

1954

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

CHARLES LEE MITCHELL,
Defendant and Appellant.

Case
No. 8226

Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

CHARLES LEE MITCHELL,
Defendant and Appellant.

} Case
No. 8226

Respondent's Brief

PRELIMINARY STATEMENT

Defendant was charged with the murder of Fred Martin in Cache County, Utah, and was found guilty of second degree murder after a one week trial commencing March 15, 1954. The trial court imposed sentence. From that judgment defendant takes this appeal.

Respondent feels that the statement of facts of defendant's brief is not adequate. Defendant makes no attempt to supply a summary of the proof. Such a summary is stated here, the attempt being to set down a chronological narrative. In view of the verdict, the

record is reviewed in a light favorable to respondent. This brief adopts the page designation employed by defendant: pages in the court reporter's transcript are referred to as "B....."; pages in the record as "R.....". Charles Lee Mitchell, the defendant and appellant, is referred to throughout as "defendant."

STATEMENT OF FACTS

Fred Martin's body was found in North Logan, Cache County, on the morning of Oct. 28, 1953, at the side of a little-used country lane (B. 22). Defendant was arrested on a Greyhound bus at Bozeman, Montana, on Oct. 30th, in connection with the crime. (B. 210).

Defendant and Martin worked in the potato fields near Blackfoot, Idaho (B. 453-4). Defendant owned, prior to the crime, a .25 calibre Star automatic pistol. He pawned this gun on Oct. 7, 1953 at Sam's Loan Company in Pocatello, and redeemed it from pledge on Oct. 22nd, receiving it back (B. 238-9). On Oct. 26th, at 2:30 a.m., defendant participated in an altercation growing out of a dice game in an upstairs room of the New Tourist Hotel in Blackfoot (B. 262, 459). The hotel-keeper was aroused by sounds of running, and a beer bottle hitting the bottom of the stairs (B. 262). He then heard a shot, opened his door, and saw defendant standing on the stairs with his automatic in his hand (B. 262). In cleaning up the following morning, the hotel-keeper found a spent .25 calibre cartridge case on the stairs (B. 264). On Oct. 30th the bullet slug fired during the fracas was

found imbedded in the carpeting of the stairs (B. 285). This slug, and the cartridge case, figure importantly in the subsequent testimony.

Defendant and Martin drove to Ogden for a holiday, arriving on the morning of Oct. 27th (B. 93). They spent the day there, seeing several of defendant's acquaintances, among them Charles Williams (B. 93), Herman Smith (B. 304), and Mr. and Mrs. DeWitt Taylor (B. 146, 167). Fred Martin, nicknamed "Pops", was identified as being his companion that day (B. 94-5, 149, 170, 308). Defendant admitted the trip to Ogden, with Martin (B. 489). Martin had a sum of money: on Oct. 22nd, he offered his employer a loan with which to meet the 60-75 man payroll (B. 274); Charles Williams saw the bank roll in Ogden and described it as "quite a wad" (B. 95); and Pops was described by defendant as "loaded" (B. 94) and as "sticking" (i.e., had money) (B. 108). Defendant, Charles Williams, and Herman Smith discussed Pop's bank roll and tried to devise a scheme to get it from him (B. 94, 108).

Defendant had his .25 calibre automatic with him in Ogden (B. 98, 128, 150). Various descriptions of it make it clear that it was the same gun which he pawned, and which he used in the earlier shooting scrape in Blackfoot. DeWitt Taylor described it as "a little .25 automatic"; "a little small gun with a thumb cock on the hammer" (B. 150). Mrs. Taylor called it "a little black gun with a little thing on the back side, looked like a trigger to me" (B. 168). A comparison with the

pawnbroker's description shows it to be the same gun ("... it's about four or four and a half inches overall length. It's an open hammer gun. You'll find a lot of automatics are hammerless. This is an open hammer.") (B. 238).

There is evidence that late in the evening Pops became drunk (B. 316), and there was some difficulty between him and defendant about the car keys (B. 97). Defendant stated, about the keys, "... that was his business, it was his keys. I mean, he brought the old man down and he'd take him back when he got ready to go" (B. 97-8). At about 9 p.m., defendant, Pops, and other friends were at DeWitt Taylor's house at a party (B. 98, 152). Defendant was heard by DeWitt Taylor to say, "*We're* going to leave sometime tonight. Going back to Pocatello." (B. 153). Mrs. Taylor also heard defendant say that "... *they* were pulling out that night." (B. 174). Mrs. Taylor thought that all the visitors at the house left together (B. 171). Mrs. Taylor was also told by defendant that he had a \$150 interest in Martin's Plymouth coupe which they drove to Ogden (B. 170). Defendant and Martin were seen together about 9:45 p.m. that night at a tavern by Herman Smith, whom defendant invited to go to Idaho with them (B. 307, 318); Smith agreed to go, but was dissuaded by other friends (B. 307, 318).

The dead body of Fred Martin was found next morning on a side road in North Logan, Utah (B. 22). Death was caused by a bullet which entered the right

side of Martin's neck and proceeded upwards, into the brain (B. 34-5). Death was instantaneous (B. 42). The examining doctor found also that Martin's skull had been fractured by a blow with a blunt instrument (B. 38). The skull fracture was accompanied by hematoma, or a blood clot, indicating that Martin was struck on the head before he was shot, since a hematoma does not form after death (B. 39). The doctor first examined the body at 11:40 a.m. on Oct. 27th, and was of the opinion, based upon the progress of rigor mortis, that death occurred about twelve hours prior, with two hours leeway either way (B. 33).

The black Plymouth coupe, 1941 model, bearing Washington license plates, in which defendant and Pops drove to Ogden, was found abandoned in Blackfoot the same morning, Oct. 28th (B. 176), and was examined by law enforcement officers the next day (B. 184). A spent .25 calibre cartridge case was found on the floor of the car (B. 185). A piece of the car's seat cover, blood stained, was cut out and sent to the F.B.I. laboratory for analysis (B. 187-189). Witnesses Charles Williams and DeWitt Taylor identified the car as being the one which defendant and Martin had in Ogden (B. 99-100, 148).

Defendant also was in Blackfoot the early morning of Oct. 28th. Before 7 a.m. the night clerk at the Grand Hotel saw him come out of Room 7, and he paid her the money for the following night's rent (B. 193). He apparently changed his mind, however, and left Blackfoot

that day, despite the fact that his employer there in Blackfoot owed him some money, the latter evidence having been admitted as tending to prove flight (B. 273). Defendant was seen in Idaho Falls on October 28th at 5 p.m. (B. 323). He there asked a friend to buy him some gin, and in getting out the money he inadvertently exhibited some cartridges larger in size than .22s but smaller than .45s (B. 323-4). Defendant at that time also had a bus ticket to Butte, Montana (B. 324).

Defendant was picked up at 1:35 a.m. on October 30th at Bozeman, Montana (B. 209). In his suitcase were five cartridges for a .25 calibre automatic (B. 218).

The record establishes that the murder weapon was the .25 calibre Star automatic which defendant redeemed from pawn on Oct. 22nd, which he employed in the shooting scrape in Blackfoot on Oct. 25th, and which he had in Ogden on the 27th. Microscopic ballistic tests proved that the bullet slug taken from Martin's brain (Exh. 6) was fired by defendant's gun, the same gun that fired the bullet slug in the Blackfoot hotel (B. 297). Microscopic examination of the shell casing found in the abandoned car proved that it bore the marks of defendant's gun, the same gun that fired the shot in the Blackfoot hotel (B. 297). The shell casings involved in the murder, the hotel incident, and those found in defendant's suitcase, are products of the same manufacturer—Remington, and are all .25 calibre automatic bullets (B. 298-9). The blood splotch on the seat cover of Martin's car was human blood, of Group B (B. 290). The blood on Mar-

tin's trousers and tee shirt was also human blood, Group B (B. 291). Human bloodstains were found on a shirt and trousers taken from defendant's suitcase, and inside the right hand pocket of another pair of defendant's trousers, but the stains were too small to enable the F.B.I. technician to make grouping tests (B. 291).

At the place Martin's body was found, prints of automobile tires showed where a car had pulled to the edge of the road (B. 72). One of the feet of the dead body lay out on the edge of the shoulder of the road, and the rear tire of the automobile had passed over the foot (B. 72). Plaster-of-paris casts were made of the tire prints (B. 73) which were received as Exhibits 10, 11, and 12 (B. 87). The officer who made the casts was of the opinion that the tire marks matched the front and rear tires on the right hand side of Martin's car (B. 350-2). The clerk of this court has both the tires and the casts, and the court, on examination, will be able to match the casts with the appropriate tires.

The defendant's testimony is outlined briefly. He admitted that he and Martin spent the day in Ogden, but says he gave Pops the car keys about 9 p.m. and never saw him again (B. 504). Defendant claims he stayed in Ogden with Herman Smith and others, leaving them about 1 a.m. (B. 505). He then caught a freight train to Pocatello (B. 507). He expressly denied DeWitt Taylor's testimony about his automatic (B. 501); denied Charles William's testimony about a scheme to get Pop's bankroll, and about Williams having seen the gun (B.

502); denied Herman Smith's testimony of having seen the clip for the automatic, and of defendant's invitation to leave Ogden with him and Pops (B. 506).

Defendant says he arrived at Pocatello about 7-8 a.m. (B. 508) and hitched a ride to Blackfoot, arriving 9-10 a.m. (B. 509). He bought a bus ticket to Butte (B. 510), then got a ticket to Denver (B. 517). He denied the testimony of the night clerk of the Grand Hotel in Blackfoot, Esther Scott, as to his having been there before 7 a.m. (B. 511). He denied Earl William's testimony that he had bullets in his pocket at 5 p.m. in Idaho Falls (B. 512). The blood on his clothes, he says, resulted from a cut on his hand about Oct. 1st (B. 526). He admitted that the blood-stained trousers (Exh. 39) were worn on the Ogden excursion, and also that a blue shirt—presumably Exh. 32—was worn to Ogden (B. 543).

Defendant's version of the hotel shooting fracas was that he did not fire a gun, that the only gun he held was a .32 six-shooter which he knocked out of a Mexican's hand (B. 541). He explained possession of the .25 calibre bullets by saying he had had them ever since 1949, when he owned a gun of that calibre (B. 524).

Defendant testified he got the .25 calibre Star automatic from Pancho, a Mexican, who pawned it to defendant for a loan in connection with a crap game. Defendant pawned it to Sam's Loan Company, redeemed it, then returned it to Pancho and never saw it again

(B. 489). On rebuttal, Herman Smith stated he saw defendant with a .25 calibre automatic of the same general appearance in September, in Boise and Pocatello (B. 668-9). Audrey Baird, employed in a Boise pawn shop, identified Exhibits 62 and 63, indicating that defendant had also pawned a .25 calibre Star automatic in September, and redeemed it Oct. 3rd (B. 680-7). Defendant thereupon resumed the stand and admitted this other pawnshop transaction (B. 693), and explained that he got the same gun from the same Mexican in another gambling transaction, while they were in Caldwell, Ida., topping onions (B. 694).

Several defense witnesses corroborated defendant's testimony that he was in Ogden between 9 p.m. and 1:00 a.m. on Oct. 27th.

Defendant's story about having jumped aboard a refrigerator car on the train (B. 580), was rebutted with proof that the particular train, #3816, was without any refrigerator car (B. 647). Defendant's claim that he jumped the train at the point the tracks divide (Cecil Junction) near the watchman's shanty by the jungle (B. 575-6), was rebutted with proof that #3816 went out the main passenger line, some two blocks away (B. 638).

STATEMENT OF POINTS

POINT I.

THE COMPLAINT WAS LAWFUL.

POINT II.

VENUE WAS CORRECTLY LAID IN CACHE COUNTY.

POINT III.

THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBITS 2, 8, AND 9.

POINT IV.

ADMISSION OF THE EVIDENCE OF THE WITNESS CLAUDE HOLMES WAS CORRECT IN THAT (A) THE RULE EXCLUDING PROOF OF ANOTHER OFFENSE IS NOT INVOLVED; (B) PROOF OF MOTIVE IS ADMISSIBLE; (C) VIOLATION OF THE EXCLUSION RULE WAS NOT A BAR TO HIS TESTIMONY.

POINT V.

THE TRIAL COURT'S REFUSAL TO INSTRUCT ON ALL INCLUDED OFFENSES WAS CORRECT.

POINT VI.

THE EVIDENCE SUPPORTS THE VERDICT.

ARGUMENT

POINT I.

THE COMPLAINT WAS LAWFUL.

Defendant's first point is directed at the complaint filed before the Logan City Judge, Jesse P. Rich. The document appears in the record at R. 2. Defendant's argument is that it was approved by the District Attorney rather than the County Attorney, and is therefore void. The proposition is apparently based on Sec. 77-12-1, U.C.A. 1953, which defendant cites. The section reads:

When a verified complaint is made before a magistrate charging the commission of a crime or public offense, he must, if satisfied therefrom that the offense complained of has been committed and that there is reasonable ground to believe that the accused committed it, issue a warrant for his arrest; but when the magistrate before whom the complaint is made is a justice of the peace, before issuing the warrant, the complaint, if made by any person other than the county attorney of the county, and the evidence taken by such magistrate relating to the offense charged, must be submitted to such county attorney, and he must examine into the charge and enter either his approval or disapproval of the issuance of a warrant upon such complaint. If the county attorney disapproves, no warrant shall be issued, but if he approves the issuance of a warrant, such magistrate shall proceed accordingly; provided, that when it appears from the complaint or evidence submitted to the magistrate that the accused is likely to escape from the county before such approval of the county attorney can be had, a warrant may issue without the approval

of the county attorney. No justice of the peace shall receive any fees or allowances whatever for any act done or services rendered in a criminal action or proceeding commenced or prosecuted in disregard of the provisions of this section.

The section does not apply to this case. What the statute says is that where a complaint is heard by a justice of the peace, the County Attorney must also approve before an arrest is ordered. The reason for the statute is that justices of the peace are not required by law to be lawyers, as are all other magistrates (Supreme Court Justices, by Art. VIII, § 2, Utah Const.; District Judges, by Art. VIII, § 5, Utah Const.; City Judges, by Sec. 78-4-8, U.C.A. 1953). The legislature apparently thought it appropriate that an additional check be placed upon the exercise of the power of a magistrate by a justice of the peace.

The complaint here involved was sworn to before the City Judge of Logan; it was not made before a justice of the peace. This means that neither the District Attorney nor the County Attorney need have approved the complaint. This is the view taken by the trial judge (B. 358), and it seems clearly correct.

Respondent contends further that the District Attorney has power to sign in the County Attorney's stead, if the latter is not available. Such authorization is contained in Sec. 67-7-4, U.C.A. 1953, which reads:

The district attorney shall, when it does not conflict with other official duties, attend to all legal business required of him in his district by

the attorney general, without charge, when the interests of the state are involved. All the duties and powers of public prosecutor shall be assumed and discharged by the district attorney, except in cases of prosecutions for misdemeanors, and preliminary examinations before justices of the peace, but the district attorney may, whenever he deems it necessary, appear and prosecute for misdemeanors, and in preliminary examinations before justices of the peace and other magistrates.

Further, the statute at issue is a part of Ch. 12, of Title 77, which chapter deals with the warrant of arrest and not at all with what is required for a valid complaint. Defendant has not referred to Ch. 11, the chapter in the Code of Criminal Procedure dealing with complaints. The question raised simply goes to the propriety of the warrant. The validity of the complaint, and jurisdiction of the defendant and the cause, are unaffected.

Neither *State v. Greene*, 78 U. 580, 6 P. 2d 177, nor *State v. Morse*, 27 U. 336, 75 P. 739, cited by defendant, reaches the proposition which defendant urges, and neither case contains even a comment about it one way or another. *State v. Morrey*, 23 U. 273, 64 P. 764; *State v. Beddo*, 22 U. 432, 63 P. 96, and *State v. Baker*, 23 U. 276, 64 P. 1118, are not in point. Those cases each involved a prosecution commenced by an information filed by the district attorney pursuant to a statutory procedure later held to be unconstitutional.

Fullingin v. State (Okla. 1912), 123 P. 558, is an Oklahoma bootlegging case cited and quoted by defendants. There the county attorney had signed, in blank, a

number of informations. A clerk would fill these in, then issue a warrant of arrest, without the knowledge of the county judge or the county attorney. Such a procedure was of course held improper. The case is not remotely like the case at bar, however.

POINT II.

VENUE WAS CORRECTLY LAID IN CACHE COUNTY.

Defendant's second point charges error in that there was failure to prove venue. The claim is that there was no evidence that the fatal shot was fired in Cache County.

At the outset, respondent disagrees with defendant's statement of the relevant law. In some states, the rule is that venue must be proved beyond a reasonable doubt. *People v. Gregor*, 359 Ill. 402, 194 N.E. 550; *State v. Miller*, 133 Ore. 256, 289 P. 1063; *Bridges v. State*, 72 Ga. App. 390, 33 S.E. 2d 850; *State v. Wiedenfeld*, 229 Wis. 563, 282 N.W. 621; *Mayes v. State*, 22 Ala. App. 316, 115 S. 291; *State v. Schroyer*, 66 Ohio App. 30, 31 N.E. 2d 469.

On the other hand, a mere preponderance of evidence has been held sufficient to establish venue in *Stribling v. State*, 171 Ark. 184, 284 S.W. 38; *Skipper v. State*, 114 Fla. 312, 153 S. 853; *People v. Vincencio*, 71 Cal. App. 2d, 361, 162 P. 2d 650; *Davis v. State*, 75 Okla. Cr. 220, 130 P. 2d 111; *Barragan v. State*, 141 Tex. Cr. 12, 147

S.W. 2d 254; *Stinson v. State*, 181 Tenn. 172, 180 S.W. 2d 883, and *State v. Kinkaid*, 69 Wash. 273, 124 P. 684. In Kentucky, "slight" proof is enough. *Commonwealth v. Duvall*, 220 Ky. 771, 295 S.W. 1047; *Gee v. Commonwealth*, 263 Ky. 808, 94 S.W. 2d 17.

The better reasoned cases adopt the view that venue is not an element of a crime in the same sense that malice, for example, is an element of a murder, and therefore hold that venue need not be proved beyond a reasonable doubt. A California court in *People v. Harkness* (1942), 124 P. 2d 85, has this to say on the subject (124 P. 2d, at 88):

As was said by this court in *People v. Carter*, 10 Cal. App. 2d 387, 52 P. 2d 294, 295, "The state gives no assurance to its feloniously insubordinate citizens that the venue of their crimes will be fixed beyond a reasonable doubt; that doctrine applies only to the issue of guilt. *People v. McGill*, [10 Cal. App. 2d 155, at page 159], 51 P. 2d 433; *Underhill on Criminal Evidence*, vol. I, § 36, p. 45. The defendant and appellant, therefore, is in no position to complain because the location of the offense was not established to a degree of certainty more to his liking."

In all the states, regardless of the required quantum of proof, circumstantial evidence of venue is sufficient, and direct evidence is not required. This is the Utah rule. *State v. Greene*, 38 U. 389, 115 P. 181.

This court dealt with a venue problem in *State v. Greene*, 38 U. 389, 115 P. 181, which was an adultery prosecution tried in Sanpete County. There was no

direct proof of venue. The court held, however, that venue could be inferred from this evidence: defendant and the girl lived in Mt. Pleasant, in the same house with defendant's wife; the parties had not left the county during the critical period except for brief visits. The girl left for California where a baby was born. There she made affidavit that defendant was the father, and that sexual intercourse had taken place in Mt. Pleasant. On being shown the affidavit defendant said, "I don't believe the baby is mine." This court construed that statement as being an admission of the intercourse, at Mt. Pleasant, and hence an admission of venue. It should be noted that the girl's affidavit was hearsay, and was admitted only for the limited purpose of forming a basis for defendant's admission. The substance of the affidavit was not considered as to the venue problem.

In *State v. Marasco*, 81 U. 325, 17 P. 2d 919, venue was established on slighter evidence. The charge was arson. The proof was that the building was: "located in the outskirts of Helper, not in the main business part of town"; that the defendant's place of business was "the west side of Helper, Bryner subdivision." The finding of venue was affirmed. This court reasoned that judicial knowledge placed Helper in Carbon County—this despite the fact that the jury were not so instructed.

See also *State v. Campbell* (Utah, 1949), 208 P. 2d 530.

Based upon the foregoing authorities, it is submitted that the rules controlling the venue of criminal

trials in Utah are: (1) that venue may be established by a preponderance of evidence, and need not be shown beyond a reasonable doubt; and (2) that venue may be inferred from circumstantial evidence and need not be shown by direct proof.

It should be noted that there is present here a jury finding of venue. A reading of the transcript indicates that defendant's counsel made this issue sharply clear to the jury. Defendant was found guilty under Instruction Twelve (R. 109) which defined second degree murder. The trial court by this instruction, and by Instruction Seventeen, imposed upon the prosecutor the burden of proving venue beyond a reasonable doubt, which in respondent's view was more than what the law requires. The only remaining question is whether the finding is within the bounds of reasonable inference.

Defendant makes much of Dr. Daines' theory that Martin was killed at a place other than where he was found (B. 41, 45). The doctor's evidence indicates that his idea was based upon the absence of blood on the ground. He testified (B. 45, line 8):

Q. And what led you to believe that [Martin was killed elsewhere] ?

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

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

A. No blood on the ground whatever.

The significance of this passage is that it shows that the basis of his conjecture was an observable physical fact—the presence or absence of blood. The validity of the doctor's conjecture depends upon the validity of his factual observation.

The preponderance of evidence (as the jury evidently believed) is that there was blood on the ground. Deputy Rowley said that when the body was moved there was blood on the ground, under Martin's head and chest (B. 60). Deputy Sorenson observed a 4 to 5 inch spot of blood on the leaves and dirt directly under the wound (B. 72). Deputy Rowley also testified that he dug some soil from underneath Martin's body which had blood on it (B. 345). This witness stuck by his story despite defense counsel's attempt to get him to say that it may have been red paint, or rabbit's blood (B. 346). The soil was received as Exh. 41.

It is to be noted that these witnesses had a better opportunity to examine the premises than did Dr. Daines, whose function was simply to examine the body. The law is clear that a lay witness can distinguish, and testify about, blood stains. 20 Am. Jur., Evidence, Sec. 887.

Taken altogether, the evidence supports a finding that the killing occurred in Cache County. That was where the body was found, and the jury could well have considered the natural inclination of one who has killed a man, and who has custody of the victim's car, with the victim in it, to get rid of the body quickly. The poor

concealment of the body, and the running over its foot with the car, indicate that it was gotten rid of with some haste. The body was not carried for any great distance after death because it was still bleeding when it was thrown where it was found. Death occurred instantaneously. This is sufficient evidence for a valid jury finding of venue.

Marion v. State (Neb., 1886), 29 N.W. 911, holds that the place where a body is found is a factor from which may be inferred the locality of the homicide. There, the defendant and deceased left Kansas with a team and wagon, which belonged to deceased but which defendant was buying from him. Defendant had bought and repaired a pistol to take on the trip. They were seen in Gage County, Nebraska, and from there they “went west”. Defendant returned to Kansas within a short time with the team and wagon, wearing some of deceased’s clothes. He said he had been in Kansas. Deceased’s body was later found in Gage County, Nebraska, with a bullet in the skull cavity.

To defendant’s requested instruction that proof of the killing in Gage County had to be shown beyond reasonable doubt, the trial court added:

But the place where the remains were found, if found at all, may be taken into consideration, together with all other evidence, in fixing the locality of the homicide, if there was a homicide.

The full instruction, and the finding of venue, were affirmed.

In *Commonwealth v. Costley* (Mass., 1875), 118 Mass. 1, defendant shot Julia Hawkes, tied a carriage robe around her head, and weighted the body with a 24 lb. tailor's goose tied around the neck. The body was deposited near a bridge in Fore River, Norfolk County, about 2½ to 3½ miles from the next county. One of the court's syllabi states:

The finding of a human body, with marks upon it of injuries sufficient to cause death, in a river in the heart of a county, in such a situation and condition as to show that it must have been thrown there by the hand of man and not borne there by the force of the stream or current, is sufficient to warrant the jury in finding that the homicide was committed in that county.

In *People v. Latona*, 2 Cal. 2d 714, 43 P. 2d 260, the court stated:

Appellant's final point is that the venue was not proved, and it is suggested that the murder might as well have been committed in Arizona and the body brought to where it was found. The coagulated blood on the ground underneath the head of deceased dispels the suggestions that the deceased was killed at some remote place, and the point is therefore without merit.

It is submitted that the evidence of venue detailed above is sufficient basis for the jury's finding. The proof is stronger than in the cited cases. The argument of defendant is a dangerous argument. The contention, essentially, comes down to this, that since no eye-witness saw where defendant killed Martin, defendant must go

free. Plainly, the law should not be so helpless, and respondent believes that it is not. Defendant's complaint about improper venue is not justified.

POINT III.

THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBITS 2, 8, AND 9.

In his Point III, defendant complains about the admission of Exhibits 2, 8, and 9, which are papers pertaining to the title of Fred Martin's automobile. The papers were found in Martin's wallet. Defendant's argument is that the presumption of ownership arising from Martin's possession of the papers is over-borne by the presumption of innocence which favors defendant. Defendant's objection is not well taken. The ownership of the automobile was not at issue. What was sought to be proved was simply that the man in whose wallet the papers were found was named Fred Martin. The papers in his wallet are perfectly admissible for that purpose.

Defendant's citation to 16 C.J. 542, Sec. 1033, deals with problems arising in criminal cases where some presumption comes into operation which conflicts with the presumption of innocence. In view of the fact that there is no presumption here respecting Martin's guilt or innocence, respondent cannot see how the citation is helpful.

Smith v. Hanson, 34 U. 171, 96 P. 1087, and *State v. Martin*, 49 U. 346, 164 P. 500, are also cited by defendant.

Those cases involve the admission of samples of a witness's handwriting as a standard of comparison with other handwriting of disputed authenticity. The cases are not in point.

At all events, these papers are but one minor item in a mass of proof as to Martin's identity. Exhibit 1, a photograph of the murdered man, was identified by Jesse R. Kyle. Defendant himself, as a witness, identified the same photograph and admitted that he and "Pops" were in Ogden together (B. 489). Charles Williams, DeWitt Taylor, and Herman Smith also identified Martin by the use of the photograph of the body. Respondent is at a loss to see how admission of the evidence complained about in this point could have any prejudicial effect upon the result of the trial or the outcome of this appeal.

POINT IV.

ADMISSION OF THE EVIDENCE OF THE WITNESS CLAUDE HOLMES WAS CORRECT IN THAT (A) THE RULE EXCLUDING PROOF OF ANOTHER OFFENSE IS NOT INVOLVED; (B) PROOF OF MOTIVE IS ADMISSIBLE; (C) VIOLATION OF THE EXCLUSION RULE WAS NOT A BAR TO HIS TESTIMONY.

Defendant assigns as error the admission of evidence that he was involved in an altercation arising out of a dice game in a Blackfoot hotel. During the fracas defendant fired his pistol at Emmet Jones. This proof

permitted a showing that a bullet fired from defendant's gun killed Fred Martin. Defendant complains that this amounts merely to proof of a collateral offense which is not admissible on the trial of this crime.

There is a rule of law that a prosecutor cannot prove one crime merely by showing commission of another unconnected crime. 22 C.J.S., Criminal Law, Sec. 682. But this rule is not applicable here. There is an exception to the rule which is as well established as is the rule itself. 22 C.J.S., Criminal Law, Sec. 683, reads in part:

The general rule of exclusion does not apply where the evidence of another crime tends directly or fairly to prove, or throw light on, accused's guilt of the crime charged, or to connect him with it, or to prove some particular element, or material fact in such crime; or where the two crimes are logically related or connected, so that proof of the other tends, or is necessary, to prove the one charged, or is necessary to a complete account thereof, as where they are so inseparable as to constitute but one transaction or crime, or where the extraneous crime forms part of a chain of circumstantial evidence of guilt of the crime charged; or where the evidence of other offenses tends to illustrate, characterize, or explain the act charged, when it is capable of more than one construction; or where such evidence bears directly and materially on the question at issue, or explains, or aids in the solution of, the crime charged. Evidence which is otherwise competent or relevant to establish accused's guilt of the crime charged is not rendered inadmissible by the fact that it incidentally proves or tends to prove him guilty of another and distinct crime.

Utah law is in accord with the textual matter cited. *State v. Peterson*, 83 U. 74, 27 P. 2d 20; *State v. Brown*, 71 U. 381, 266 P. 716. In *State v. Mares*, 113 U. 225, 192 P. 2d 861, this court stated:

We need say little about the third proposition argued by appellant. This assignment of error raises the inadmissibility of the evidence showing the commission of other crimes by the defendant. With the possible exception of the stealing of the Packard automobile in Denver, Colorado, all other offenses were directly connected with and related to the principal crime charged. The disposition of the property of deceased, the forging of deceased's name to certain documents, and the stealing and selling of the personal property are admissible for many reasons. These facts and circumstances are relevant to establish a motive for the killing, to identify the defendant as the perpetrator of the crime, to discredit defendant's claim of killing in self-defense, and to show an attempt on the part of defendant to conceal the crime and to prevent an identification of the deceased. A relevant fact does not become incompetent because it may tend to establish another and separate crime.

Respondent submits that the prior shooting fracas is necessarily interwoven with proof of the case at bar. The defendant is not entitled to diminish the amount of competent testimony against him simply by multiplying the number of his crimes.

Defendant also argues that the trial court erred in permitting Claude Holmes to testify that Martin offered him a loan to meet his payroll. The argument appears

to be that actually Martin's bank roll amounted only to \$25.00 and that it is not fair to defendant to impute to him a motive to rob and kill for such a small amount of money.

The proof indicates that the amount was larger. Martin offered his bank roll as being nearly big enough to meet a 60-75 man payroll. Charles Williams saw Martin with a big bankroll in Ogden. That defendant thought it sizable enough to be attractive is evidenced by the plans discussed in Ogden to get possession of it. At bottom, defendant is here simply arguing conflicting evidence. The problem of resolving conflicts of evidence has been settled by the jury. The evidence outlined above was admissible to show motive. The law is clear that proof of motive, although not required, is proper. 20 Am. Jur., Evidence, Sec. 340. *State v. Woods*, 62 U. 397, 220 P. 215.

Defendant's final argument in Point IV is that error was committed when Claude Holmes was permitted to testify despite his violation of the exclusion rule. Holmes had talked to some witnesses for the defense after Holmes himself had testified.

Holmes' conduct may have amounted to contempt, but there was obviously no effect upon his testimony, since he had already testified. The trial court's ruling was sensible and practical and well within discretion. In matters of this kind the trial court has broad discretion. The rules governing such happenings are summarized in 53 Am. Jur., Trial, Sec. 33, as follows:

There is a sharp diversity of opinion as to what shall be done when a witness who has violated an order directing his exclusion from the courtroom is presented. One view is that in such a case it is within the sound discretion of the trial court whether the testimony of such witness shall be received, but that there may be such an abuse of discretion in rejecting evidence as will justify interference by an appellate court, and a refusal to receive evidence where the party is without fault may violate his constitutional rights. To justify an interference with the reception of such evidence, the case must be an extreme one. Where a witness who has been put under the rule remains in the courtroom after testifying, it is discretionary whether he shall be permitted to be recalled.

Another view is that a witness' violation of the order of the court after being placed under the rule will not alone disqualify him, and that the court has no power to exclude his testimony for this reason. These authorities hold that the party calling the witness is entitled to his testimony in any event, notwithstanding the violation of the rule.

A third view is that where a witness who has been put under the rule violates the order of the court without the consent, connivance, or procurement of the party calling him or of the counsel representing such party, the witness is not thereby rendered incompetent to testify, and that the party calling him cannot, on account of the violation of the order without his fault, be rightfully deprived of the testimony of such witness. Under this view, if the party is at fault the evidence may be excluded. In any event, to render the exclusion of evidence prejudicial it must be made to appear that the witness would have testified to a material

fact. Of course, under any of the above rules a disobedient witness may be punished for contempt of court, and his disobedience may be considered as affecting his credibility. Where it could not be foreseen that a person in the courtroom who did not observe an order excluding witnesses, would be needed as a witness, it is proper to permit him to be called to rebut testimony.

POINT V.

THE TRIAL COURT'S REFUSAL TO INSTRUCT ON ALL INCLUDED OFFENSES WAS CORRECT.

Defendant contends that the trial court erred in not instructing on all included offenses. Defendant appears to argue that the whole record is speculative, and that if the jury were permitted to speculate about the murder charge, it should be permitted to speculate about all included offenses.

Defendant's point simply amounts to an attack on the sufficiency of the evidence. The answering argument in this connection is taken up in Point VI of this brief.

Defendant virtually concedes that the evidence would not support a manslaughter charge; the proposition is phrased negatively (page 37 of defendant's brief):

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.

Utah law is clear that where the evidence would not support a finding of guilt of a lesser included offense the trial court should not instruct on such included offenses. *State v. Mewhinney*, 43 U. 135, 134 P. 632; *State v. Thompson*, 110 U. 113, 170 P. 2d 153.

POINT VI.

THE EVIDENCE SUPPORTS THE VERDICT.

Defendant outlines three factual issues which he claims to be determinative, and as to which he claims failure of proof. These points will be discussed in the same order in which defendant takes them up.

Defendant argues first that there is no evidence as to identification of the body. This proposition is discussed in Point III of this brief. The proof is not restated here. Defendant's own identification of the victim's photograph, while on the witness stand, is a complete answer (B. 489).

Defendant's second contention is that there is no proof that the place of the homicide was Cache County, Utah. This is substantially a reargument of defendant's Point II, and is answered in Point II of this brief.

Defendant also contends that the evidence does not support the finding that he was the murderer. Respondent believes that when the whole record is examined the court will emerge with a settled conviction of defendant's guilt. The proof shows an opportunity to kill, a motive, a clear connection of defendant with the crime, and flight. Martin was killed with defendant's gun, which

defendant had with him only a few hours before the crime. Defendant left Ogden with Martin, having declared his intention to take Martin back to Blackfoot. Proof that defendant and Martin left Ogden about 10:00 p.m. fits in perfectly with the time of the killing at North Logan about midnight, in accordance with the medical evidence. After the crime defendant drove to Blackfoot. The time of defendant's brief stop at Blackfoot integrates with his abandonment of the Plymouth coupe there that morning. The spent cartridge case found in the automobile, the blood which is of the same blood group as Martin's, and the tire marks, show the involvement of the automobile in the crime. Defendant's flight from Blackfoot meant that he abandoned his job, the money owed him for back wages, and the automobile in which he owned an interest. The trip to Denver, via Montana, was erratic and roundabout. The lame explanations of the blood on his clothing and the bullets in his possession were understandably rejected by the jury. Defendant's consciousness of his own guilt is unmistakably revealed by his actions.

That the jury reasonably could find that defendant shot Fred Martin is demonstrated above. The remaining element of murder, malice aforethought, is implicit in the nature of this crime. Defendant shot Martin in the head, at sufficiently close range to cause powder burns, while the victim was dazed or unconscious from a blow on the head severe enough to fracture his skull. That such a killing is a homicide with malice aforethought is the only conclusion consistent with reason.

CONCLUSION

Respondent believes that all of defendant's assignments of error have been answered and shown to be groundless. The court is urged that defendant was accorded a fair and lawful trial at which he was well defended. The jury had ample basis for its verdict and could in truth have been more severe than they were. Defendant has no just complaint. The judgment should be affirmed.

Respectfully submitted,

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