

1960

State of Utah v. Jesse M. Garcia, Jr. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

—vs.—

JESSE M. GARCIA, JR.,
Defendant and Appellant.

Case No.
9092

FILED

APR 1 - 1933

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

—vs.—

JESSE M. GARCIA, JR.,
Defendant and Appellant.

Case No.
9092

BRIEF OF APPELLANT

STATEMENT OF FACTS

On the 24th day of August, 1958, at approximately 8:00 p.m., LeRoy Joseph Verner was killed. The decedent was an inmate at the Utah State Prison, and the homicide occurred at the Prison in the attic to Cell Block A. The killing was accomplished by Mack Merrill Rivenburgh, Jr. (R. 381, 387, 505 and 721). There were two other inmates present in the attic at the time of the killing, Leonard Warner Bowne, and the appellant in this matter, Jesse M. Garcia, Jr.

Earlier that evening, Rivenburgh told the defendant to go get a knife (R. 717). The defendant went to an-

other inmate, Darrel Stark and told him that Rivenburgh wanted the knife (R. 302, 305, 364 and 365). When the defendant returned, Rivenburgh told him to go upstairs with Bowne and stand point (serve as a lookout) while Rivenburgh engaged in an act of perversion with the decedent (R. 717 and 718).

The defendant and Bowne went into the attic a few minutes prior to the arrival of Rivenburgh and the decedent (R. 718). After the latter two had entered the attic, Rivenburgh spoke to Bowne to make sure he and Garcia were standing watch. Bowne left the defendant by a ventilator, and went to close a grating which covered the place of entry (R. 718). At this instant a ruckus started (R. 718). There was hollering and kicking, and a great deal of noise (R. 719). Because of fear, defendant ran to help Rivenburgh protect himself (R. 412 and 413). The defendant was kicked by someone. He believed it was the decedent (R. 719). The defendant tried to "get" the decedent and grabbed his legs (R. 383 and 719). There was "twisting and turning all over the place" (R. 719). Rivenburgh lost his knife and asked for help to find it. The defendant let go of decedent's legs, and in the dark attic, attempted to find the lost knife (R. 719). Defendant felt something wet and sticky, and was very much afraid (R. 719). Rivenburgh said, "Let's split" (R. 720), and the defendant followed him out of the attic.

After leaving the attic, the three with the help of other inmates disposed of the bloody clothing and established alibis (R. 409 and 720). Sometime later, the

defendant concluded that the decedent had been killed (R. 721). At no time did the defendant hit the decedent with either his fists or a knife (R. 719 and 720). At no time did the defendant take part in any plan to kill the decedent or entertain any intent to kill (R. 385, 410 and 721). The defendant *first* learned of Rivenburgh's intent to kill the decedent and of the actual killing while alibis were being discussed *after the killing*. This was when Rivenburgh, Dalton, Stark, and the defendant were playing cards just before check-in time (9:00 p.m.) (R. 318 and 535). The defendant was present during subsequent conversations wherein Rivenburgh's intent and acts were discussed (R. 318, 349, 350, 373-377, 408 and 409), but at no time before the killing did he know that Rivenburgh intended to kill the decedent. On the contrary, defendant thought he was going to the attic to stand point for an act of sodomy (R. 340, 380, 381, 397, 460, 461, 478, 717 and 718).

Testimony was introduced concerning a conversation between Rivenburgh and another inmate, Randel, which took place on the 24th of August prior to the homicide. The drugged condition of the decedent was discussed. The decedent, as well as other inmates involved, including the witnesses for the state, had taken excessive amounts of amphetamine pills over a period of days prior to the homicide. During this conversation, Rivenburgh remarked that somebody was going to cut off the decedent's head if he continued to act as he had. This led Rivenburgh and Randel to a general discussion of various methods of homicide. Such talk was commonplace at the prison. Rivenburgh had threatened to

kill others on many occasions without doing so (R. 448 and 454). At the time of this conversation, the defendant was not present. He and another inmate, Dripps, were in another cell (R. 420 and 447), and neither of them heard the conversation.

Indulging in amphetamines and other drugs, possessing knives, threatening death, and engaging in acts of sodomy were not unusual activities for inmates of the Utah State Prison at this time -- especially Rivenburgh. It was a common practice for inmates to stand point for each other (R. 386-388).

The defendant was convicted of murder in the first degree. The detailed testimony introduced supports all of these facts. We will refer to the details of the testimony as they become applicable in stating our arguments.

STATEMENT OF POINTS

POINT I.

DEFENDANT WAS DENIED A FAIR TRIAL BEFORE AN IMPARTIAL JURY IN THAT THE TRIAL JUDGE IMPROPERLY COMMUNICATED WITH A JUROR.

POINT II.

DEFENDANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV AND THE CONSTITUTION OF UTAH, ART. I, §12 IN THAT HE WAS DENIED HIS RIGHT TO BE PRESENT AT ALL STAGES IN THE PROCEEDINGS.

POINT III.

DEFENDANT WAS DENIED A FAIR TRIAL IN THAT THE TRIAL JUDGE RECEIVED AN IMPROPER QUESTION

FROM A JUROR AND TRANSMITTED THIS IMPROPER QUESTION TO COUNSEL.

POINT IV.

THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S MOTION FOR A DIRECTED VERDICT SINCE THE JURY COULD NOT HAVE FOUND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY OF MURDER.

POINT V.

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 43.

POINT VI.

THE TRIAL COURT'S INSTRUCTION NO. 20 IS CONFUSING AND IN ERROR BECAUSE IT FAILS TO SEPARATE THE CRIME OF SODOMY FROM THE CRIME OF MURDER. AND IN ITS ABSTRACT FORM COULD ALLOW THE JURY TO FIND THE DEFENDANT GUILTY OF MURDER IF THEY BELIEVED HE AIDED AND ABETTED IN THE ACT OF SODOMY.

POINT VII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 17.

POINT VIII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NO. 19 AND NO. 21.

POINT IX.

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 20.

POINT X.

THE TRIAL COURT ERRED IN FAILING TO COMPEL THE PROSECUTION TO FURNISH TAPE RECORDINGS AND COPIES OF STATEMENTS MADE BY WITNESSES AND THE DEFENDANT.

POINT XI.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL.

POINT XII.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO STRIKE TESTIMONY WHICH WAS ADMITTED ON THE STATE'S REPRESENTATION THAT IT WOULD SHOW A CONSPIRACY TO COMMIT MURDER.

POINT XIII.

THE TRIAL COURT ERRED IN SUBMITTING THE CASE TO THE JURY ON THE QUESTION OF MURDER IN THE FIRST DEGREE SINCE AS A MATTER OF LAW, DEFENDANT'S MENTAL CONDITION PREVENTED HIM FROM PREMEDITATING OR DELIBERATING.

ARGUMENT

POINT I.

DEFENDANT WAS DENIED A FAIR TRIAL BEFORE AN IMPARTIAL JURY IN THAT THE TRIAL JUDGE IMPROPERLY COMMUNICATED WITH A JUROR.

On the last day of the trial, the trial judge requested counsel to meet with him in chambers. He then related a conversation which had taken place between himself and one of the jurors. The trial judge stated as follows:

"This morning about 8:30, a juror by the name of Armstrong, asked me, as I arrived at

the Courthouse, if he could ask me a question, and I told him "Yes."

"He came into Chambers, and he asked if the parties were going to introduce the tapes of the conversation between the two defendants.

"I told him I did not know. I would tell counsel that he had asked and leave it up to counsel.

"He also said that he was anxious [sic] to know, it was important, because he could not get an answer to a question in his mind, as to who did the stabbing.

"He said there was evidence that Garcia had the knife in the attic, in his hand, and that later on, another person had the knife, and he did not know who did the stabbing.

"I told him that I would relate his questions to counsel, and leave it up to counsel to either attempt to re-open their case and put in more evidence to clarify or take care of the matter on argument." (R. 855 and 856).

This action on the part of the trial judge was improper, prejudicial, and certainly constitutes a reversible error. See *State v. Crank*, 105 Utah 332, 142 P.2d 178 (1943); *State v. Anderson*, 65 Utah 415, 237 Pac. 941 (1925); *State v. Thorne*, 96 Utah 208, 117 Pac. 58 (1911).

The statutes of this state are explicit in regard to communication with the jury. The officer in charge of the jury must be sworn, ". . . to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, . . ." Utah Code Ann. §77-31-27 (1953).

The court must admonish the jury at each adjournment, “. . . that it is their duty not to converse among themselves *nor with anyone else* on any subject connected with the trial, . . .” Utah Code Ann. §77-31-28 (1953) (Emphasis added.).

It is elementary that communication with the jury must be prevented if the defendant is to have a fair trial. Article 1, §12 of the Utah Constitution guarantees the defendant a trial by an impartial jury. Certainly this impartiality cannot be insured if improper communication with the jury is allowed. See *State v. Anderson*, 65 Utah 415, 237 Pac. 941 (1925). The fact that the communicant was the judge does not remedy the error. To the contrary, the official office of the judge makes the communication all the more prejudicial, for the information the juror might gain, intentionally or indavertantly, would carry much greater force. The court in *Sargent v. Roberts*, 1 Pick. (Mass.) 337, 11 Am. Dec. 185 (1823), stated as follows:

“It is not sufficient to say that this power is in hands highly responsible for the proper exercise of it: the only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case, except in open court, in presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the convenience of jurors is of small consideration compared with this great object.”

The juror must be careful to hold himself above suspicion. In *State v. Anderson*, 65 Utah 415, 237 Pac.

941 (1925), it appeared that the prosecuting witness had given a juror a ride to and from the court everyday of the trial. The Utah court stated as follows:

“... it should also be remembered that, when a juror is selected by reason of his impartiality to determine not only the property rights between individuals, but in criminal cases the personal liberty of individuals charged with offenses, the law requires of the juror such conduct during that time that his verdict may be above suspicion as to its having been influenced by any conduct on his part during the trial. . . .”

In *State v. Thorne*, 96 Utah 208, 117 Pac. 58 (1911), a juror talked to someone over the telephone. It was held that this unexplained communication amounted to misconduct. The Utah court in so holding stated as follows:

“To obtain the free and dispassionate judgment of jurors in the trial of capital cases, long experience has demonstrated the necessity of preventing the jury from mingling or conversing with the people, and of keeping them secluded from all outside influences calculated to interfere with or affect their impartiality or judgment. These safeguards were at common law deemed essential to the right itself of trial by jury. That right with its ancient safeguards has been preserved in this country by Constitutions and statutes. An infraction of it calculated to impair the right cannot properly receive the sanction of the court without doing violence to such constitutional and statutory provisions. If it should be thought that they no longer serve a useful purpose, let them be abolished and taken out of the Constitution and statute and others substituted in their place. As long as they remain, it is the

duty of the courts to see that they are observed and obeyed."

This Court has dealt with the problem of communication with the jury on other occasions. In *State v. Crank*, 105 Utah 332, 142 P.2s 178 (1943), a juror conversed with the prosecuting witness. This was said to be improper even though the communication was merely for the purpose of renewing an old friendship. The Court stated that, "[i]n such instances, the verdict of the jury, like Caesar's wife, *must be above suspicion*."

Other jurisdictions have considered the question of communication with the jury, and the general rule holds such improper activity to be reversible. In *Doles v. State*, 97 Ind. 555 (1884), the unexplained presence of the bailiff in the jury room required a new trial. In *People v. Chambers*, 279 Mich. 73, 271 N.W. 556 (1937), a new trial was ordered even though the bailiff entered the jury room at the request of the jury to provide tobacco and water. It is clear that any discussion of the case by the bailiff in charge of the jury with the jurors will entitle the defendant to a new trial. See *Taylor v. State*, 18 Ala. App. 466, 93 So. 78 (1922); *People v. Kawoleski*, 313 Ill. 257, 145 N.E. 203 (1924); *Bramlett v. State*, 129 Neb. 180, 261 N.W. 166 (1935).

There are many cases involving communication with the jury by the judge. In *State v. Murphy*, 17 N.D. 48, 115 N.W. 84 (1908), the conduct of the judge in discussing the case with the jury in the jury room after their retirement for deliberation was held prejudicial error, regardless of whether the particular conversation in-

fluenced their decision. In the recent Utah case, *Johnson v. Maynard*, 9 Utah 2d 268, 342, P.2d 884 (1959), the trial judge entered the jury room to answer a question. This was done in the absence of and without the consent of counsel. After the incident the trial judge advised counsel and for the record made a general statement of what was done.

The Utah court held the conduct of the judge to be improper even though there was no question of his good intentions. Similar activity was held to be prejudicial error in *Ferdorer v. Northern Pacific Ry.*, 75 N.D. 139, 26 N.W. 2d 236 (1947). See also *State v. Waite*, 135 Wash. 67, 238 Pac. 617 (1925) (attempted robbery); *Bennett v. State*, 275 Pac. 390 (Okla. Crim. Rep. 1929) (assault to do bodily harm); *Wacaster v. State*, 172 Ark. 983, 291 S.W. 85 (1927) (murder; judge talked to foreman in hall outside of jury room; conviction reversed even though verdict had already been agreed upon); *State v. Matthews*, 191 N.C. 378, 131 S.E. 743 (1926) (murder); *Shields v. United States*, 273 U.S. 583 (1927) (conspiracy to violate prohibition act); *Williams v. Commonwealth*, 207 Ky. 807, 270 S.W. 61 (1925) (selling intoxicating liquor).

The only sure way to prevent suspicions of unfairness and possible impairment of confidence in the integrity of the court is to consider the judge as having no control over the case except in open court in the presence of counsel and the parties. See *Sargent v. Roberts*, 1 Pick. (Mass.) 337, 11 Am. Dec. 185 (1823). All questions of the jury should be considered here, and

if an answer can properly be given, it should be given here. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice. Certainly this interest is greater when the case is a criminal one and the crime is punishable by death. The maintenance of high ideals in this respect stems from consciousness on the part of those who participate in trials that proceedings are open to the public.

In *State v. Murphy*, 17 N.D. 48, 115 N.W. 84 (1908), the court stated as follows:

“As to the purity of the intentions of the judge in going into the jury room in this case, and there having the brief communication with the jury, no certificate or proof is necessary so far as this court is concerned, as it well knows that his uprightness and sincere desire to be absolutely just and fair in all cases are beyond question. That admitted fact, however, does not meet the question before us, which is: Did he do that which was beyond his judicial functions in respect to the case? We are forced to the conclusion that he he did. His presence in the jury room for any kind of communication with the jury is not contemplated by any provision of the statute. The opposite is the plain interference from the statute. All communication to the jury in open court is subject to exception by the parties, if deemed improper. If any communication is made to them in the jury room in the absence of the parties, no opportunity is afforded for objections and exceptions at the time. The open court is the place for communications to the jury in the presence of, or on notice to the attorneys. The jury room is for the jury alone, and no com-

munications are allowed with them in the room except upon orders from the court through the officer in charge of them, who is permitted to ask them whether they have agreed upon a verdict. All communications to the jury in reference to the case should be made in open court, and all communications to them in the jury room avoided. In this way all distrust and fear that something improper is said or done will be without foundation, and every act be subject to exception and review. Any communication by word or writing not in open court affects the efficiency of jury trials as a means of accomplishing justice after giving all parties full opportunity of being heard at all stages of the trial. A strict compliance with this practice of having all proceedings in court in the presence of counsel, or on notice to them, unless waived, is better than to countenance violations thereof unless prejudice is shown. . . . We think that any communication in this way as to the case should be prohibited and held prejudicial. It is against the policy of the law to indulge in secret communications or conferences with the jury or with jurors in reference to the merits or law of the case. To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better served by avoiding such communications entirely. The authorities are practically unanimous in condemning such communications, and in holding them prejudicial as a matter of law."

See also *State v. Wroth*, 15 Wash. 621, 47 Pac. 106 (1896).

The communication in the *Murphy* case took place in the jury room, while as in the instant case the communication was in the judge's chambers. This distinction makes little difference indeed. The conversation be-

tween the judge and the juror was a secret conversation. The defendant was not given notice, and was afforded no opportunity to be present. He had no chance to object to the questions or the answers, and is not even sure of what was said or the impact that it may have had on this jury.

The defendant has no burden of showing that the communication was prejudicial to his case or that the content of the conversation involved prejudicial matters or pertained to the case. One reason for this rule was stated in *State v. Murphy*, supra. *Sargent v. Roberts*, 1 Pick. (Mass.) 337, 11 Am. Dec. 185 (1823), also put forth this reason and in so doing stated:

“As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper; and, if it was not, the party against whom the verdict was is entitled to a new trial.”

See also *Fina v. United States*, 46 F.2d 643 (10th Cir. 1931).

In *State v. Thorne*, 96 Utah 208, 117 Pac. 58 (1911) the state offered no evidence to dispute the defendant, and did not attempt to show that the communication was harmless. The state argued that prejudice could not be presumed from an unexplained communication. It was their position that the defendant was required to show that harmful information was communicated to the juror and that this information tended to influence his deliberations and verdict, and until such was shown, the state was not required to show the contrary.

The Utah court stated as follows:

"That rule might well be applied to communications between a juror and a person having no interest in the litigation, which were authorized and not forbidden. It may be presumed that a juror, who pending the trial, or after the retirement of the jury to consider of their verdict, and not forbidden to do so, communicates with one, a stranger to, and not interested in the litigation, communicated about something not related to the case or the parties. An unexplained communication under such circumstances would not amount to misconduct, unless the circumstances attending it were such as to induce an inference of some wrongful or improper conduct. In such case a presumption of prejudice should not be indulged from an unexplained communication even though from the attending circumstances it may be said that the conduct with respect to it was of doubtful propriety. But here the communication had, under the circumstances disclosed, was unauthorized and forbidden. If it was necessary for the juror to communicate with someone over the telephone or otherwise, the matter should have been called to the attention of the court who could have granted or refused the permission as the exigencies of the case required. To hold such private communications, under the circumstances, apart from and in the absence of his fellow jurors, and without the court's permission, certainly was misconduct. Such conduct cannot be tolerated and the purity of the jury maintained. To permit it and to excuse it as to one juror requires a permission of it to others. To do that is to allow members of the jury to be brought in contact with outsiders, and to afford them an opportunity to hold prejudicial communications about the case, or at least to expose them to such harmful and

prejudicial influences. The juror here by his misconduct exposed himself to such influences. What the juror said over the telephone, or what was said to him, is not made to appear. Had his conduct in such particular not been misconduct, perhaps the presumption might be indulged that what was said by him or communicated to him was entirely personal to him and unrelated to the case until the contrary was made to appear. But he did something which he was unauthorized and forbidden to do. He was a contemnor and a wrongdoer. From the misconduct disclosed and the exposure of the juror to harmful influence, prejudice is presumed, and the burden cast on the state to show what the communication was, and that it was harmless and could not have influenced or affected the deliberation of the juror or his verdict. . . .

“ . . . To say that the accused cannot sustain his claim of prejudice until he also shows that the juror talked about something harmful to the accused’s rights is to fritter away the constitutional and statutory provisions requiring the jury to be kept secluded from all outside influences.”

Certainly the judge cannot be considered a “stranger” to the case. The matters which were discussed involved both the law and the merits of the case. The content of the conversation was prejudicial even as related by the judge to counsel at a later time. Of course the judge was not purporting to disclose every single word that was spoken. Other significant thoughts could have and probably did pass to the juror. The defendant is certainly in no position to come forward with the content of the conversation for he was not

present. The communication was not proper. In light of the statutes and the very instructions and admonitions which the judge had delivered to the jurors, the judge and this juror were guilty of misconduct in so conversing. See *Sargent v. Roberts*, 1 Pick. (Mass.) 337, 11 Am. Dec. 185 (1823). If the misconduct in *State v. Thorne* was deemed sufficient to justify a new trial, then the activity in the instant case would certainly warrant such an order.

The trial judge and the juror in question are both guilty of misconduct. What we know of the content of their conversation indicates that they discussed the case as to its merits and also as to the law. On the face of things prejudice is shown. Certainly if from what the judge saw fit to place in the Record, there is no prejudice, the defendant should not be made to show prejudice in what was said but not recorded. Because of the very circumstances of this incident, prejudice should be presumed. The improper action of the trial judge in discussing the case alone in his chambers with a juror is sufficient to raise many suspicions. If our jury system is to maintain itself, if it is to be regarded as the best way at hand to achieve justice, then this court must make sure that no activity is allowed which would create suspicions of unfairness. The test was set forth in *State v. Anderson*, 65 Utah 415, 237 Pac. 941 (1925), as follows:

“ . . . can it be said that appellant had the full benefit of trial by an impartial jury and one in no way influenced except by the evidence and the instructions of the court relative to the law applicable to the facts in the case?”

The action of the trial judge in discussing the case with a juror is prejudicial. The defendant is entitled to a new trial before a fair and impartial jury.

POINT II.

DEFENDANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV AND THE CONSTITUTION OF UTAH, ART. I, §12 IN THAT HE WAS DENIED HIS RIGHT TO BE PRESENT AT ALL STAGES IN THE PROCEEDINGS.

In connection with the communication between the trial judge and a juror which was described in the argument to Point I (page 6), the defendant was denied his right to be present at all stages of the proceedings. It is elementary that in a felony there can be no trial on the merits in the absence of the defendant. See *State v. Aikers*, 87 Utah 507, 51 P.2d 1052 (1935); *Hopt v. People of Utah*, 110 U.S. 574 (1883).

The right of the defendant to be present stems from The Constitution of Utah, art. 1, §12. The statutes of this state also require the presence of the defendant. See Utah Code Ann. §§ 77-1-8, 77-22-2, 77-27-3, 77-33-2, 77-35-3 (1953).

In *State v. Aikers*, 87 Utah 507, 51 P.2d 1052 (1935), the Utah court stated as follows:

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

may be waived by the defendant personally is a question on which the authorities are divided. . . . The decisions turn on the question of whether the defendant was voluntarily absent at such time. In such cases it is generally held that the defendant cannot by his voluntary act invalidate the proceedings. [cases cited]

“It is one thing for him to absent himself when he is at liberty and can voluntarily do so, and quite another thing for the court to deprive him of any substantial right against his protest or even when, in some circumstances, he remains silent. Where a defendant is in custody, and therefore not a free agent, the duty is on the court to see that he is personally present at every stage of the trial. . . . Proceedings had in the absence of a defendant, without his fault and without his knowledge or consent, is ground for reversal.”

While the particular facts of *State v. Aikers* required a decision that there had been no denial of constitutional rights, the dictum cited above is an indication of the feeling of the court and the great importance of the requirement that the defendant be present at all stages in the proceedings.

In *Hopt v. People of Utah*, 110 U.S. 574 (1883), the defendant challenged six jurors for bias. The statute provided that a juror be tried by three impartial triers. The six jurors were tried out of the presence of the defendant and the bias was found to be not true. The question presented to the court was whether or not this proceeding was part of the trial. The Supreme Court of the United States held that it was. In so doing they stated as follows:

“... the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.”

The conversation between the judge and the juror in the instant case was part of the proceedings. It was held during the course of the trial. It took place in the judges chambers. It concerned the merits and the law of the case. Indeed, it affected the substantial rights of the defendant. The defendant had a right to be present when the conversation occurred. It is true that in *State v. Mortensen*, 26 Utah 312, 73 Pac. 562 (1903), the Utah court held that the word “trial” as used in the constitution and statutes was limited to the proceedings conducted in the place where the court was held, and this did not include a view. However in that case the defendant knew full well of the view and declined to go. In the instant case, the proceeding did take place in the court house, and the defendant was given no notice of it. The defendant was in the custody of the court and yet no effort was made to have him present. As the Utah court stated in *Aikers*, the trial court had a duty to see that the defendant was present. See also *State v. Morris*, 58 Or. 397, 114 Pac. 476 (1911); *Diaz v. United States*, 223 U.S. 442 (1911).

Not only did the court have a duty to have the

defendant present, the right that defendant had to be present was one which could not be waived. In *State v. Mannion*, 19 Utah 505, 57 Pac. 542 (1899), the court held that that which the law required and made essential on trial could not be dispensed with, either by consent of the defendant or by his failure to object to unauthorized methods pursued by those in authority. A defendant charged with a felony cannot waive his right to be personally present at trial. See also *State v. Matthews*, 191 N.C. 378, 131 S.E. 743 (1926).

That communication between the judge and jury is properly considered part of the proceedings is illustrated by the many cases involving further instructions to the jury after they have retired.

See *State v. Duvel*, 4 N.J. Misc. R. 719, 134 Atl. 283, aff'd, 103 N.J.L. 715, 137 Atl. 718, (1927) (instructions by telephone); *State v. Weissman*, 5 N.J. Misc. R. 625, 137 Atl. 718 (1927); *Ferderer v. Northern Pacific Ry.*, 75 N.D. 139, 26 N.W.2d 236 (1947); *State v. Murphy*, 17 N.D. 48, 115 N.W. 84 (1908); *State v. Wroth*, 15 Wash. 621, 47 Pac. 106 (1896).

In *State v. Woolsey*, 19 Utah 486, 57 Pac. 426 (1899), the court indicated that it was not necessary that the defendant charged with felony be present at filing and trial of motions and pleas not involving question of his guilt or innocence on the merits. The activity complained of in the instant case did go to the merits of the defendants guilt. This was the very thing that was bothering the juror. This is why he wanted to talk with the

judge. They in fact talked about the merits of the case.

Defendant was denied due process of law.

POINT III.

DEFENDANT WAS DENIED A FAIR TRIAL IN THAT THE TRIAL JUDGE RECEIVED AN IMPROPER QUESTION FROM A JUROR AND TRANSMITTED THIS IMPROPER QUESTION TO COUNSEL.

As was indicated in the argument to Point I, the trial judge discussed the merits and the law of the instant case with a juror in the judge's chambers during the course of the trial. See page 6. This misconduct is objectionable in that the trial judge later disclosed the content of this conversation to counsel. Counsel were thereby put on notice as to the matters which at least some of the jurors thought significant.

Of course it would be grossly improper for counsel to make any contact with the jury during the course of the trial other than that prescribed by our rules of procedure. If counsel were to communicate with the jury or any member thereof for the purpose of discovering their thinking in regard to the case, he would of course be guilty of misconduct and reversible error would have been committed. This is so even if counsel had no thought of influencing the jury, and in fact did not. It would certainly be a tactical advantage to understand those matters which were bothering members of the jury. This tactical advantage when given to either side, and indeed when given to both, may very well operate so as to upset the sometimes delicate balance upon which the success

of our advocate system depends, and from which our justice is derived. When counsel are provided with an understanding of the workings of the jury's mind, the defendant is certainly denied a fair trial within the meaning of our traditional ideas of justice and fair play. The defendant has been denied a fair trial as prescribed by the Constitution.

The occasion sometimes arises when a juror has a question to ask. The proper procedure for handling such questions when they occur, as they should, in open court, was set forth in *State. v. Martinez*, 7 Utah 2d 387, 326 P. 2d 102 (1958). In that case the trial court invited and encouraged jurors to question witnesses even after retirement and even witnesses not called at the trial. This Court reversed the decision of the trial court because of this error. In a concurring opinion Justice Worthen stated as follows:

“In my opinion no juror should ever be allowed to ask questions of the witnesses. If a juror indicates that he has a question the court should invite the juror to disclose to the court the question and the court, if the question is *not germane to the issues involved* or is such as would be *clearly improper and therefore prejudicial to the rights of the defendants to a fair and impartial trial* should not permit the question to be propounded. If the question is germane to the issues, and would not be prejudicial to the rights of the defendants to a fair and impartial trial, the judge in turn should ask the question himself.” (Emphasis added).

A question by a juror directed to counsel concerning counsel's tactics, or the way he is handling the case is an

improper question. It is not germane to the issues involved and is prejudicial to the rights of the defendant. Such a question should never be allowed in open court, for once it is pronounced, if it cannot be answered consistent with the best interests of the defendant, the damage has been done. The jury is left with the thought that counsel is covering up or withholding information from them. In the instant case the juror in question should have been advised by the judge that his question was improper. The juror should further have been admonished not to discuss the incident with the other jurors. Rather the trial judge instructed the juror as follows:

“I told him that I would relate his questions to counsel, and leave it up to counsel to either attempt to re-open their case and put in more evidence to clarify or take care of the matter on argument.” (R. 855 and 856).

As far as the juror knew, his question would be transmitted to counsel. He was free to discuss the entire matter with the other jurors once the matter was submitted. The activity in the instant case was capable of the same evil effects in regard to the jury as the activity which was struck down as reversible error in *State v. Martinez*, 7 Utah 2d 387, 326 P. 2d 102 (1958).

The improper question in the instant case could have influenced the jury in an unfair and prejudicial manner. When the question was related to counsel it was effective to inform counsel of the thinking of the jurors. Counsel were provided with the very same information they would have obtained if they had questioned

the juror personally. The trial judge should have refused to communicate with the juror except in open court. See page 11. Pursuant to *State v. Martinez, supra*, the judge could properly receive the juror's question in court in order to decide whether or not it was a proper one. Since the question in the instant case involved the tactics of counsel, it was not germane to the issues involved and it was clearly prejudicial to the rights of the defendant. The trial judge should have instructed the juror that his question was improper and could not be asked. The question never should have reached the ears of counsel or the other jurors.

Because of the error of the trial judge in allowing an improper question to be asked by a juror, the defendant has been denied a fair trial.

POINT IV.

THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S MOTION FOR A DIRECTED VERDICT SINCE THE JURY COULD NOT HAVE FOUND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY OF MURDER.

In Instruction No. 7 the trial judge instructed the jury as follows:

"To warrant you in convicting the defendant, the evidence must, to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after an entire consideration and comparison of all the testimony in the case, you can reasonably explain the facts given in evidence on any reasonable ground other

than the guilt of the defendant, you should acquit him." (R. 103).

That this is a proper instruction in Utah cannot be doubted. In *State v. Laub*, 102 Utah 402, 131 P.2d 805 (1942), this Court stated as follows:

"... the prosecution still has the burden of proving beyond a reasonable doubt that the defendant is guilty. Or stated another way, the prosecution must 'not only show . . . that the alleged facts and circumstances are true, but they must also be such facts and circumstances that are incompatible upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt. . . . all the circumstances as proved must be consistent with each other, and they are to be taken together as proved. Being consistent with each other and taken together they must point surely and unerringly in the direction of guilt.'

'Hence, if two reasonable hypothesis are pointed out by the evidence and one of them points to the defendant's innocence, it would then be difficult to see how any jury could be convinced beyond a reasonable doubt of the defendant's guilt.'

See also *State v. Anderson*, 108 Utah 130, 158 P. 2d 127 (1945); *State v. Burch*, 100 Utah 414, 115 P. 2d 911 (1941); *State v. Crawford*, 59 Utah 39, 201 Pac. 1030 (1921); *People v. Scott*, 10 Utah 217, 37 Pac. 335 (1894); *State v. Erwin*, 101 Utah 365, 120 P. 2d 285, 302 (1941).

If the evidence indicates a reasonable hypothesis as to innocence, the case should not be allowed to go to

the jury. If the facts relied on by the State are not inconsistent with defendant's innocence, the innocence of the defendant is established as a matter of law. See *State v. Anderson*, *supra*; *State v. Erwin*, *supra*.

The State relied on the fact that Rivenburgh before entering the attic disclosed a plan to kill the decedent. The decedent was killed in the attic and the defendant was there at the time of the killing.

Some of the State's witnesses were present at the time Rivenburgh revealed his alleged plan, but none of them believed Rivenburgh was serious (R. 448). The defendant was not even present at the time. He was in another cell with the inmate Dripps (R. 416, 417 and 447). Neither the defendant nor Dripps heard the discussion of the alleged plan (R. 447).

The first knowledge that defendant gained of the killing was when the matter was discussed in a card game after the killing (R. 513 and 514). There seems to be a dispute as to whether or not there was a card game before the killing as well. The inmate Stark testified that there was such a card game (R. 786, 787 and 792). At that card game there was no conversation concerning a plan to kill the decedent (R. 793). Stark was present during all of the time defendant was at the card game and no plan to kill the decedent was mentioned (R. 794).

The State argued that the defendant knew of the plan for the following reasons: (1) He was in the next

cell when the plan was discussed, so he could have been able to hear it. So was Dripps, however, he did not hear the conversation. (2) The plan was discussed at a card game which was allegedly before the killing (R. 535), as well as again at another card game after the killing while alibis were being discussed. However, Stark was present at both card games and he heard nothing of a plan to kill until during the card game held after the killing (R. 794). (3) In defendant's written statement which was taken at 4:00 a.m. on August 29, 1958, five days after the killing, the defendant said he heard of Rivenburgh's plan to kill the decedent "when all of us was up there playing cards"; that he thought he was joking at first; that Rivenburgh sent him for a knife; when asked by the defendant why he killed the decedent, Rivenburgh answered that the defendant's reasons were Rivenburgh's reasons (R. 514).

The only card game that was played "when all of us was up there" (Rivenburgh, Dalton, Stark, and the defendant) was *after* the killing. Certainly this was the only card game where Rivenburgh was present.

After the killing but five days before the defendant's statement, the defendant had been present when there were conversations involving Rivenburgh and other inmates relative to the alleged plan, what in fact did happen, and many possible alibis. Defendant's statement is merely what he believed to be the facts of the incident.

Attention must be directed to the fact that the defendant was but sixteen years of age and had an

emotional age of three or four years. Certainly he had not led the life of the average boy before his incarceration in the Utah State Prison. He had fear instilled in him the day he entered the prison. He was used and abused in homosexual activities, was sold, given and discarded among other inmates, and was indoctrinated early that he was to do what others told him to do.

He was awakened at approximately 3:30 a.m. out of a sound sleep, advised that Bowne had given a statement, advised by the investigating team that they felt Rivenburgh was really the guilty one that the defendant and Bowne were "patsies," advised that it would be "better for him to give a statement," that it was "real important that he tell," that he would be sent to the Salt Lake County Jail if he gave the statement (R. 512-521). In view of the defendant's mental condition, his age, and the advice given to him, it is little wonder that his statement is less than clear as to the sequence of events.

It is reasonable to believe that the defendant thought Rivenburgh was going to the attic to commit sodomy and not to kill because of the following facts:

1. Defendant knew of no plan to kill before the killing (R. 513 and 514).
2. Rivenburgh told Dalton after the killing that it was in the attic that he first intended to and did kill the decedent. This was because the decedent was going to tell about the sodomy (R. 381), and because he would not perform the sodomy in a particular manner (R. 387).

3. None of the State's witnesses thought Rivenburgh was going to kill the decedent, e.g.,
 - (a) Neither Stark nor Dalton thought the decedent would be killed in spite of the fact that they saw Rivenburgh and the decedent go to the attic.
 - (b) Rivenburgh asked Dripps to stand point for sodomy (R. 340).
 - (c) Rivenburgh told Dalton that he was going to take the decedent to the attic for sodomy (R. 380 and 381).
 - (d) Bowne told Randel that he and the defendant went to the attic to stand point for sodomy (R. 478).
4. During none of the many conversations, did the defendant tell anyone that he had known of a plan to kill before the killing (R. 349, 350, 373-377, 385, 408-413, 460 and 461).
5. It was common at the prison to hear of plans to kill others.
6. It was common to stand point for sodomy in the attic and elsewhere (R. 388).
7. It was common to carry knives in the prison (R. 389).
8. It was common to practice sodomy at the prison (R. 389).

9. The use of Amphetamine pills was common at the Prison. At 6:30 p.m., Rivenburgh was high on pills, and he talked about killing the decedent. No one thought him serious because of previous plans, threats, and "big talk" induced by the pills.
10. Other inmates who were witnesses for the State and who knew of Rivenburgh's "plan," stood point, destroyed evidence and joined in alibis; yet they were charged with nothing. They could not receive immunity for turning state's evidence. Immunity can only be afforded a *defendant* and that requires court approval. Utah Code Ann. § 77-31-7 (1953). The reason they were not charged along with the defendant, as asserted by the prosecuting attorney's office, was because they had no intent or knowledge that the decedent was going to be killed. The reason they had no intent was because they did not think Rivenburgh was serious. The defendant did not even know of his plan.

Even if it is reasonable to believe that a plan was effected, it is also reasonable to believe that the defendant was in the attic to stand point for sodomy. Even if the facts relied on by the State are consistent with the defendant's guilt, they do not "... exclude every reasonable hypothesis other than the existence of such fact. . . ." *State v. Anderson*, 108 Utah 130, 158 P. 2d 127 (1945).

POINT V.

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 43.

Defendant's requested instruction No. 43 deals with the jury's right to recommend imprisonment at hard labor for life in the event of a verdict of murder in the first degree. It reads in part as follows:

" . . . you are instructed that whether you make such a recommendation is entirely within your discretion to be exercised in any manner and for any reason you see fit. You are not to be influenced or intimidated by the Court in this absolute right of yours as jurors." (R. 95).

The law in Utah in this area is stated in *State v. Thorne*, 96 Utah 208, 117 Pac. 58 (1911). See also, *State v. Markham*, 100 Utah 226, 112 P. 2d 496 (1941). This case clearly indicates that the recommendation is within the sole discretion of the jury. If the jury is led to think that their recommendation must be justified, then there is error.

In the instant case the trial court instructed the jury as follows: "Prejudice, passion and sympathetic feelings have no place whatsoever in your deliberations. You should disregard all bias, prejudice, and other extraneous influences." (R. 103). In regards to the recommendation, the trial court instructed the jury as follows: "you are instructed to give it your careful and conscientious consideration." (R. 115).

In view of the instructions the trial court did give, which are noted above, the defendant was prejudiced

by the court's refusal to give his requested instruction No. 43. The jury was told that sympathetic feelings had no place in their deliberations. They were further told to consider their recommendation carefully. They were impressed by the fact that their recommendation, if made, was to be justified in some way and not the product of mere "sympathetic feelings" or "passion". This is contrary to the law as stated in *State v. Thorne*, supra. The defendant's requested instruction No. 43 would have cured this difficulty. The trial court erred in refusing to give it.

POINT VI.

THE TRIAL COURT'S INSTRUCTION NO. 20 IS CONFUSING AND IN ERROR BECAUSE IT FAILS TO SEPARATE THE CRIME OF SODOMY FROM THE CRIME OF MURDER, AND IN ITS ABSTRACT FORM COULD ALLOW THE JURY TO FIND THE DEFENDANT GUILTY OF MURDER IF THEY BELIEVED HE AIDED AND ABETTED IN THE ACT OF SODOMY.

Instruction No. 20 is the trial court's instruction on "aiding and abetting" (R. 118 and 119). It would not be objectionable if it were not for the fact that in the instant case more than one crime was involved. Much of the testimony introduced involved the crime of sodomy (See e.g. R. 409, 460 478, 716 and 738). The crime of sodomy was defined in the court's instruction No. 16 (R. 114). Sodomy was inextricably connected with the fact situation. Sodomy, the crime against nature, is capable of engendering deep seated prejudices against anyone connected with it. Indeed it must have been difficult for the jury in the instant case to appreciate the

fact that no one was being prosecuted for this act of perversion. In view of this, it was error for the court to instruct as in Instruction No. 20.

In Instruction No. 20, the court fails to specify which crime it is speaking of. The Instruction reads in part as follows:

“You are instructed that one who keeps watch where *a crime* is being perpetrated, so as to facilitate the escape of one actually committing it, or to prevent his being interrupted, if the said keeping watch is pursuant to a common design to commit *the crime*, said person keeping watch, is aiding and abetting, and is a principal.” (Emphasis added.) (R. 119).

When read in the context of the evidence, the court literally seems to tell the jury that if the defendant was concerned in the commission of “a crime” (the crime of sodomy perhaps), then he is a principal in “any crime” (the crime of murder included).

The defendant was charged only with murder. It was error not to specify which crime the jury was to consider. The defendant admitted his part in the crime of sodomy. This, in fact, was his defense to the crime of murder. Yet in Instruction No. 20, the trial judge failed to specify which crime the aiding and abetting of would render the defendant guilty. The jury, while still under the impact of a sordid story of sexual perversion, was free to consider the defendant's part in the sexual activities as acts capable of rendering him guilty on the charge of murder. If the jury chose to follow this instruction, the fact that the defendant stood point (look-

out) for an act of sodomy was sufficient to make him a principal in the crime of murder.

This Court has expressed itself on many occasions in regard to the use of abstract instructions. See *State v. Thompson*, 110 Utah 113, 170 P. 2d 153 (1946), and cases cited therein. Instruction No. 20 is needlessly abstract in failing to substitute the term "murder" for the general term "crime". In view of the peculiar facts of this case, the shocking and highly distasteful facts involving sodomy, the failure of the trial court to indicate that it was the aiding and abetting of murder and only murder which would make the defendant a principal in the crime charged was greatly prejudicial.

The prejudicial nature of this instruction was not cured by a correct statement of the law elsewhere in the instructions. See *Soda v. Marriot*, 118 Cal. App. 635, 5 P. 2d 675, 677 (1931). This rule is especially true in a criminal case where the crime charged is punishable by death. The trial judge in his instructions should take special care to remove any material which is erroneous or unnecessarily abstract and thus prejudicial to the defendant.

POINT VII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 17.

Defendant's Requested Instruction No. 17 reads as follows:

"You are instructed that where the direct evidence is conflicting as to whether the defendant

Jesse M. Garcia, Jr. killed Leroy Joseph Verner and where either part or all of the evidence is circumstantial evidence, the defendant's motive to do the acts in question or his absence of motive should be considered by you as strong evidence of the guilt or innocence of the accused. The absence of a motive on the part of the defendant Jesse M. Garcia, Jr. to kill Le roy Joseph Verner strengthens the presumption of defendant's innocence and may raise a reasonable doubt as to his guilt." (R. 68).

The trial judge refused to give this instruction to the jury (R. 68).

No motive was asserted or shown as far as the defendant was concerned. The absence of any proof as to motive tends to indicate innocence. See *People v. Tom Woo*, 181 Calif. 315, 184 Pac. 389 (1919). Where reliance is placed entirely on circumstantial evidence to establish a crime, absence of motive is a circumstance tending to clear the accused. See *Slater v. State*, 224 Ind. 627, 70 N.E. 2d 425 (1947). While the presence or absence of motive is not proof of a substantive fact, its absence strengthens the presumption of innocence. See *Thomas v. Comm.*, 187 Va. 265, 46 S.E. 2d 388 (1948).

Defendant was entitled to have the jury consider the absence of any proof as to motive, and the trial judge erred in not submitting defendant's Requested Instruction No. 17 to the jury.

POINT VIII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NO. 19 AND NO. 21.

Defendant's Requested Instruction No. 19 reads as follows:

"You are instructed that if you find from all of the evidence in the case that the defendant, Jesse M. Garica, Jr. [sic] was in the attic at the time Leroy Joseph Verner was killed for the purpose of standing point while an act of sodomy was committed and that Leroy Joseph Verner was killed as a result of an independent act and intention on the part of the defendant, Mack Merrill Rivenburgh, you must find the defendant, Jessie M. Garcia, Jr., 'Not Guilty.'" (R. 70).

Defendant's Requested Instruction No. 21 has the same significance except that the added factor of a fight in the attic was dealt with, and the jury was asked to consider the defendant's intent in regards to such a fight. See, R. 72.

These instructions in substance contained defendant's defense. He went to the attic in compliance with an order from a person he greatly feared to function as a lookout during an act of perversion. He did not intend to kill, or to do great bodily harm to the decedent or anyone else. He was not aware of any plan or intent on behalf of the inmate Rivenburgh. If the jury thought it reasonable to believe the defendant, then certainly he was not guilty of murder in the first degree.

Defendant had a right to have the jury instructed as in his Requested Instructions No. 19 and No. 21. See

State v. Evans, 74 Utah 389, 396, 279 Pac. 950 (1929). It was prejudicial to him not to have his theory of defense before the jury. This is especially so in view of the instruction the court did give in the form of Instruction No. 20 (R. 118 and 119). See page 33.

POINT IX.

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 20.

Defendant's Requested Instruction No. 20 reads as follows :

"If after a consideration of the evidence you conclude that it is reasonable to believe that the defendant Jesse M. Garcia, Jr. intended to commit murder and also reasonable to believe that he intended to stand point for sodomy, you have no duty to determine which of the two is more reasonable but should find the defendant "Not Guilty". (R.71).

This instruction injects the defendant's theory of defense into the reasonable hypothesis rule.

It is well settled that the reasonable hypothesis rule is the law of Utah. See page 26. The trial court instructed the jury as to this rule in the court's Instruction No. 7 (R. 103). This instruction was however abstract in nature and difficult for the jury to understand. Defendant's Requested Instruction No. 20 merely inserted the names and alternate theories into the abstract instruction.

Abstract instructions should be avoided. See State v. Thompson, 110 Utah 113, 170 P. 2d 153 (1946), and

cases cited therein. Defendant's Requested Instruction No. 20 merely helped to get the defendant's theory of defense before the jury within the meaning of the reasonable hypothesis rule. Certainly the defendant was entitled to have his defense before the jury. See page 37. Certainly the reasonable hypothesis theory is more meaningful to a jury when it is stated in terms of the evidence.

The trial judge erred in not submitting defendant's requested instruction No. 20 to the jury, and the defendant was prejudiced thereby.

POINT X.

THE TRIAL COURT ERRED IN FAILING TO COMPEL THE PROSECUTION TO FURNISH TAPE RECORDINGS AND COPIES OF STATEMENTS MADE BY WITNESSES AND THE DEFENDANT.

The Prosecution was permitted, while examining witnesses and the defendant at trial, to refer to notes, contents of tape recordings and statements taken during the State's investigation of the facts.

The full contents of such documents should have been afforded counsel for the defendant as argued in his Motion to Produce Documents (R. 16 and 17). The prosecution had the unfair advantage of quoting words out of context. This jeopardized counsel for the defendant in his cross-examination and re-direct. Quoting words out of context is especially unfair and prejudicial in the instant case because of the great amount of circumstantial evidence.

In his cross-examination, the prosecution was in a position to impress the jury that everything he stated was contained in the notes, tape recording or statements, when in fact it might never have been. Because the witness could not remember everything that was said at a definite time and place many months prior to trial, it was implied that he was falsely testifying. This could have been cured by refreshing the witness's memory on re-direct. Without the proper documents, support was impossible.

An unfair and prejudicial advantage was afforded the prosecution by the error committed by the trial court in failing to compel the production of documents as requested in defendant's motion.

POINT XI.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL.

A new trial should have been granted for the reasons cited in defendant's motion (R. 132 and 133). Here it was specifically brought to the court's attention that the defendant was not present during all stages of the proceedings. See page 18. The improper communication with the jury was also relied upon. See page 6.

Defendant's motion for a new trial also indicated that the jury was separated during its deliberations. This was occasioned when the bailiff took six jurors at a time down an elevator for purpose of going to the rest room.

For the reasons set forth in defendant's Motion For

New Trial (R. 132 and 133), especially those noted above which were argued in detail in connection with the arguments to Point I and Point II, the trial judge erred in not granting a new trial.

POINT XII.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO STRIKE TESTIMONY WHICH WAS ADMITTED ON THE STATE'S REPRESENTATION THAT IT WOULD SHOW A CONSPIRACY TO COMMIT MURDER.

A great deal of testimony prejudicial to the defendant was admitted during the trial on the State's representation that it would show a conspiracy to commit murder on the defendant's part. Illustrative of this was the testimony of William Randel, an inmate who testified for the State as to a certain conversation between himself and Rivenburgh prior to the killing. Randel stated that the defendant was not present during the conversation. The conversation was objected to as hearsay and a motion to strike was made. This was denied (R. 418). The objection was raised again, and the State explained the testimony as "the start of a conspiracy." (R. 419 and 420).

The State presented a great deal of testimony which was hearsay as to the defendant because he was not present. This testimony dealt with conversations between Rivenburgh and others and Bowne and others. The testimony served to impress the jury with the fact that there was some kind of a plan to kill. After the State's case, the defendant once more moved to

strike on the grounds that the State had failed to tie the defendant to the so called conspiracy (R. 530).

The record is rather confusing as to the court's ruling on this motion and it may be that the court never, in fact, made a ruling. If the court's action or lack of action is construed as a denial, then it erred in denying the motion. The only evidence which the State could point to that would serve to connect the defendant to any kind of conspiracy was contained in the defendant's statement (R. 536). This statement dealt with a conversation which was had during a card game. The evidence is clear that the card game was had after the killing. This point is covered in detail in the argument to Point IV. See page 25.

The State failed to tie to the defendant the evidence introduced which tended to show a conspiracy. The trial court erred in not striking this testimony from the record.

POINT XIII.

THE TRIAL COURT ERRED IN SUBMITTING THE CASE TO THE JURY ON THE QUESTION OF MURDER IN THE FIRST DEGREE SINCE AS A MATTER OF LAW, DEFENDANT'S MENTAL CONDITION PREVENTED HIM FROM PREMEDITATING OR DELIBERATING.

The testimony introduced relative to the defendant's mental condition was somewhat confusing. Dr. Clarence Craig Nelson testified that in his opinion, under the circumstances of this incident, the defendant was unable to premeditate and deliberate upon the killing (R. 458 and 459). Dr. Nelson is a Psychiatrist who was em-

ployed by the State for a number of years (R. 593, 594 and 596). He had an opportunity, by virtue of his employment, to observe and examine the defendant on several occasions over a long period of time. (R. 593-606). Dr. Lincoln D. Clark and Dr. Richard Iverson testified as witnesses for the State (R. 797 and 812). In substance, Dr. Clark's opinion was contrary to that of Dr. Nelson's although the only examination which Dr. Clark made of the defendant was made during the action for the purpose of testifying at the trial (R. 811). Dr. Iverson did not give an opinion as to the defendant's ability to premeditate or deliberate the crime charged.

The law in Utah relative to diminishing and partial responsibility is set forth in *State v. Green*, 78 Utah 580, 6 P.2d 177 (1931). It is clear that if the defendant is affected with a mental disease which prevents him from deliberating or premeditating, then the jury cannot find him guilty of murder in the first degree. See also, *Washington v. State*, 165 Neb. 275, 85 N.W. 2d 509 (1957); *State v. Franco*, 347 P.2d 312 (N.M. 1959); cf., *State v. Anselmo*, 46 Utah 137, 148 Pac. 1071 (1915).

In the instant case, the testimony presents a conflict of expert witnesses. Certainly the jury could not find beyond a reasonable doubt that the defendant was capable of premeditating and deliberating. If the experts themselves could not agree as to the mental ability of the defendant, it is doubtful that laymen, who know nothing at all about psychiatry could be in perfect agreement. The court erred in submitting this question to the jury. As a matter of law there is reasonable doubt.

CONCLUSION

The defendant has been denied the due process of law which is guaranteed by our Constitutions. He has been deprived of a fair trial before an impartial jury. The evidence in this case did not warrant submission to the jury on the question of Murder in the First Degree, and the defendant's conviction of such charge is not substantiated by the evidence. The trial and verdict constitute a miscarriage of justice and should be reversed.

Respectfully submitted,
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