

1956

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

Utah Supreme Court

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Clayton L. Simmons; John C. Beaslin; Henry S. Nygaard; Attorneys for Defendant and Appellant;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

JUL - 9 1956

STATE OF UTAH,

Plaintiff and Respondent

-VS-

PAUL BUDDY ST. CLAIR

Defendant and Appellant

Clerk, Supreme Court, Utah

Case

No. 14962

#8489

APPELLANT'S BRIEF

CLAYTON L. SIMMONS

JOHN C. BEASLIN

HENRY S. NYGAARD

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and Appellant

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

Case

-vs-

No. 14962

PAUL BUDDY ST. CLAIR,

Defendant and Appellant.

APPELLANT'S BRIEF

STATEMENT OF FACTS

An information charging Paul Buddy St. Clair with the crime of murder in the first degree was filed on September 14, 1953. A motion for a change of venue was filed with the court on September 14, 1953, on the grounds that a fair and impartial trial could not be had in Tooele County. This motion was denied by the court and a plea of not guilty was entered by the defendant, and the case came on for trial on January 12, 1954. The jurors found the defendant guilty of murder in the first degree and an appeal was taken to this court. This court ordered

Salt Lake City, County of Salt Lake, Utah, with the Honorable A. H. Ellett presiding. The case came on for trial on November 15th, 1955.

The jury was duly impanelled and sworn in and the State proceeded to offer testimony in support of the charges of first degree murder as alleged in the information. The testimony disclosed that Paul St. Clair went to the home of the deceased, Vesta Wittke, at about 1:15 A.M. on the morning of July 6th, 1953. There is a great deal of conflicting testimony as to what occurred there, but it is certain that Mrs. Wittke was shot three times and died from these wounds at about 11:05 P.M. that same day. (R. 97)

Dr. Wallace Johnson testified on behalf of the State that he examined Mrs. Wittke early on the morning of July 6th, 1953; that he found two wounds having the appearance of bullet holes; and that she was then in critical condition. (R. 96) He stated in his opinion that death resulted from gunshot wounds. (R. 100) He later removed the two bullets from the body and turned them over to the Tooele County Sheriff. (R. 98)

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

Wittke family in Grantsville and also in Pine Canyon, the last time being about Thanksgiving of the previous year. She further testified that on the night of July 5th, 1953, she had left the home about 4:30 P.M. to go on a date. She returned about 11:30 P.M., talked with her mother for awhile (R. 114) and she and her mother (deceased) went to bed. Patricia and her mother slept in the same bed. She was later awakened and looking up she saw defendant at the foot of the bed with a gun in his hand. (R. 115) She heard her mother say, "My God, Paul don't." She only heard one shot fired, (R. 116) crawled over the foot of the bed and grabbed Paul's hair. She and her mother, the deceased, struggled with Paul. Patricia's older brother, Dayton, was called and he came into the bedroom and took the gun away from Paul, holding it on him. Dayton told Patricia to get his .22. This she did, loaded it and brought it back to Dayton. The deceased asked Patricia to go call Fay; meaning Fay Gillette the Sheriff. Patricia then told the next door neighbor Bruce Sagers to call Fay as she did not know the number. The Wittke home did not have a telephone. Patricia upon returning home found Dayton and Jack (a younger brother) on the front porch. The defendant was gone. She went in to her mother, now

on the bed, who asked her if she had called the ambulance or doctor. Upon being told no, the deceased told her to call one. (R. 123) She again ran to Sagers and Mr. Sagers informed her that the Sheriff had taken care of that.

Dayton Wittke testified that about two days before the shooting his mother came in and got him out of bed during the night and told him to go call the Sheriff in order to get St. Clair out of the house. He went into the kitchen where his mother and Paul were. Paul kept asking for the keys to his car, which Vesta had taken, and Vesta said she would not give them to him until the Sheriff got there. A scuffle ensued, during which time Mrs. Wittke hit St. Clair two or three times on the head with a stove poker while Dayton held Paul's arms behind his back. (R. 151)

On the night of July 5th, 1953, Dayton retired about 11:00 P.M. He was awakened about 1:30 A.M. of the 6th by Patricia's screaming. Upon entering his mother's bedroom he saw his mother and Patricia grappling with Paul, who finally sat down in a rocking chair. Dayton took the gun from defendant, who then said, "Go ahead and shoot me." Dayton pointed the gun at him, pulled the trigger, but the gun mis-
fire: Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library. Machine-generated OCR, may contain errors. she .22, which she did,

and he held this on the defendant. During this time the defendant repeatedly kept saying, "Go ahead and shoot me." (R. 155-6) Defendant subsequently walked out through the kitchen and the front door. Dayton's brother Jack came in and Dayton told him to get the shotgun; he then followed Paul with both guns and took a shot at Paul's car with the .22 as he drove away. (R. 156)

At this time Patricia returned from the Sagers and informed Dayton that his mother had been shot. Dayton had not known about the shooting until this time. He then went into the house and stayed with his mother until she was taken to the hospital. (R. 156)

The testimony of Mr. Sam J. Walters, now deceased, was read into the record on the basis of his prior testimony in the first trial of this case. He testified that the defendant came to his home the night before the shooting and borrowed a gun and shells from him. St. Clair told him he was going to go target shooting with a friend. (R. 194)

Mr. Bruce Sagers, a next door neighbor of the Wittkes', testified that he heard what he thought were firecrackers early the morning of July 6, 1953. (R. 187)

He then heard screaming and opened the door and met Patricia there. "She said that Paul had shot her mother." (R. 187) He then called Sheriff Fay Gillette and went to the Wittke home with Patricia. When he came into Vesta's bedroom, she said, "Bruce, before I pass out, I would like you to know what happened." She said, "Paul came in and turned on the light and began shooting. He said, 'This is pay day, Vesta' and began shooting." (R. 189) Mr. Sagers was told by Mrs. Wittke to see if he could quiet the children. Mr. Sagers further testified that he had seen Paul in and around the house shortly after they moved to Pine Canyon.

Mr. Fay Gillette, the Sheriff of Tooele County, testified as to two separate incidents. First he testified that he picked up the defendant shortly after he had been beaten over the head by the deceased with a poker, and that in his opinion he was drunk at the time. (R. 199) While he was taking the defendant to Tooele to have his head stitched and bandaged the defendant said he would get even with that little son of a b----, Dayton, and that there would be a pay day for Vesta.

He also testified that he had seen Vesta on July 5, 1953, in his home and that her physical appearance was good but that she appeared worried. (R. 201)

Upon his arriving at the Wittke home on the night of the shooting, he found Vesta in bed with two bullet holes in her body. He also found a bullet hole in the headboard of the bed and in the east wall of the bedroom. He found a gun on top of the dresser with five shells in it, three of which had been fired; and the one under the firing pin having been hit by the firing pin, but had not fired and one that was intact. (R. 211)

He further testified that the defendant was picked up by him about 4:30 P.M. of July 6, 1953, and taken into custody.

Mr. Joseph A. Shields, called by the defense, testified that St. Clair approached him on the night of July 3, 1953, and said that he was hurt. He was going to take St. Clair to the doctor when Sheriff Gillette arrived.

Dr. Phillip J. Antrim's prior testimony was read into the record upon stipulation of counsel. Dr. Antrim testified that he sewed up the wounds of the defendant on the night of the beating; there were

two wounds; one was three inches long and the other was one inch long. He further testified that he observed no indication of intoxication on the part of the defendant.

Mr. Rex Mueller testified that he had seen the defendant on July 4th and that the defendant's head was bandaged. He also testified that he had seen the defendant with Vesta Wittke numerous times. Also, he and St. Clair had gone target shooting together on several occasions. (R. 252)

Dr. Jack Tedrow, called by the defense, testified that he examined the defendant on October 14, 1953, and that he found a large lump over the vertex of the skull. When asked what the effect of such a blow might be on or about July 6th or three days after the beating he replied, "Oh a person in that condition would be what we would term hyperirritability. That is, he would respond more to certain action than he would ordinarily. He would be in less control of his temper. He would probably be bothered more by loud noises; more easily irritated, you would say, and certainly not able to reason in his normal capacity." (R. 273)

The defendant took the stand in his own behalf and testified as to the incidents that lead up to his

being hit with the poker and things incident thereto.

He testified as to the shooting itself. He stated that he went home in response to an earlier phone call by Vesta telling him she wanted to see him. Upon arriving at the Wittke home he entered by way of the unlocked screen door; he didn't find Mrs. Wittke on the love seat or dufold so he went into her bedroom.

(R. 286) He turned on the light, and Mrs. Wittke said,

"You finally got here." (R. 287) He asked her what

she wanted and she informed him she regretted the

beating and that she wanted things as they were before.

(R. 287) Defendant said that he wouldn't do this and

that he ~~wasn't~~ going to continue their relationship.

He didn't want anything to do with her. He informed her

that she could add the hospital bill she caused by the

beating to what she already owed him. To this she said,

"if this is - - - I don't owe you anything, Paul." She

said, "You have been well paid. Remember?" (R. 288)

Defendant then testified that from this conversation

until he found himself sitting on the edge of the chair,

with Dayton standing over to the right of him and the

gun lying on the bed, he remembers nothing. (R. 288)

He stated that he did not remember anything said to him;

during the time of the shooting, Dayton's picking up

the gun, pointing it at him and pulling the trigger, nor Patricia and Vesta's hitting him and pulling his hair. (R. 289) He left in his car and drove in the vicinity of Wendover and Magna, Utah, and was apprehended late in the afternoon of July 6, 1953, near Tooele, Utah, by Sheriff Gillette.

STATEMENT OF ERRORS

I.

The court erred in giving instruction number 15 because it failed to clearly and properly distinguish between first and second degree murder.

II.

The court erred in admitting certain physical evidence which was prejudicial to the defendant.

III.

The court erred in not permitting Sheriff Gillette to testify as to the meaning of threatening words. stated by the defendant three days before the alleged murder. This was error because the meaning of the words were not submitted to the jury in their proper context.

IV.

The evidence is legally insufficient to support the verdict of first degree murder.

ARGUMENT

1.

THE COURT ERRED IN GIVING INSTRUCTION NUMBER 15 BECAUSE IT FAILED TO CLEARLY AND PROPERLY DISTINGUISH BETWEEN FIRST AND SECOND DEGREE MURDER.

This court has repeatedly stated that where possible the use of technical legal terms and cumbersome definitions thereof should be avoided so that the laymen on the jury can understand them. State v. Thompson, ___ U. ___, 170 P. 2d 153, 162, and citations therein. The instructions, as given in this case, defining the elements of first degree murder and second degree murder for the jury do not follow this court's previous admonition. Second degree murder is defined in such similar terminology that it is extremely difficult for anyone to see any difference.

Instruction number 14 defines first degree murder and we do not question its accuracy. However, instruction 15 fails to properly define second degree murder so as to distinguish it from first degree murder. Instruction number fifteen was given as follows:

" You are further instructed * * * First, that on or about the 6th day of July, 1953, at Tooele County, State of Utah, the defendant killed Vesta Wittke. Second, that the killing was with malice aforethought. Third, that the defendant intended to kill Vesta Wittke but that he did not deliberate or premeditate upon killing, or that the defendant did not intend to kill Vesta Wittke but that he did intend to do great bodily harm to Vesta Wittke. Fourth, that the said killing was unlawful. Fifth, that the killing was felonious. Sixth, that the said Vesta Wittke died within a year and a day after the cause of death was administered." (emphasis added)

In distinguishing between first and second degree murder it is essential that the necessary elements for each be set forth and clearly defined so the jurors will be able to intelligently reach a just verdict.

It is clear that if appellant is to be found guilty of first degree murder he must fall within category one as defined in State v. Russell, 106 U. 116, 145 P.2d 1003, 1008:

" Every murder perpetrated by poison, lying in wait or any other kind of willful, deliberate, malicious and premeditated killing is murder in the first degree." (emphasis added)
(76-30-3 U.C.A. 1953)

The elements of first degree murder within category one are:

1. Unlawful killing of a human being,
2. With malice aforethought,
3. With premeditation, and deliberation,
4. With specific intent to kill the person killed.

The definition of the aforesaid elements is absolutely necessary in order to avoid confusing the jurors with second degree murder; for second degree murder does not require premeditation, deliberation, or the specific intent to kill the person killed, while first degree murder under category one does.

To be guilty of second degree murder, all the jury need find is that the defendant intended to do great bodily harm or to do an act knowing the reasonable and natural consequences thereof would be likely to cause death or great bodily injury. It is important to note that specific intent to kill the person killed is not necessary. Also in second degree murder, malice aforethought refers to a design thought out beforehand to do great bodily harm or to do an act knowing great bodily injury or death might naturally follow.

State v. Trujillo, ___U._____, 214 P.2d 626.

First degree murder goes much farther, for it requires that not only must malice aforethought be present, but also the defendant must coolly and calmly conceive a plan to kill the particular person (under category one which is the division under which the defendant was tried).

Applying this distinction to the facts of this

case

carefully and fully

apprised that if Buddy St. Clair went to the home of Vesta Wittke to do great bodily harm or commit an act which might naturally tend to do great bodily injury or to kill her, they must find the defendant not guilty of first degree murder but guilty of second degree murder. If, however; the jury finds that the defendant went to the home of Vesta Wittke with a specific intent to kill Vesta Wittke and did plan to kill and did in fact kill her, they may find the defendant guilty of murder in the first degree under category one.

Not only did the court not clearly distinguish between the specific intent to kill the person killed and the intent merely to do great bodily harm or to do an act tending to naturally kill or do great bodily harm but also inserts the elements of premeditation and deliberation into the second degree definition. It is true that instruction number 15 says that second degree murder is the unlawful killing of a human being with malice aforethought but without deliberation and premeditation; however the fact that the terms "deliberate" and "premeditate" are included in a negative fashion would naturally cause the jury to attempt to make distinctions that courts themselves cannot satisfactorily make. **Deliberation and**

premeditation to be clearly presented to the jury should be limited to the affirmative definition of first degree murder and not the negative definition of second degree murder. To include the terms in both definitions is to cause confusion.

This is true because of the great difficulty in adequately and concisely distinguishing between malice aforethought, premeditation and deliberation. These terms are used so interchangeably that for the court to say you must find malice aforethought but not deliberation or premeditation is to cause the jurors to ask themselves what the difference is, for they all refer to degrees of planning and weighing a proposed activity. Justice Wade's opinion in State v. Russell, supra, at page 1009 makes it clear that it is almost impossible to distinguish between malice aforethought, premeditation or deliberation.

"How can an act be done with "Malice aforethought but without deliberation and premeditation? All three of these italicized terms are usually used interchangeably and with the same meaning. The terms premeditation and aforethought both mean to think out, plan or design beforehand. Some courts make a slight distinction between those terms and the term deliberation holding that it requires more calmness of mind and coolness of blood for deliberation than merely to premeditate and think out beforehand, but other courts refuse to make such a distinction. There can be no distinction in the length of time required to think out

perorenanand, in premeditation and deliberation. Such instruction was certainly confusing." Cases cited therein.

Therefore, because instruction number fifteen fails to clearly distinguish second degree murder and first degree murder under category one as to malice aforethought, deliberation, premeditation and specific intent, the defendant was prejudiced and should be granted a new trial in which the jury would not be confused by an improper instruction as set forth above.

II.

THE COURT ERRED IN ADMITTING CERTAIN PHYSICAL EVIDENCE WHICH WAS PREJUDICIAL TO THE DEFENDANT

The defendant's knife marked as exhibit 12 was admitted in as evidence by the court; yet the F.B.I. report read as follows:

" No foreign deposits of metal or paint were found on the blades or in the blade recesses of the pocket knife, specimen Q-7, which could be identified as having come from the section of the screen, specimen K-2. None of the individual cut strands of wire in the screen contain tool markings suitable for identification purposes. It was not possible, therefore, to associate by tool marking comparisons the knife, Q-7, as the tool used to cut the submitted screen, K-2." (R. 217)

From this report it is evident there was no relevancy or a proper "connecting up" between the knife found on the defendant and the screen door to the

Wittke home which was ripped open. Despite this expert testimony the court interjected its conclusions between the knife and the cut in the screen door. (R216)

"THE COURT: Well, you would hardly expect the harder blade of a knife to leave a part of its metal on soft copper wire. I would think you would look for the soft metal on the hard metal."

Clearly this was prejudicial to the defendant's rights because the court's comments on the evidence certainly misled the jury.

The screen itself was improperly admitted on two grounds:

First, there was no evidence or testimony that the defendant's knife was used to cut the screen door.

Second, there was no testimony or evidence that would establish that the screen door was cut from the outside or that the defendant may have cut it. In fact the photograph of the screen (exhibit 7) and the screen itself indicates there is a high probability that the screen was cut from the inside.

There is no doubt that the screen door was introduced to show the willful intention of the defendant to gain entrance to the Wittke home and thereby place him in a position where he could commit the alleged murder.

For the court to admit the knife and screen was to improperly set up a chain of circumstances which would

impress the jury with the idea that the defendant left his car, took out his pocket knife, cut the screen door from the outside, unlatched the screen door and then entered the home and shot and killed Vesta Wittke. This was extremely prejudicial. It is granted that the defendant's possession of the knife coupled with the fact that the screen was cut raises some possibility that the defendant used his knife to cut the screen, but there was no evidence or testimony introduced which connects the knife to the cut in the screen door or that the defendant did cut the screen. It is supposition unsupported by the evidence.

Evidence which has no tendency to establish the guilt or innocence of accused, and which, if effective at all, could only serve only to prejudice or mislead, or excite the minds and inflame the passion of the jury should not be admitted. 22 C.J.S 922

The improper admission with its necessary inferences established for the jury that the defendant acted willfully, with deliberation premeditation, and malice aforethought.

Not only did the court improperly admit the physical evidence but it committed greater error by commenting on the evidence itself. There can be no doubt that a juror would give considerable weight to comments made from the

In view of the aforesaid statements it seems clear that it was error for the court to admit and comment on the physical evidence improperly admitted.

III.

THE COURT ERRED IN NOT PERMITTING SHERIFF GILLETTE TO TESTIFY AS TO THE MEANING OF THREATENING WORDS STATED BY THE DEFENDANT THREE DAYS BEFORE THE ALLEGED MURDER. THIS WAS ERROR BECAUSE THE MEANING OF THE WORDS WERE NOT SUBMITTED IN THEIR PROPER CONTEXT.

Sheriff Gillette testified that Paul St. Clair told him three days before the alleged murder that " he was going to get even with that little son of a b----Dayton and there would be a pay day for Vesta.". These words are extremely important as to the degree of the offense in this case. In particular they go to the elements of willfulness, premeditation, deliberation and malice aforethought.

The following is what Sheriff Gillette stated on cross examination: (R. 222)

" Q Did you have any conversation at all with him on the way over there?

A From Shieldses' to - -

Q Yes, from Shields' over to Wittkes'.

A - -the Wittke home? I don't recall what we talked about, it was just a short distance, and I don't know whether I - -

Q Just general conversation?

A I imagine that's all it was I don't recall anything.

On page 223 of the record the question is put to Sheriff Gillette:

" Q Now these words that you took as threats, did you consider them as threats at the time?

A Well, he was angry and hurt, apparently hurt, and intoxicated, so I just figured that maybe they would ease up later on. Some times they do.

Q Did you -- what did you take those words as meaning at the time when they were said?

A Well -- -- --

THE COURT: I wonder-- -- excuse me just a moment, Mr. Gillette, I wonder if that would help the jury as to what this witness took them to mean, I don't mean to make objections for you, but I am wondering if what he assumed it would mean would be of any help to the jury. Wouldn't it be for the jury to assume what was meant?

MR. BAGLEY I think your honor is right on that, I withdraw the question."

Here, the court assumes that Gillette is assuming what the words meant to him. This is improper because Gillette himself knew what the words meant to him and how they impressed him. This interference by the court prejudiced the defendant because it prevented possible testimony to the effect that the words were made under such a state of mind that St. Clair did not really understand what he was saying or that he did not intend to carry out the "threats" made. If the words conveyed the impression to Gillette that St. Clair was not serious about the "threats", then this would lessen the weight of other testimony given as

to the premeditation and deliberation on the part of the accused. This goes to the very distinction between first and second degree murder.

This question should have been answered. A similar situation appeared in *People v. Thomas*, 25 Cal 2d 880, 156 P.2d 7, at page 13 and the court in that case said:

" As to the admissions of defendant it is code law that evidence of the oral admissions of a party is to be viewed with caution. * * * * His statement that he had "laid in wait to catch her" apparently refers to other occasions when assertedly he had caught her going out surreptitiously. But regardless of whether it refers to other occasions or to this occasion, as a matter of law it does not on its face and in its context justify the claim on behalf of the state that it constitutes an admission of lying in wait to commit murder."

Here the meaning of the words stated by the accused must be presented to the jury in their proper context to avoid a miscarriage of justice. Most people at one time or another say things they do not mean or the words spoken are received in a manner in which they were not intended. Conveying one's intention is many times a difficult thing.

Sheriff Gillette remembered the very words spoken by St. Clair but on cross examination stated that it was just general conversation. (R. 222) When asked what these damaging words meant the court forbids him to say what the words meant. This was prejudicial to the defendant.

The court erred in not allowing Sheriff Gillette to state what the defendant meant by these words. The court would be correct in not allowing Gillette to testify as to the meaning of the words only if Gillette was drawing a conclusion. He certainly may state what was meant to his knowledge or the impression he received. The fact that Sheriff Gillette said, "I just figured that maybe they would ease up later on. Sometimes they do." was indicative of the fact that Gillette did not consider the words very serious. Yet, the jurors were allowed by the court to reach the conclusion that defendant intended to carry out the threats without first presenting to the jury the words in their proper context. In any event it was the duty of the district attorney to object and not the courts.

-IV-

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE VERDICT OF FIRST DEGREE MURDER.

None of the evidence properly before the court, taken separately or together could show that the defendant had fulfilled the requirements under ~~division~~ one of the Russell case to substantiate first degree murder. It failed to show that the defendant had any premeditation as to the shooting, that he had a specific intent to kill Vesta Wittke, that he

willfully took her life at the time of the shooting, or that he had any malice aforethought to kill. The elements as set out in instruction number fourteen were not fulfilled. In fact the whole atmosphere surrounding the alleged murder is that of a killing other than first degree murder. It appears to be more in the nature of a "lover's quarrel".

From the evidence it is quite clear that Paul and Vesta's relationship was not that of an ordinary boarder in a home. These two had had a great affection for one another or they wouldn't have seen each other after Paul left the Wittke home near Thanksgiving Day of 1952.

The evidence clearly shows that St. Clair took the gun with him to the Wittke home for his own self protection. He knew from the beating he suffered a few days before that Vesta and Dayton were dangerous and could cause great bodily harm.

The conduct of Dayton Wittke certainly shows a great deal of bias against this defendant. Dayton helped his mother beat up St. Clair and then two days later he came into his mother's bedroom and attempted to kill the defendant; he took the pistol, pointed it at St. Clair, pulled the trigger, but fortunately it misfired. He then called for an arsenal of guns from Pat and Jack. He then

followed Paul out of the house holding a shotgun and a .22 on him. As the defendant drove away Dayton fired a .22 shot into Paul's car hitting the front door panel on the driver's side. Dayton was doing all of this shooting before he even knew that his mother had been shot. (Italics ours) Bruce Sagers testified as to what Dayton said as follows: " * * When Paul was here I didn't know Mother had been shot." He said, "If I had done, I would probably have shot Paul too." (R.193)

Paul St. Clair went to the Wittke home to talk to Vesta Wittke. It seems in all probability that he took the gun with him so that he could ward off another beating. Paul did not go there with a preconceived plan or design to kill Vesta Wittke. The malice aforethought as required under the Russell case is that the killing must be thought out beforehand and not just the malice. This element is missing in this case.

The fact that Patricia only heard one shot certainly allows some credibility to St. Clair's testimony that he and Vesta Wittke talked for some time before the shooting took place. Actually there were three shots fired.

If this had been a cool, claculated, premeditated murder would he have shot Mrs. Wittke with Patricia in the same bed? Did he plan to have a witness present when the ~~murder was committed~~ have an avenue of escape

thought out beforehand so that he could get to his car and make a get away? All of these questions are answered in the negative.

It is clear that after the alleged murder St. Clair sat in a chair, dumb founded, and made no pretense to escape. Was this reaction the cool, calculated, pre-meditated act of a planned and designed murderer?

The evidence fails to show that the defendant thought this crime out with the cool and deliberate state of mind that is required under the case of People v. Hillman, ___ Cal. 2d ___, 295 P.2d 939.

The court's error in admitting into evidence the knife, which wasn't connected with the alleged cutting of the screen; the screen itself certainly prejudiced the rights of this defendant. Improperly admitted evidence, as was the case here, cannot help but have its effect upon the jury.

The Court's failure to permit Sheriff Gillette to testify as to what he thought the damaging words meant to him prejudiced this defendant.

The Court's failure to properly instruct the jury as to the distinction between first degree murder and second degree murder confused the jury and prejudiced the defendant's cause.

For the above stated reasons we feel that the evidence just does not support a verdict of first degree murder, therefore we respectfully request that the verdict of the jury be set aside and a new trial granted or in the alternative that this court modify the verdict based upon the evidence as a matter of law.

Respectfully submitted,

Clayton L. Simmons

John C. Beaslin

Henry S. Nygaard

Attorneys for Defendant
and Appellant

Receipt of copies of the above and foregoing Brief
of the Defendant and Appellant acknowledged this _____
day of July, 1956.

Attorneys for Plaintiff and Respondent