where it was found in North Logan and after describing the condition of the body and giving his opinion as to the cause of death, testified as follows, B 41:

"Q. Do you know when that body arrived at the scene where you found it?

A. No.

Q. Do you know whether it was dead or alive when arrived there?

A. Yes, I'm certain that the body was dead when it arrived at the place.

Q. You don't know what place it was when it received these wounds you've described?

A. I did not.

Q. You couldn't say that those wounds and bullet, both the skull fracture and the bullet wound, was received in Cache County, could you?

A. No, I couldn't.

Q. Would you say that the wound that caused death was an instant death?

A. Yes.

Q. There wasn't any lingering after those wounds were inflicted?

A. No.

Q. So wherever those wounds were inflicted, that's the place where the death occurred, isn't it?

A. That's right. That is, you mean the one that caused the death?

Q. Yes.

A. That's right."

On redirect examination the doctor testified, B 44:

"Q. Now, Doctor, you testified that the man was dead at that place, on cross examination?

A. That is---

Q. That is, was dead at that place in North Logan when he was placed there?

A. He was dead when I arrived.

Q. When you arrived?

A. That's right.

Q. Do you have any idea whether or not he was killed at that place?

A. I think I testified I didn't think he was killed there. I'm sure he wasn't killed there.

Q. And what led you to believe that?

A. Because there was no blood on the ground, and the wound he received, there would have been considerable bleeding.

Q. You did not observe any blood on the ground?

A. No blood on the ground whatever."

This is the only evidence in the entire record that touches on the subject of where the deceased met his death, and this evidence affirmatively shows that the deceased did not meet his death at the place where his body was found in North Logan, Utah.

Querrie? Where was the deceased killed? Did he receive that mortal gunshot wound at any place in Cache County, Utah?

It is the position of appellant that the burden rests with the State to prove, by some evidence, that that wound was inflicted some where in Cache County, Utah, and on this point, the evidence is void.

On this point there seems to be three lines of authority. (1) The burden is on the State to prove venue beyond a reasonable doubt. (2) The burden is on the State to prove venue by satisfactory evidence. And a third line of cases that hold that venue may be assumed from other facts and circumstances in the case. But the authorities are unanimous in holding that the State is required to prove its venue by one method or the other.

In State vs Erwin, supra, this Court indicated that venue should be proven beyond a reasonable doubt by its criticism of the following instruction, given by the trial court:

"You must find from the facts in evidence, from which it may be reasonably inferred that the offense was committed in Salt Lake County."

This Court said the above instruction was not a correct statement of the law, but did not define the law on this point, stating that there was no dispute about the offense being committed in Salt Lake County, if it was committed at all.

Under the Title Criminal Law, 22 C.J.S. 184, Sec. 108, it is said:

"Jurisdiction is a fundamental prerequisite to a valid prosecution and a usurpation thereof is a nullity. Hence, the primary question for determination by the court in any case is whether or not it has jurisdiction."

And again, at page 211, Section 127, the same author says:

"...as shown in Section 108, supra, jurisdiction of the offense is essential to the validity of a criminal prosecution."

Nichols Applied Evidence, Volume 4, page 3170, it is said:

"The state must prove not only the commission of the offense, but also, is commission within the territorial jurisdiction of the court where the indictment is found."

In State vs U. P., supra, the Nebraska Supreme Court laid the rule down in the following language:

"The fact of venue in a criminal case is an essential averment to be established by the prosecution beyond a reasonable doubt."

A majority of the courts seem to follow the Nebraska rule, some of which are cited in this brief.

Oklahoma is one of the states that adheres to the liberal rule and allows convictions on slight or circumstantial evidence, and in that state, in the case of Young vs State, supra, the court said, page 448:

"While it has been held in several cases that the venue of the offense need not be proved beyond a reasonable doubt, that does not imply that venue can be established without any proof whatever, or upon mere conjecture or suspicion."

In this case the defendant was convicted of the crime of aiding his son to escape jail in Blaine County as a fugitive from justice, and the facts were substantially as follows: The defendant's son and another were awaiting trial in Blaine County jail on a charge of robbery and they escaped. Three witnesses testified that they knew the defendant and his son and that they saw the son and

the other escapee on the running board of defendant's car, going in a certain direction, near Elreno, Oklahoma. The defendant and his witnesses denied this and explained who the people were that was on the running board of his car and why they were on there. In analyzing this evidence, the court said:

"Assuming that this defendant did, on that occasion, convey his son and this negro in this roadster, or on the running boards thereof, for the purpose of aiding them to escape as fugitives from justice, there is no showing anywhere in the record that any part of the transportation took place in Blaine County. This court will take judicial notice that Kingfisher is the county seat of Kingfisher County and that Elreno is the county seat of Canadian County, and that both are populous towns and railroad centers. It follows, therefore, that, if the defendant did aid these fugitives to escape, he may have picked them up in Kingfisher or some other place in Kingfisher County, or in Elreno or some other place in Canadian County. There is nothing in the record to indicate that any part of the transportation of these fugitives, if they were indeed transported by this defendant, occurred in Blaine County; and this court would not be justified in assuming that such was the case."

We have set forth the testimony of the doctor in this case which shows affirmatively that the deceased was dead when his body was dumped at the place where it was found in North Logan. Again I challenge the Attorney General to point out the evidence that establishes the place where the shot was fired. This court can take

judicial notice that Logan, Utah is located about 15 to 20 miles from the border of the State of Idaho, about a 25 minute drive in an ordinary automobile. Was the deceased shot to death in Idaho and the body driven to North Logan and unloaded? Was the deceased shot to death in Box Elder or Weber County, or either of them, and driven to North Logan and dumped? No one knows, and certainly the evidence does not indicate, and we respectfully submit that the court cannot assume that the shot was fired in Cache County. Such an assumption would be an usurpation of jurisdiction as indicated by the author in C.J.S. cited above.

In Tate vs People, supra, the Colorado Court said:

"The question of venue when raised in a criminal prosecution is issue to be determined the same as any other issue in the case."

In Idaho, State vs Seipert, supra, the court says:

"The venue of an offense must be laid in the information and proven as any other material allegation."

Oregon says, State vs Harvey, supra:

"Venue is a material allegation of the complaint to be proved beyond reasonable doubt."

State vs Wheaton, supra, is a Kansas case where the defendant was charged with committing an abortion, in

"Several assignment of error have been presented, but in our view the case must be disposed of upon a single one, and no other need be considered. The information charges that the offense was committed in Allen County, Kansas. This allegation was not supported by any evidence whatever. This is a material allegation. The jurisdiction of the court depended upon the fact averred. The most that can be said for the testimony upon this subject is that it tends to support the inference that the death of the deceased was the result of a miscarriage or abortion. How this was produced, whether by natural or artificial means, is not shown. When or where it occurred does not appear; nor is there any evidence from which either of these material facts may be inferred... In our view this offense is committed wherever the prohibited means are used, and a defendant can only be tried for the crime at that place."

Montana seems to adhere to the liberal view on this question, but in *State vs Ducolon*, supra, it reversed a conviction where there was no evidence at all showing where the offense was committed.

We contend that Section 77-8-5 is conclusive and controlling as to the place where this offense should be tried. It specifically says that in cases of murder or manslaughter the venue is in the county where the injury was inflicted, and thus there is no room for the theory of the trial court, that it may have been a question of boundary lines between counties or states. Certainly there is no evidence that indicates that the shot that

killed deceased was fired on a county or a state line.

We close this discussion by citing one more Oklahoma case, *Brunson vs State*, supra, the opinion is short and we quote it in full:

"PER CURIAM. In this case there was no attempt made on the part of the state to prove venue. The name of the building and name and number of the street where the alleged offense was to have been committed are mentioned; but no proof as to the city, town or county in which said offense was committed was offered. Courts will not take judicial notice of names of buildings or names and numbers of streets. This case is reversed solely on the ground venue was not proven."

III.

The presumption of ownership arising from possession cannot be indulged in a criminal proceeding in opposition to the presumption of innocence.

Criminal Law, 16 C.J. 542, Sec. 1033
State vs Roswell, 133 SW 99
State vs Martin, 164 P 500
Smith vs Hansen, 96 P 1087

Exhibits Nos. 8 and 9 are what purports to be registration certificates for an automobile from the State of Washington, about which an issue arose as to their admissibility in evidence. With reference to these exhibits, Tom Rowley testified, B 57-58:

"Q. I show you what has been marked as plaintiff's proposed exhibit 8 and ask if

you've seen that paper before.

A. I have. I took this from the body of the man we found dead up in North Logan.

Q. And I show you plaintiff's proposed exhibit number nine and ask you if you have ever seen that paper before?

A. This was taken from the body of the dead man. It's a 1953 Washington--

MR. OLIVER: Objected to as incompetent, irrelevant, and immaterial and no proper and sufficient foundation laid.

THE COURT: For what do you offer them?

MR. CALDERWOOD: As evidence tending to prove the identity of the deceased.

THE COURT: For that purpose I'm inclined to receive them. Not for the purpose of conclusively showing the ownership of the car, but for the purpose of identifying the man.

MR. OLIVER: My main objection on the foundation is that there's no evidence to show or even indicate that these documents belonged to the deceased.

MR. CALDERWOOD: I think there's a reasonable inference.

THE COURT: There may be some presumption that may arise from the mere fact that the documents were taken from the body as to identity. They're received. What numbers are they?"

The language of this proposition is quoted from the text of Corpus Juris, supra.

As shown by the exhibits, they purport to be the registration and title certificates from the State of Washington, issued to the person named therein and, as indicated by the prosecutor, they were offered for the purpose of identifying the deceased. Appellant contends that the person named in the exhibits is not necessarily the person on whose body they were found, and that it is the burden of the state in a criminal prosecution to prove, by competent evidence, that the deceased was one and the same person named in the exhibits and that the exhibits themselves were genuine.

A similar situation exists in regard to Exhibit 2 which purports to be an application for a certificate of title. One Jesse R. Kyle was called as a witness for the state, B 11. This witness testified that he lives in the State of Washington where he ran a grocery store and that the deceased traded at his store and signed credit slips, but he did not produce any of said slips with the deceased's signature on them for observation by the court and jury. As to Exhibit 2 this witness testified, B 15.

"Q. I show you what is marked plaintiff's exhibit number two, purporting to be an application for certificate of title, and will ask you if you have ever seen that paper before.

A. No, sir, I don't believe I have.

Q. I ask you to look at the signature on this plaintiff's exhibit number two. In your opinion, Mr. Kyle, is that the signature of the person you knew to be Fred Martin?

MR. OLIVER: Just a minute before you answer that. It's objected to, no foundation laid for an opinion from this witness.

THE COURT: Yes, you'll have to qualify him further..."

Then counsel established that deceased had signed credit slips at this witness' store about twice a week over a period from April to August, then:

"Q. Now, ... Do you have an opinion as to whether or not that is Fred Martin's signature?

A. I would say it's the exact signature of the ones on my sales slips.

MR. CALDERWOOD: I offer at this time plaintiff's exhibit number two in evidence.

MR. OLIVER: May I ask a question?

THE COURT: Yes, go ahead.

Q. You don't know who made out this certificate, do you?

A. No, I don't.

Q. You don't know whether it's genuine or false, do you?

A. No, sir, I don't.

Q. You don't know the signatures of any of these other names that appear on this

exhibit, do you?

A. No.

Q. I notice this exhibit has a stamp on here, Mr. Kyle. It seems to be a rubber stamp. You don't know who put it on there, do you?

A. No, sir, I don't.

Q. You don't know whether the auditor of the State of Washington put that stamp on there or not, do you?

A. No, I don't.

MR. OLIVER: It's objected to as no proper and sufficient foundation laid.

MR. CALDERWOOD: We offer it for the purpose of identification."

Thereupon the exhibit was received in evidence for that purpose, B 17.

It is the contention of appellant that the exhibit was not admissible for any purpose on the foundation as laid.

The substance of the witness' testimony is that he had seen the deceased sign the slips at his store and the signature on the exhibit appeared to him to be the same. Under the rule, as laid down by this court in the cases cited above, if this exhibit had been proven, or admitted, to be genuine, and only the signature disputed, then the state would be entitled to produce a genuine

signature of the deceased and have the witness express his opinion as to the sameness of the two signatures, and then let the court and jury decide for themselves whether or not the signatures were, in fact, the same. This procedure was not followed and appellant contends that it is reversible error.

The rule on this subject was laid down by this court in the case of Smith vs Hansen, supra, page 1091:

"The real test, we think, in determining the admissibility of a document as a standard of comparison is whether the introduction of the instrument is calculated to raise a collateral issue as to the genuineness of the signature offered and whether the selection of the specimen was fairly made. On such a question much must be left to the sound discretion of the trial court. We can not say that the introduction of the document was not calculated to raise such an issue. The offered documents were not conceded nor admitted to be genuine. While the genuineness was testified to on behalf of appellant, it is not made to appear that, had they been received in evidence, such testimony would not have been disputed by testimony on behalf of respondent; nor was it made to appear that he was precluded to deny them."

In the case at bar the procedure was most unfair to appellant in that he was not even afforded an opportunity to see the signatures which the witness claimed was identical with the name on the exhibit. The mischief that could be accomplished if such procedure is allowed

to stand should be apparent to this Court.

In State vs Roswell, supra, the defendant was convicted of larceny from the person. Ownership of the wallet was proven but no proof of the ownership of the money in the wallet. In reversing the conviction, the court said, page 100:

"Until the ownership is shown by something more than a mere presumption of law to the effect that possession is prima facie evidence of ownership, the matter is repelled and overcome by the presumption of innocence which attends the accused at all times throughout the trial."

IV.

Collateral offenses, not directly connected with the subject under investigation, are inadmissible in a criminal prosecution.

Criminal Law, 16 C.J. #1027, 1034, 1146, 1150
and 1165

State vs Leek, 39 P 2nd 1091

State vs Jensen, 279 P 506

State vs Moore, 95 P 409

State vs Smith, 106 P 797

State vs Hembree, 103 P 1008

People vs Studer, 211 P 233

One Claude Holmes was called as a witness for the State and testified, over defendant's objections, to an altercation that took place in a dice game in a hotel at Blackfoot, Idaho on October 25, 1953, B 256 to 266.

The substance of this testimony was that a number of

potato pickers were at the hotel engaged in a dice game and got into a fight and that some one fired a shot. This witness said he heard the shot but didn't know who fired it. He looked out his door and saw the defendant with a revolver in his hand (which he later said was an automatic), the next morning he found a spent cartridge, exhibit 35, and some 3 or 4 days later, he found a bullet, under the rugs on the steps in the hallway. The deceased was not present on this occasion and was not involved in it in any manner whatsoever. This cartridge and bullet was of 25 calibre, the type or calibre of bullet which killed the deceased, but there is not one scintilla of evidence in the entire record that shows or tends to show that the same gun that fired this bullet was the gun that killed the deceased, and in this we respectfully submit that such evidence could only serve to unjustly prejudice the minds of the jury against the defendant.

The law on this subject is so well established until we don't feel that it is necessary to burden this court with authorities. Syllabus 3 of People vs Studer, supra, states the rule tersely as follows:

**"Admission of evidence as to previous quarrels
with others held prejudicial in close case."**

State vs Leek, supra, is a Utah case wherein the defendant was charged with the crime of forgery. The check which the defendant was charged with forging was received in evidence and in addition thereto, over the objection of the defendant, the State offered two other checks in evidence, which it claimed the defendant had forged. The State claimed that these other checks were offered for the purpose of establishing motive on the part of the defendant, and for that purpose, the court received them in evidence. This Court held such reception, for such purpose, was reversible error.

Assume, for the sake of argument, that the defendant in this case did get into a fight in a crap game as stated by the witness Holmes and did shoot at some one in that fight, there is nothing in the entire record that connects that fight with the offense charged in this case, and certainly the mere fact that defendant did have a fight at that time and place does not constitute a motive for killing the deceased, who was not present at that time and was not, in any manner whatsoever, involved therein.

This same witness testified, over the objection of the defendant, B.267 to 275, that on October 22 he had a

conversation with deceased concerning borrowing money.

The District Attorney claimed the offer was for the purpose of showing motive. The substance of the conversation was that on the date in question it was raining and all of his men, some 60 to 75 in number, were gathered in his office asking for their pay and he didn't want to pay them because if he did they wouldn't work. Witness told the men he didn't have any money and the deceased offered to loan him the money to pay them with. The witness testified the defendant was present in the office at that time, but there is no testimony that the defendant actually heard the conversation, and the witness, himself, said that when they talked about the amount of money required, he and deceased went outside away from everybody, specifically to keep the men from hearing what was said about money. In his main testimony the witness says the deceased told him he (deceased) had about \$300.00 on his person and would loan it to him.

This reputed bankroll which was to provide the motive for robbery, on cross-examination, turned out to be \$25.00, B 282.

For the sake of argument let's assume that the de-

fendant did know that the deceased had \$25.00 at that

time. Is it fair to him, on a trial for murder, to impute to him a design to rob and kill? It is a matter of common knowledge and this court can take judicial notice that men, in the ordinary walks of life, may have \$25.00 on their person and their associates often know thereof and that such small amount of money does not provide an incentive for ordinary people to rob and kill. There is no evidence anywhere in the record that indicates that decedent was robbed or that defendant had a special mania for taking other people's money, and in this we submit that such testimony constituted prejudicial error.

In addition to this witness' testimony being incompetent, it should have been stricken from the record for the further reason that he violated the exclusion rule. The exclusion rule was invoked, B 8. This rule was violated by this witness and objected to by defendant, B 328 to 336.

V.

It is the duty of the trial court to instruct the jury on all included offenses of the offense charged.

Utah Code, 77-32-1, Rule 51
State vs Smith, 62 P 2nd 1110
State vs Newhinney, 134 P 632
Cobo vs State, 60 P² 592

This court is familiar with the statutes which require the court to instruct the jury on the law in criminal cases, especially in regard to included offenses.

I am not unmindful of the decisions of this court which holds that in certain cases where the evidence is all one-sided and shows a willful, malignant, and malicious killing, such as a killing while engaged in robbery, etc., an instruction on included offenses are not justified, and with this general principle, I have no quarrel.

But this case does not disclose any such evidence. In this case all of the evidence is purely speculative and circumstantial. There is not but one point in the entire record that can be said to have been proven beyond a reasonable doubt and that point is, the body of a dead man was found in North Logan, Utah. Where he was killed? The record is silent. When he was killed? The record is speculative. The doctor says about midnight the night before. Who fired that fatal shot? Again, no evidence. The only circumstance that tends to connect the defendant with the killing is the fact that once upon a time he owned, or had in his possession,

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a 25 calibre gun. Was this particular gun the one that killed deceased? Nobody knows. The State's own witness, the ballistic expert, testified with regard to the cartridge and bullet that killed deceased, B 302:

"Q. Can you tell from the impressions on those cartridges what type or make of gun those cartridges were fired from?

A. No, sir.

Q. You don't know whether these cartridges or these bullets which you examined came from the type of gun that you have just described, do you?

A. No, sir."

The gun that the evidence shows was once in the possession of defendant was a Star Automatic, B 238, and this is the gun which the ballistic expert could not identify as the fatal weapon, and out of 714 pages of verbage, no one else could, or did, identify that gun as the fatal weapon.

Just how the jury could be convinced, beyond a reasonable doubt, that the defendant fired the fatal shot when no witness said so; no witness placed him at the scene of the crime; no witness located the scene of the crime; and no witness ever saw the defendant or the deceased in Cache County prior to the homicide is shocking to the sense of reason. The fact that they brought

in a verdict of second degree is indicative of the doubt that existed in their minds. The verdict indicates that the jury wasn't sure and for this reason brought in the minimum verdict they could find under the court's instructions.

There is nothing in the evidence to indicate that the deceased was not killed in a sudden quarrel or heat of passion or that he was not killed in self-defense, by whoever killed him. Notwithstanding the State's theory of the case, there is no evidence of robbery.

In view of the status of the evidence in this case and the doubtfulness of its character, especially as it applies to this defendant, we respectfully submit that the jury should have been instructed on all included offenses, as held by this court, in State vs Cobo, supra. If the jury could speculate as to the guilt of the defendant at all, they should have been allowed to speculate on the whole crime, including all included offenses.

VI.

The evidence is insufficient to sustain the verdict and judgment.

Tate vs People, 247 P 2nd 665
Cobianchi vs People, 141 P 2nd 688
State vs Lawrence, 234 P2 600
People vs Lombardi, 236 P 2nd 113
Gray vs State, 90 P 2nd 686
Bryon vs State, 144 P 392
State vs Ah Kung, 30 P 995
People vs Jackson, 52 NE 2nd 945
State vs Lewis, 223 P 915
Davis vs State, 193 P 745
Taggart vs State, 159 P 940
State vs Crawford, 201 P 1030

That the State has the burden of proving the material allegations of its information in a homicide case, there can be no question.

In this case, we claim three vital and determinative issues:

1. Was Fred Martin murdered?
2. If so, was he murdered in Cache County, Utah?
3. If Fred Martin was murdered in Cache County, Utah, did the defendant murder him?

Numbers 1 and 3 constitute the corpus delicti of this case.

As previously stated in this brief, there are 714 pages of testimony in this case, none of which sheds any light on the three pertinent questions enumerated here, and for that reason this discussion will be directed towards the lack of proof, rather than what the proof

Number 1. The evidence is clear that a dead body was found in North Logan, Cache County, Utah, on the morning of October 28, 1953. All evidence offered as to the identity of this dead body was timely objected to, as pointed out in Proposition III in this brief, and such evidence being incompetent, and improperly received, therefore, for all legal purposes, there is no evidence as to the identity of the deceased.

Number 2. Assume for the sake of argument that the dead body was that of Fred Martin; was it killed in Cache County, Utah? Not one witness hazarded a guess on this question. As pointed out in Proposition II, the doctor testified that the body was already dead when it arrived at the place where it was found. This being true, the time of decedent's death became an important factor, in view of the fact that he was last seen alive in Ogden, Weber County, Utah, at about 9:00 P.M. on the night before. According to the doctor's testimony, the deceased was killed at approximately 12:00 Midnight, October 27-8. No witness saw deceased after 9:00 P.M., October 27. No witness ever saw the deceased in Cache County alive. No witness ever saw defendant in Cache County prior to the time he was brought there under

arrest. At least five disinterested witnesses, Bessie Bush, B 410; Clarence Green, B 423; Johnny Dixon, B 434; Izola Bush, B 437 and Johnny Gregory, B 468, saw the defendant in Ogden as late as 1:00 A.M. the morning of the 28th. The defendant was in the company of these witnesses from about 10 o'clock that night to about 1:00 A.M. that morning. This evidence stands uncontradicted and undisputed.

Number 3. Not a single witness was able to say that the defendant was ever in Cache County at any time and, of necessity, they could not say that defendant killed deceased in Cache County, or at all.

The evidence does show that the defendant and deceased came to Ogden together in deceased's car on October 27 and that they were together in Ogden until about 9:00 P.M. that night, at which time deceased took the keys to his car from defendant and departed, presumably for Idaho, alone. The record is voluminous as to the activities of the defendant and the deceased in Ogden that day, and the testimony of all the witnesses, both for the State and the defendant, is in accord, without conflict, that the deceased left the party alone about 9:00 P.M. and the defendant left alone about

1:00 A.M. that morning. Several of the State's witnesses testified that the defendant had a small calibre gun on his person that day, which the defendant and his witness denied.

The defendant testified in his own behalf, B 476 to 625, in which he categorically denied any knowledge of the killing whatever. He admitted that he came to Ogden with the deceased on the 27th and left him about 9:00 P.M. that evening and never saw him again. He denied having the gun that the State witnesses said they saw in his possession. He explained how he came into possession of the Star Automatic which the pawn brokers testified to in Boise and Pocatello, which explanation is not reputed anywhere in the record. He says he got the gun from a Mexican on a loan in a crap game and that the Mexican redeemed it. This testimony is substantiated, to some degree, by the State's own witness, Mr. Williams, the ballistic expert, who says that the gun was of Spanish manufacture, B 302, line 11, thus it could be fairly assumed that this Mexican brought this gun with him from Mexico when he came to this country looking for work. The defendant denied ever being in

Cache County in his life until he was brought there under

arrest, and no witness was produced to testify to the contrary.

On behalf of the defendant, the witnesses above named testified to the whereabouts of the defendant at midnight, October 27th, none of which were contradicted, typical of which is Johnny Gregory, B 468 to 473.

Assuming that the defendant did have a small calibre gun, can it be assumed, without evidence, that he shot the deceased? Let's assume again, for the sake of argument, that the defendant actually shot the deceased; from the evidence as it appears in this record, that shot, of necessity, would have to have been fired in Weber County, and in that event, the District Court of Cache County could not have jurisdiction to try the offense.

In addition to the statute cited on this proposition, Article I, Section 12, Utah Constitution, expressly provides that the accused shall have a speedy public trial in the county or district where the offense was committed. The record is completely void of any evidence as to where the shooting took place. The record is equally void of evidence as to who did the shooting.

Counsel for the State seems to proceed on the theory that

the jury could presume that the defendant fired the shot from the fact that his witnesses said the defendant had a gun, then after so speculating, they could predicate another presumption on the first presumption and presume that the shot was fired in North Logan, Cache County, Utah.

All of the cases cited in support of this proposition are cases wherein the convictions were reversed for lack of sufficient evidence.

In *People vs Jackson*, supra, the court said:

"Inferences based on conjecture, not upon known or proven facts which are essential and alone give probative value to circumstantial evidence can not support a verdict of conviction."

This court, in the case of *State vs Lawrence*, supra, reversed a conviction on the sole ground that the State did not prove the value of a 1947 Ford automobile in good condition to be in excess of \$50.00. In that case the value of the car was an essential element of the offense charged.

In the case at bar the person firing the fatal shot was an essential element of the offense charged and on which the evidence is void. While venue may not be an element of the crime of murder, it certainly is an

essential element to be alleged and proven to give the trial court jurisdiction to try the offender therefor. On this point the evidence is void. On this point the trial court instructed the jury as follows, No. 17, R 114:

"You are further instructed that an alibi is a valid and legitimate defense and before you can find the defendant guilty you must find, from the evidence, that the defendant was present in North Logan, Cache County, Utah, on the date and at the time charged in the information, and in this respect, you are instructed that the burden is not on the defendant to prove that he was not here, but such burden is on the state to prove, beyond a reasonable doubt, that the defendant was in fact in North Logan, Cache County, Utah, at the time charged in the information.

You are further instructed that if you believe from the evidence that the defendant was not in North Logan, Cache County, Utah, at the time alleged in the information, you should acquit him, or if there is a reasonable doubt in your minds as to whether or not the defendant was in North Logan, Cache County, Utah, at that time, you should acquit him."

There is no evidence in this case that points to the place where the shooting took place, and for this reason the jury should not have been allowed to speculate on that subject. Their verdict shows that they obviously disregarded the court's instruction. In view of the total lack of evidence on this point, the court should

instruction Number 1, R 93, and directed an acquittal.

Tate vs People, supra, is a Colorado case wherein the facts and circumstances are very similar to the facts and circumstances in this case and the Colorado court held that such facts and circumstances were not sufficient to sustain a conviction.

Case after case could be quoted where convictions were reversed on evidence much stronger than the evidence presented by this record, but to do so would serve little purpose. This court knows the law on this subject, and the real question presented is one of fact, is there any evidence sufficient to support the verdict?

At the beginning of this brief we cited what we call a history of this case which we think may be useful in trying to determine what was on the jury's mind in reaching the verdict which they did. This history shows this case to be the first such case in 50 years. The whole community was worked up over it. The local prosecutors and court attaches were having their first experience in such trials, and certainly the jurors were unaccustomed to such affairs and their sympathies were naturally on the side of the home town. They probably felt that the

credit for his first big effort and for this reason would not send him down to complete defeat, and thus rendered a compromise verdict, giving the defendant the very minimum possible under the court's instruction.

My first reaction to the verdict was that it was based on racial bias, but my personal experience in Logan dispells any such idea. I want it made perfectly clear in this record that all the people in Logan, including the Court, the District Attorney, County Attorney Sheriff and his deputies, especially Deputy Rowley, the court attaches and the citizens of Logan, generally, accorded to me, the defendant, and all witnesses all the courtesies that any American could expect. The behavior of the people in Logan, on a racial basis, was beyond reproach. Rather than racial bias, I rather think the jury, under the circumstances and their lack of technical knowledge in matters of this kind, tried to favor both side and particularly their home town prosecutor. But whatever their reason for so doing, whether in good faith or bad faith, their verdict is not supported by legal evidence and should be reversed.

CONCLUSION

We have pointed out herein wherein the constitutional rights of the defendant have been abridged by the procedure by which this prosecution was commenced. The State will probably take the position that the defendant was not prejudiced by such error in that he had a fair trial on the merits, but we contend that the procedure provided by the Legislature for the ascertainment of guilt is basic and fundamental, and if that procedure can be bypassed and short-circuited in this case, then any other provision of the Legislature may be bypassed at the convenience of the particular prosecutor at the time, and sooner or later criminal prosecutions could proceed at the convenience of the individual prosecutor, who happens to be in office at the time any offense takes place.

In State vs Lawrence the trial court instructed the jury as to the value of the automobile in question, and this Court criticized the court with the following language:

"If a court can take one important element of an offense from the jury and determine the facts for them because such fact seems plain enough to him, then which element cannot be similarly taken away, and where would the process stop?"

By the same token, we contend that if the County Attorney may pass his statutory duty on to the District Attorney without authority of law, in this case, then why shouldn't any other court official pass his duties on to somebody else? Or, to put it another way, if the County Attorney may bypass this particular statute in this instant, why couldn't he, at his own convenience, bypass the holding of a preliminary hearing, etc., and where would the process end?

We have shown wherein venue was not established in this case and wherein proof of venue is essential to a valid conviction.

We have pointed out wherein the identity of the deceased was not established by competent evidence. The State will probably claim that the exact name of the victim is not that important, but we contend that this defendant has a right to be protected against another prosecution for this same offense and should it later appear that this particular dead body was that of, for example, John Hamilton, then, and in that event, this defendant could be put on trial for murdering John Hamilton, and for that reason, it is essential that the

information.

We have identified the errors of the court in receiving improper evidence and the misconduct of the State witness, Claude Holmes.

Finally, we have shown the complete lack of evidence to connect the defendant with the firing of the fatal shot that killed the deceased together with the total lack of any evidence to show that the fatal shot was fired in Cache County, State of Utah, and for these reasons we respectfully submit that the judgment and sentence should be reversed with directions to discharge the defendant, or grant a new trial in the event the State can produce further evidence.

Respectfully submitted,

D. H. OLIVER
Attorney for Appellant
409 Frick Building
Salt Lake City, Utah