

1960

# State of Utah v. James William Warwick : Brief of Respondent

Utah Supreme Court

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Walter L. Budge; Gordon A. Madsen; Attorneys for Respondent;

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# In the Supreme Court of the State of Utah

STATE OF UTAH,

*Plaintiff and  
Respondent,*

- VS -

JAMES WILLIAM WARWICK,

*Defendant and  
Appellant.*

FILE

JUL 26 1960

Clerk, Supreme Court, U

Case No. 9205

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## BRIEF OF RESPONDENT

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PRINTERS INC., SUGAR HOUSE

## INDEX

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	1
ARGUMENT .....	2
POINT I. THE WRITTEN CONFESSION OF THE DEFENDANT WAS PROPERLY ADMITTED INTO EVIDENCE AND THE TRIAL COURT DID NOT COMMIT ERROR IN ADMITTING IT.....	2
POINT II. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF THE DEFENDANT .....	13
POINT III. THE TRIAL COURT DID NO ERR IN DENYING DEFENDANT'S MOTION TO DISMISS.....	17
POINT IV. DEFENDANT BY PLEADING TO THE INFORMATION IN DISTRICT COURT WAIVED ANY IRREGULARITY OF PROCEDURE AT THE PRELIMINARY HEARING STAGE.....	20
POINT V. THE TRIAL COURT DID NOT COMMIT ERROR IN GIVING INSTRUCTION NO. 24A TO THE JURY.....	21
POINT VI. ADMISSION OF THE TESTIMONY OF THE WITNESS ROBERT COIL WAS A PROP- ER EXERCISE OF THE TRIAL COURT'S DIS- CRETION AND, THEREFORE, NOT ERROR.....	24
POINT VII. THE STATE'S ASKING THE DEFEND- ANT IF HE HAD BEEN ARRESTED FOR ASSAULT TO KILL WAS PROPER CROSS EX- AMINATION AND NOT PREJUDICIAL ERROR.....	24
CONCLUSION .....	26

## AUTHORITIES CITED

3 Am. Jur., para. 971, 74 ALR 841.....	21, 25
--	--------

## INDEX—Continued

### CASES CITED

	Page
<i>Mares v. Hill</i> , 118 Utah 484, 222 P.2d 811, p. 815.....	12
<i>Osborne v. People</i> , 83 Colo. 4, 262 Pac. 892, 901.....	4
<i>People v. Davis</i> , 43 Cal. 2d 661, 276 P.2d 801 at 808.....	22
<i>People v. Lopez</i> , 32 Cal. 2d 673, 197 P.2d 757 at 759.....	23
<i>Phillips v. State</i> , 297 S.W.2d 135.....	25
<i>State v. Ashdown</i> , 5 U.2d 59, 296 P.2d 726 at 729.....	12
<i>State v. Braasch</i> , et al., 119 Utah 450, 229 P.2d. 289 at 293.....	12
<i>State v. Crank</i> , 105 Utah 332, 142 P.2d, p. 178.....	4, 5, 21
<i>State v. Gardner</i> , 119 Utah 529, 230 P.2d 559, at 564.....	12
<i>State v. Iverson</i> , —Utah—, 350 P.2d 152.....	17
<i>State v. Lewellyn</i> , 71 Utah 331, 366 Pac. 261.....	18
<i>State v. Martinez</i> , 342 P.2d 227.....	15
<i>State v. Neal</i> , 1 U.2d 122, 262 P.2d 756.....	22
<i>State v. Penderville</i> , 2 U.2d 281, 272 P.2d 195.....	17

### STATUTES CITED

77-16-2, Utah Code Annotated, 1953.....	20
77-42-1, Utah Code Annotated, 1953.....	22

# In the Supreme Court of the State of Utah

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STATE OF UTAH,

*Plaintiff and  
Respondent,*

- vs -

JAMES WILLIAM WARWICK,

*Defendant and  
Appellant.*

} Case No. 9205

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

Respondent adopts appellant's statement of facts, but will cite and comment upon additional facts in the course of the argument.

### STATEMENT OF POINTS

#### POINT I

THE WRITTEN CONFESSION OF THE DEFENDANT WAS PROPERLY ADMITTED INTO EVIDENCE AND THE TRIAL COURT DID NOT COMMIT ERROR IN ADMITTING IT.

POINT II

THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF THE DEFENDANT.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS.

POINT IV

DEFENDANT BY PLEADING TO THE INFORMATION IN DISTRICT COURT WAIVED ANY IRREGULARITY OF PROCEDURE AT THE PRELIMINARY HEARING.

POINT V

THE TRIAL COURT DID NOT COMMIT ERROR IN GIVING INSTRUCTION NO. 24A TO THE JURY.

POINT VI

ADMISSION OF THE TESTIMONY OF THE WITNESS ROBERT COIL WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION AND, THEREFORE, NOT ERROR.

POINT VII

THE STATE'S ASKING THE DEFENDANT IF HE HAD BEEN ARRESTED FOR ASSAULT TO KILL WAS PROPER CROSS EXAMINATION AND NOT PREJUDICIAL ERROR.

ARGUMENT

POINT I

THE WRITTEN CONFESSION OF THE DEFENDANT WAS PROPERLY ADMITTED INTO EVIDENCE AND THE TRIAL COURT DID NOT COMMIT ERROR IN ADMITTING IT.

Respondent in its brief will take the liberty to respond to Point III of appellant's brief first, then to Point II, and third to Point I in that order, since Points I and II depend in large measure on the admissibility of the defendant's confession, which issue is raised in Point III of appellant's brief.

The testimony with regard to the confession of the defendant (Exhibit P) as elicited from Officer Jack Joseph Good of the Oakland Police, begins in the transcript at page 96 and continues through page 116. Additional testimony concerning the confession and its voluntariness given by Officer George Chamberlain, also of the Oakland Police, begins at page 117 and runs through page 120. Further testimony concerning the confession obtained from Lt. J. M. Stevens, begins at page 209 of the transcript and runs through page 212.

At page 211 the document was offered in evidence, objected to on the same page by the defendant and admitted into evidence by the court on page 212.

The defendant's testimony concerning the confession begins at page 287 and continues through page 292 on direct examination, and is resumed, still on direct, at page 295 and concluded on page 296 of the transcript.

Appellant in his brief argues error in admission of the confession on the grounds that defendant (1) was not advised of his right to counsel; (2) that no persons besides Officer Good and defendant were present; (3) it was in the handwriting of the officer; (4) defendant at the time of the trial testified he did not read the statement, and (5) that there was conflicting testimony as to whether the state-



ment was read aloud by a peace officer to the defendant on June 10, 1959.

The case of *State v. Crank*, 105 Utah 332, 142 P.2d, p. 178, is a landmark case on the law of admissibility of confession in this state. Two pertinent quotations from that opinion seem relevant:

“ \* \* \* We hold that the defendant, as a matter of right, may give all evidence he has before the court, pertaining to the voluntariness of a confession before the confession is received in evidence; and that the court must base its ruling on the competency of the confession as evidence upon all testimony on the question adduced by both state and defendant. If on a consideration of all the evidence on the matter the court does not find the confession to be voluntary it should be excluded as incompetent. To hold otherwise does violence to the constitutional provision that an accused may not be compelled to give evidence against himself.”

The court earlier in its opinion cited with approval the case of *Osborne v. People*, 83 Colo. 4, 262 Pac. 892, 901 in the following language:

“If this is true, it follows that *where the court is in doubt* whether the confession was voluntary or not, the evidence may be admitted, leaving it to the jury to determine the weight to which it is entitled under all the circumstances.” (Emphasis added)

It is clear from a reading of the pages of the transcript above cited that defendant was given ample opportunity to put on all his evidence concerning the manner of the taking, the time, the place, and the witnesses connected with the confession in issue. Indeed, appellant does not complain that he was prevented from impeaching the document, but



rather, claims that he succeeded in proving it to be inadmissible because not voluntary. It is to be further observed that each of the grounds upon which appellant relies as the basis for involuntariness runs rather to weight and credibility of the document. This Court, in the Crank case, *supra*, spelled out the test of voluntariness in the following language:

“\* \* \* In laying a foundation for offering the writing, if a written confession, or conversation, if an oral confession, the state will of course be required to show the time and place of the conversation, or the writing and signing of the instrument, and also what is generally called a *prima facie* showing that it was the free and voluntary act of the accused. Then when the conversation or writing is offered, is the time for the accused to make objection to its competency. When such objection is made, the court will hear all the evidence pertaining to that question and itself determine its voluntariness as a matter of law—that is, the competency of the offered evidence. Unless the parties stipulate to the contrary, this evidence had best be taken without the presence of the jury. \* \* \*”

In thus indicating the requirements for the foundation, it is to be noted the court says nothing about advising the accused of his right to counsel. It says nothing about who shall write the confession, nor does it say how many witnesses must be present or whether the document must be read aloud to, or silently read by, the defendant. Rather, the State has the burden of showing the time, the place, and the signing of the instrument, together with absence of threats or inducements. From the testimony of all the above noted witnesses in this case, the State amply has shown these elements. A review of the transcript pages above cited referring to the confession show:

*Officer Frank Edwin Steinbrenner:* This witness testified that the defendant on the 30th day of May, 1959, called to him and said "I'm going to pin a feather in your cap," to which the witness replied, "How is that?", and the defendant responded, "Well, I wanted to tell you that I killed a man," whereupon the witness summoned Detective Good. (T. 93).

*Detective Jack Joseph Good:* This witness established that on May 30, 1959, at the Oakland Jail, in the interrogation room, he had a conversation with the defendant; that no one else was present. (T. 96). The conversation occurred approximately 12:00 noon. (T. 97).

Defendant at this point objected to further testimony from this witness on the grounds of "no proper foundation." The judge dismissed the jury and the matter was argued. (T. 97-101). The jury was recalled and the witness repeated the conversation between himself and the defendant. Exhibit P was then marked and given to the witness, who established the date (May 30, 1959), the place, who was present and how it was prepared. Specifically he said that the witness wrote the statement in his own handwriting, writing a paragraph at a time. He "read back" each paragraph to the defendant for approval and then proceeded. Finally, having finished the statement, he handed it to defendant and asked the defendant to read it. (T. 101-102).

After defendant had "appeared" to have finished reading the statement, the witness called an Officer Chamberlain. The transcript at page 104, line 3, reads as follows:

"Q. Was any statement made to the defendant at that time, with regard to the truthfulness of the statement?"

"A. Yes.

"Q: What was said?

"A. He was asked if this was a voluntary statement freely given without promises, force or threats, or promises of leniency.

"Q. What did the defendant say?

"A. He said it was.

"Q: Was this in the presence of yourself and Officer Chamberlain?

"A. It was."

The witness then testified that the defendant signed the statement and that Officer Chamberlain also signed the statement after the defendant. (T. 104).

Approximately a week later the witness again saw the defendant in company with officers from the Ogden Police Department, and asked the defendant if the statement (Exhibit P) were true. The statement "was read to him in its entirety" and the defendant agreed it was correct. Additional writing to this effect was added to the exhibit and the defendant again signed it in the presence of the Ogden officer. (T. 105).

On cross examination the witness said the total conversation and writing of Exhibit P took from one and one-half to two hours, and that Chamberlain was present not more than the last 15 minutes. (T. 109). Also, on cross examination, the following testimony appears at page 112 in the transcript, lines 24 through 30, and page 113, lines 1 through 6:

“Q. Now I take it that the language of this statement—the words used and so forth—are words that you chose and you put down, following what he told you; is that right?

A. I attempt to follow the Defendant’s wording as closely as possible.

Q. He didn’t dictate this though?

A. No, he did not.

Q. And none of the writing here on it, except the signatures as you pointed out, are in his writing?

A. That is correct.

Q. Do I understand correctly that, as you wrote it, you would finish a single paragraph and then read that aloud?

A. Yes.”

The witness was asked if he told the defendant of his right to legal counsel. The witness replied he had not; that California procedure did not require it. (T. 113).

Defense counsel also inquired of this witness about a conversation concerning the defendant’s problem of drinking. (T. 113). On redirect, this witness was asked if he observed the defendant to be sober or under the influence of narcotics, alcohol, sedation, etc. He replied his observations were that the defendant was not under such influence. (T. 115-116).

*Officer George Chamberlain:* This witness testified as follows with regard to the witnessing of the defendant’s signature on Exhibit P. The last paragraph of the statement was read aloud in his presence to the defendant by Detective Good. The specific words read aloud were:

“This is a true statement given by me voluntarily without any force, threats or promises of leniency.”

The witness then testified that he saw the defendant sign the statement and that he, the witness, then read the statement and signed it himself.

*Lt. J. M. Stephens:* This witness testified that on the 6th day of June, 1959, at 3:00 p.m. in the presence of Detective Good and Sgt. Bruestle (Ogden Police Department) and the defendant at the Oakland City Jail, there was a conversation. (T. 209). The witness told the defendant:

“We would like you, if you would Mr. Warwick, we would like you to read this statement (Exhibit P) and if it is correct we would like you to make a notation attached to it to the effect it is correct and sign it in our presence.”

The witness further told the defendant he did not have to do those things. Defendant then wanted to know why. The witness explained the defendant would likely go to trial and that the witness, together with Sgt. Bruestle, would probably be a witness, and by watching the defendant sign such a statement, they could then testify to it. (T. 210).

The testimony at page 210 of the transcript, beginning at line 117, reads as follows:

“Q. Then what did you do?

A. He finally agreed to the situation. I handed him the statement, and asked him to read it.

Q. What did he do?

A. He picked up the statement and looked at it,

looked at each page, turned them over. After he got through he handed the statement back, and I asked him if that was true and correct. The way it was written. He said yes.

Q. Did he appear to be reading it?

A. He appeared to be reading it.

Q. Then what did you do?

A. I asked him if ~~we~~<sup>HE</sup> would make the notation, on the back of it, to the effect that he had read it voluntarily, and that it was a true and correct statement.

Q. What did he say?

A. He said: 'No, I don't want to do that.' He said: 'You do it.'

Q. What did you do then?

A. I turned it over, and wrote the notation on the back.

Q. What did you do then?

A. After that was done, I handed the statement back to him.

Q. Then what?

A. And he signed it. And I signed it as a witness and Sergeant Bruestle signed it as a witness.

Q. The notation that you made on it, do you know whether he read it? Or appeared to read it? Or whether it was read to him?

A. I read it to him.

Q. I show you page 6—what is marked with a numeral 6, of State's Exhibit P—and ask you if you recognize any of the writing upon that page?

A. That is my writing."



At this point, having identified all the writing on the document, the State offered Exhibit P in evidence. Defendant objected and the Court received it in evidence. (T. 211-212).

The matters of faulty eyesight, inconsistency of memory of witnesses, etc. were extensively inquired into by appellant's counsel and the Court was fully informed of all the evidence, both of the State and the defendant concerning the voluntariness of this confession. Thereupon the Court admitted the document. Such admission respondent contends was a legitimate and proper exercise of the trial court's discretion. While it may be true that all of the evidence concerning voluntariness under the Crank holding would have better been heard out of the jury's presence, neither party so moved the court, and in view of the fact that the court admitted the document, all of such evidence under the Crank holding could have properly been received by the jury anyway. The wording in the Crank case that is relevant is as follows:

“\* \* \* Unless the parties stipulate to the contrary, this evidence had best be taken without the presence of the jury. This is wisdom, since if the confession is excluded, and the state has sufficient other evidence to take the case to the jury, the confession itself and all the evidence which led to its exclusion would not be proper for the consideration of the jury, and if heard by it, might well be the determining factor in reaching a verdict. \* \* \* If on the other hand, the state has shown the confession was voluntary as a matter of law, the court admits it in evidence, and it is then for the consideration of the jury for what it is worth together with all the other evidence submitted to it. The court having decided the confession is competent and may be received in evidence, the state need not



then further assume the burden of showing its voluntariness before the jury. The defendant may put in evidence to the jury all the facts and circumstances under which the statements were made to enable the jury to determine its credibility and the weight to be given to it. The state may also offer testimony to the jury on that matter by way of showing that the statements were freely made and therefore entitled to great weight and full credit."

This Court has repeatedly upheld in the cases of *Mares v. Hill*, 118 Utah 484, 222 P.2d 811, p. 815; *State v. Braasch, et al.*, 119 Utah 450, 229 P.2d 289 at 293, and *State v. Gardner*, 119 Utah 529, 230 P.2d 559, at 564, that failure to advise the defendant of his right to counsel does not in itself make the confession involuntary.

In the case of *State v. Ashdown*, 5 U.2d 59, 296 P.2d 726 at 729, this Court said in part:

"Although the burden of proof as to the voluntariness of the confession lies with the party seeking to use it as evidence, i.e., the prosecution, after the trial court has decided from the evidence that the confession was voluntarily made, the appellate court will not disturb that finding in the absence of a showing of abuse of its discretion where there is substantial evidence from which it could reasonably so find."

It is submitted from the above review of the testimony (quite apart from the self serving statements of the defendant at the trial about his poor eyesight, etc., referred to above) there is ample evidence that the statement was voluntarily made and the admission of Exhibit P into evidence by the trial court was a proper exercise of discretion. Indeed, appellant makes no specific assignment of abuse of discretion on the part of the trial court.

## POINT II

THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF THE DEFENDANT.

Appellant argues that the only evidence of premeditation and deliberation in evidence in the trial of this case was the defendant's own confession, and argues that "some other evidence" of premeditation besides the confession, is necessary to supply this essential element of the State's case. As respondent understands it, appellant argues that defendant's testimony at the trial and a proper construction of defendant's confession (Exhibit P) indicate that this death was the simple result of a struggle or a fight between two "half drunk" participants, of which the decedent was the original aggressor, and that no specific intent to kill, or premeditation or deliberation to take a life occurred until after the fight began.

As admitted by appellant in his brief, the cause of death, as testified to by Dr. Warren A. Bennett, was drowning (T. 81), and not the result of blows received by decedent on his head. Dr. Bennett in fact testified that such blows may or may not have caused unconsciousness. (T. 79).

At page 3 of defendant's confession (Exhibit P) are found the words:

"I hit him behind the left ear after swing him around with my left hand. He dropped and he was unconscious. I hit him eight or nine more times while he was lying helpless on the ground. He did not make any movements."

Resuming from page 4:

“When the fight first started I had not intended to kill this man but once I hit him I decided I would finish his life. To make certain of his death there was a creek about 5 feet below from where we fought. I dragged the body by one leg. The man way lying on his back. I dragged him down an incline and dragged the body into the creek. There was a pool of water about 3 or 4 feet in depth. I jerked the body into the creek where the pool of water was and turned the body over so that the face would be down and he would be sure to drown if he were alive.”

While these statements differ with the testimony of the defendant at the time of the trial, since both were admissible the jury was at full liberty to choose which account or what parts of each it would believe. Clearly, if the jury chose to believe the account written in Exhibit P, those statements above quoted from Exhibit P demonstrate a deliberate desire to take the life of one obviously observed to be unconscious. Further, if the jury also believed that the defendant did the deliberate, planned act of turning McCall face down in the water so that he “would be sure to drown if he were alive,” it would be justified in determining that there was premeditation and deliberation.

Appellant in his brief implies that the elements of premeditation and deliberation had to occur prior to the scuffle which led to the decedent’s being knocked unconscious; that absent any such premeditation at that point, a verdict of first degree murder is untenable. Such an interpretation, to be valid, would require the decedent to have been killed as a result of the blows on the head, and death to have occurred either at the time or inevitably and

immediately thereafter from that sole cause. As indicated above, however, the cause of death was not the blows to the head inflicted by defendant with his wrench in hand, but rather from drowning.

If, therefore, the jury believed that there was an appreciable period of time, as indicated in Exhibit P, following defendant's rendering the decedent helpless during which the defendant deliberated and meditated and determined to take further steps to snuff out the decedent's life, as observed above, the jury would be justified in returning a verdict of guilty of first degree murder. The Court, in Instruction No. 7, properly defined the words "deliberate" and "premeditate" and correctly stated the Utah law in that connection. The Court said in part:

" 'Premediate' means the act of meditating, contriving or designing beforehand for any length of time. The time must be sufficient, however, for some reflection on and consideration of the act in contemplation during which the alternative choices of killing and not killing are debated in the mind of the actor for the formation of a definite purpose to kill. When the lapse of time is sufficient for this purpose, it matters not how short the time may be. Whether or not a premeditated design to kill was formed must be determined from all the facts and circumstances of the case, including the mental condition of the defendant."

The court further instructed the jury in Instruction No. 9 that premeditation and deliberation could not be presumed from the mere fact of killing.

Appellant relies in support of his position on the Wyoming case of *State v. Martinez*, 342 P.2d 227, where a first degree murder verdict was found by a jury and set aside

by the Wyoming Supreme Court on the basis that defendant's confession was the only evidence of premeditation and deliberation, and upon viewing the confession as a whole there were no statements which could be reasonably construed to give rise to premeditation or deliberation. Specifically in his confession defendant said only that he was acting out of fear for his own life. Such is not the case in the confession before this court, and, in particular, the statements cited earlier in this point. Respondent contends, therefore, that the Martinez case gives no aid and comfort to appellant, since statements indicating deliberation and premeditation clearly appear in defendant's confession.

It is also to be observed that the court properly instructed the jury in Instruction No. 30 that they were to view the confession of defendant admitted into evidence with proper caution and in connection with all the surrounding circumstances.

The only issue in this case is whether the jury should have believed the statements in the confession as opposed to the testimony of the defendant at the time of the trial, and appellant himself concedes that it is the jury's prerogative to choose which version of the facts it prefers to believe.

The jury in this case was properly instructed that it was to determine the existence or lack of existence of premeditation and deliberation from all the facts and circumstances of the case, and since in fact the jury has so determined, and since in fact there was competent evidence before the jury from which such a determination could be made, and hence no abuse of its discretion on the part of the jury, this Court should not overturn that verdict.



## POINT III

## THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS.

This Court has repeatedly held, most recently in the case of *State v. Iverson*, —Utah—, 350 P.2d 152, that so long as there was competent evidence upon which a jury might return a verdict of guilty, the <sup>TRIAL</sup> Court cannot dismiss a criminal information on the grounds of insufficiency of evidence.

The court in the Iverson case said:

“The law involved is ably discussed in the opinion of Justice Wolfe in *State v. Thatcher*, 108 Utah 63, 157 P.2d 258. The controlling principle is that upon such a motion the evidence is to be viewed most favorably to the state, and if when so viewed, the jury acting fairly and reasonably could find the defendant guilty beyond a reasonable doubt, the judge is required to submit the case to the jury for determination of the guilt or innocence of defendant.”

In the case of *State v. Penderville*, 2 U.2d 281, 272 P.2d 195, the court said.

“\* \* \* It has been repeatedly held by this court that upon a motion to dismiss or to direct a verdict of not guilty for lack of evidence that the trial court does not consider the weight of the evidence or credibility of the witnesses, but determines the naked legal proposition of law, whether there is any substantial evidence of the guilt of the accused, and all reasonable inferences are to be taken in favor of the state. \* \* \* (Cases cited) As is pointed out in one or more of these cases, the trial court has a discretion in the case of a motion for a new trial that it does not have in case of a motion to dismiss

or to direct a verdict of not guilty. Nevertheless, in either case if there is before the court evidence upon which reasonable men might differ as to whether the defendant is or is not guilty, he may deny the motion."

In the case of *State v. Lewellyn*, 71 Utah 331, 366 Pac. 261, an adultery prosecution where defendant made a motion for a directed verdict, which motion is equivalent to the motion to dismiss under consideration here, the court said:

"In 16 C.J. 935, the conclusions of various courts are condensed in the statement:

'As a general rule the court should direct a verdict of acquittal \* \* \* where there is *no* competent evidence reasonably tending to sustain the charge; or where the evidence is undisputed and so weak that a conviction would be attributable to passion or prejudice, or where it is so slight and indeterminate that a verdict of guilty would be set aside, as where the evidence consists solely of the uncorroborated testimony of an accomplice, or is insufficient to overcome the presumption of innocence, or to show defendant's guilt beyond a reasonable doubt. But the case should be submitted to the jury and the court should not direct a verdict of acquittal, if there is *any* evidence to support or reasonably tending to support the charge, as where it is sufficient to overcome prima facie the presumption of innocence, or where the evidence of a material nature is conflicting.' (Emphasis added)

From *Pace v. Commonwealth*, 170 Ky. 560, 186 S.W. 142, we quote the syllabus on this point as follows:

'It is only in the absence of any evidence tending to establish the guilt of the accused that the trial court will be authorized to grant a peremptory in-



struction directing his acquittal.'

The same principle is decided in *State v. Gross*, Ohio St. 161, 110 N.E. 466.

An able discussion and determination of the bounds of judicial authority in considering a motion for a directed verdict is contained in *Isbell v. U.S.* 142 C.C.A. 312, 227 F. 788, in which it is made clear that the court in such case does not consider the weight of evidence or credibility of witnesses but determines the naked legal proposition of law whether there is any substantial evidence of the guilt of the accused. This is undoubtedly the correct rule. See annotation 'Directing Acquittal,' 17 A.L.R. 910. The function of a court in dealing with an application for a directed verdict must not be confused with that in considering a motion for a new trial upon the grounds of insufficiency of evidence. The court has a discretion in the latter case which he does not properly have in the former. The reason for the distinction is that the order sought in one case acquits the accused and finally ends the prosecution, while in the other, the order, if granted, does not discharge the accused but merely gives him the advantage and benefit of another trial. The rule is controlled by the same principles in criminal cases as in civil procedure. And in a civil case, *Stam v. Ogden P. & P. Co.*, 53 Utah 248, 177 P. 218, this court said:

'It is familiar doctrine in this jurisdiction and perhaps in nearly every other where the jury system prevails, that, if there is any substantial evidence whatever upon which to base a verdict, the court will not withdraw the case from the jury or direct what their verdict should be'."

Since, as observed in the previous points argued, there is competent and substantial evidence in Exhibit P alone from which a jury could have returned (and in fact did

return) a verdict of guilty of first degree murder, as a matter of law the trial court did not err in denying the defendant's motion to dismiss.

#### POINT IV

#### DEFENDANT BY PLEADING TO THE INFORMATION IN DISTRICT COURT WAIVED ANY IRREGULARITY OF PROCEDURE AT THE PRELIMINARY HEARING STAGE.

The appellant in this case has not filed a designation of the record on appeal and the transcript of the preliminary hearing in this trial was not included in the record on appeal, and respondent, accordingly, has no opportunity to review the defects in the preliminary hearing to which appellant refers in Point IV of his brief. The substance of appellant's argument, however, was that the written confession (Exhibit P) was improperly admitted into evidence at the preliminary hearing.

In spite of the absence of the preliminary hearing transcript, the controlling Utah statute (77-16-2, U.C.A. 1953) eliminates this point from being properly considered by this Court in the following language:

"No defect or irregularity in or want or absence of any proceeding or statutory requirement, prior to the filing of an information or indictment, including the preliminary hearing, shall constitute prejudicial error and the defendant shall be conclusively presumed to have waived any such defect, irregularity, want or absence of proceeding or statutory requirement, unless he shall before pleading to the information or indictment specifically and expressly object to the information or indictment

on such ground. Whenever the consent of the state to any waiver by the defendant is required, such consent shall be conclusively presumed, unless the state before or at the time the defendant pleads to the information or indictment expressly objects to such waiver."

This statute has been cited and upheld in *State v. Crank*, supra, p. 181. Since in this case defendant entered a plea of not guilty to the information filed in the District Court, he thus waived his objection to any irregularity in the preliminary hearing and said defects are not now appealable before this body.

## POINT V

### THE TRIAL COURT DID NOT COMMIT ERROR IN GIVING INSTRUCTION NO. 24A TO THE JURY.

Appellant argues error not on the basis that Instruction 24A is an incorrect statement of the law with regard to the question of self defense and subsequent aggression, but rather that it is incomplete. Appellant argues that the Court should have further instructed the jury that the defendant, having rendered the decedent helpless, had no affirmative duty thereafter to go to his aid. Respondent contends that such a proposed instruction would not deal directly with and would not be a proper part of the subject treated by Instruction 24A.

The matter of giving instructions or refusing same has long been held the province of the trial court, 3 Am. Jur., para. 971, 74 ALR 841. In criminal cases the courts have held that the verdict of the jury will not be overturned for

failure of trial court to give an instruction unless such failure constitutes prejudicial error. In that connection in the case of *People v. Davis*, 43, Cal. 2d 661, 176 P.2d 801 at 808, the Supreme Court of the State of California said:

“Reviewing courts will scrutinize with great care any claim of prejudicial error predicated solely upon the omission of the trial court to give of its own motion and instruction, the propriety of which is indicated solely by the condition of the evidence. Prejudicial error will be held to exist if, upon an examination of the entire record \* \* \* (cases cited) it appears that the giving of the instructions was *vital to a proper disposition of the case.*” (Emphasis added).

In the Davis case, defendant was tried for performing abortions and on appeal defense counsel argued prejudicial error on the grounds that the trial court failed to instruct the jury that a specific witness was an accomplice, whose testimony needed corroboration.

This court has spoken on the subject of prejudicial error most recently in the case of *State v. Neal*, 1 U.2d 122, 262 P.2d 756. The opinion reads in part:

“We will not reverse criminal causes for mere error or irregularity. It is only when there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted.”

The Court then cites Section 77-42-1, U.C.A. 1953, which provides:

“After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If

error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment."

While it is the function of the appellate court to determine in each fact situation what is prejudicial, respondent herein submits that a fair inference which 12 reasonable jurors, independent of any instruction, might well make, is that a defendant who is attacked and defends himself quite naturally has neither the inclination nor the duty to go to the aid of a helpless attacker. It is further suggested that to constitute prejudicial error, it must be demonstrated that the trial court in failing to give such an instruction to the jury has committed such error that had the instruction been given, the jury would have returned a different verdict. See *People v. Lopez*, 32 Cal. 2d 673, 197 P.2d 757 at 759. Respondent contends that this Court may reasonably determine that had such an instruction as requested by defendant been given to the jury, the verdict would have been the same and that absent instruction, the jurors may well have considered that the defendant had no duty to go to the aid of McCall.

It must be further observed that the jury apparently chose to believe the statements appearing in defendant's confession which, if believed, made the question of going to the aid of the decedent moot in that they illustrate conduct of the opposite nature. That is, he affirmatively took steps to insure McCall's death after rendering him helpless.

Counsel for appellant cites no case authority to demonstrate that there is no duty to go to the aid of a helpless assailant. Adopting for a moment the defendant's theory

that a scuffle occurred and that at the end of the altercation defendant discovered McCall lying face down in the water unconscious, and thereafter left the scene, respondent submits this is not merely abandoning someone who is helpless, but more an abandonment of someone who is helpless and in dire peril of losing his life. Whether the same lack of duty to go to the aid obtains in such a situation remains to be demonstrated. Counsel for defendant in taking exception to the Court's failure to give such an instruction at the time of the trial did not demonstrate the validity of such a proposed instruction and has not so demonstrated on appeal, but has done no more than suggest such an instruction should have been given.

Accordingly respondent contends that no error was committed by the trial court in giving Instruction 24A.

## POINT VI

ADMISSION OF THE TESTIMONY OF THE WITNESS ROBERT COIL WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION AND, THEREFORE, NOT ERROR.

## POINT VII

THE STATE'S ASKING THE DEFENDANT IF HE HAD BEEN ARRESTED FOR ASSAULT TO KILL WAS PROPER CROSS EXAMINATION AND NOT PREJUDICIAL ERROR.

The remaining two points of this brief have to do with alleged errors committed during the course of the trial in the admitting of the testimony of the witness Robert Coil and in permitting the State on cross examination to ask



the defendant if his arrest in Oakland had been on the charge of "assault to kill." Under the doctrine of discretion of the trial court cited above (3 Am. Jur., para. 971) and the ruling in the Neal case, *supra*, the question of admissibility of evidence or propriety of questions asked is a discretionary matter for the trial judge, and in the absence of showing prejudice to the rights of the accused, there is no reversible error. Appellant argues that testimony of the witness Coil was too indefinite an identification. He cites the case of *Phillips v. State*, 297 S.W.2d. 135, in support of his argument. It must be observed in that case the identification by the witness supplied an essential element of the crime connecting the defendant with the robbery. In the case before this court, the identification by the witness Coil, if believed, tended to show no more than that the decedent and the defendant had been seen together prior to the crime. The jury could well have reached its verdict without the testimony of this witness. Defense Counsel had ample opportunity to impeach this witness and did so, and it ~~was~~<sup>was</sup> ~~the~~<sup>A</sup> proper exercise of the court's discretion to permit the testimony to go to the jury to be given what weight, if any, the jury might choose.

In the transcript at page 296, the defendant on direct examination stated:

"I was arrested for drunk and disturbing the peace at my ex wife's home."

He had earlier testified that his ex wife's home was located in Oakland, California. On cross examination counsel for the State inquired into the conduct of the defendant at his ex wife's home in Oakland on the day of his arrest. Coun-



sel for the defendant objected and the court overruled the objection, finding that such questions were proper cross examination. In the course of such cross examination the State twice asked the defendant if in fact his arrest was for assault to kill and that the charge had been reduced to disturbing the peace, to which he plead guilty. The defendant denied the charge of assault to kill, but admitted pleading guilty to the offense of disturbing the peace and being sentenced to 30 days. A reading of the record indicates that the subject of defendant's arrest was raised during the course of the direct examination; and the questions objected to on cross, while perhaps prejudicial, were nonetheless proper cross examination. The court accordingly did not abuse its discretion.

## CONCLUSION

For the reasons stated above, respondent submits that the verdict and judgment of the trial court should be affirmed.

Respectfully submitted,

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