1966

State of Utah v. Melvin Canfield : Brief of Appellant

(2)

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Respondent,

vs.

MELVIN CANFIELD,
Appellant,

Case No. 10559

BRIEF OF APPELLANT

Appeal from Judgment of the Third Judicial District Court of Salt Lake County Honorable Aldon J. Anderson, Judge

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STATEMENT OF CASE

The Appellant, Melvin Canfield, was arrested on the 14th day of May, 1965, for murdering Douglas Holland of Salt Lake City, Utah, on the 10th day of May, 1965. The Appellant was arraigned before the Salt Lake City Court and charged with Murder in the First Degree, together with two codefendants, Ted Hildebrande and Gordon Adamson. On the 28th day of

June, 1965, the deposition of Dr. James R. Miller was taken in open court in the Salt Lake City Court, and the Preliminary Hearing for the Appellant and co-defendant, Gordon Adamson, commenced the 1st day of July, 1965. During the Preliminary Hearing, and upon motion of the Salt Lake County Attorney, the charges against Gordon Adamson were dismissed. The State presented ten witnesses. The defense presented no evidence. After arguments of counsel, the Appellant was bound over to stand trial in the Third Judicial District Court on the reduced charge of Murder in the Second Degree.

On July 12, 1965, the Appellant was arraigned in the Third Judicial District Court, charged by Information of the crime of Murder in the Second Degree, in violation of Title 76, Chapter 30, Sections 1 and 3, Utah Code Annotated, 1953, as amended. A plea of not guilty was entered.

The trial was held and heard by jury with the Honorable Aldon J. Anderson, District Judge, presiding, on the 27th day of September, 1965. The jury rendered a verdict of guilty of Second Degree Murder. The Defendant was sentenced the 7th day of October 1965, to be imprisoned in the Utah State Prison for an indeterminate term. The commitment issued forthwith.

The appeal of the Appellant is taken from the rulings of the Court.

STATEMENT OF FACTS

On the 10th day of May, 1965, at approximately 9 o'clock p.m. the Appellant and three others drove to the office of the deceased, Douglas Holland, at 649 South Fifth East, Salt Lake City, Utah (R260, 317, 324, 392, 393) to collect payment for the clothes of Appellant that the deceased had maliciously ripped and destroyed the day before. (Exhibits 30, 31 and R398, 317, 323, 418, 403.) Immediately upon their arrival the father of the deceased, Ben Holland, came out of the office onto the lawn, approached the car, and told the Appellant and the others in the car, "You guys better clear out of here or you're going to be in real trouble." (R262, 317, 395, 425.) Within seconds thereafter the deceased, Douglas Holland, came out of the office onto the porch, with a shotgun in hand, and without any warning shot at the Appellant. (R263, 270, 318, 325, 395, 425.) The Appellant ducked down in the car to avoid being shot (R394, 396, 398, 425) and raised up to look and saw the deceased pump a new shell into the firing chamber of the shotgun and aim it at Appellant to shoot again. (R396, 426, 399.) Simultaneously, the Appellant saw a rifle being pushed up by Gordon Adamson from the back seat of the car. (R263, 270-271, 396, 426.) Appellant took the gun, put a shell in the chamber and fired at the legs of the deceased (R396, 426-427, 436) to "either scare him or wound him to prevent him (the deceased) from shooting me." (R400, 427, 428.) The Appellant backed the car out of the driveway and drove away from the office of the deceased.

(R264, 397.) As he was driving away, the deceased fired a second shot at the Appellant. (R265, 326, 397.) The victim died the next morning (R101).

Appellant contacted his attorney by phone and made arrangements to turn himself in to the police voluntarily (R410). The Appellant's attorney went to meet the Appellant but upon his arrival he found the police were present and had placed the Appellant under arrest (R411).

STATEMENT OF POINTS

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ARGUMENT

POINT I

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A VERDICT OF MURDER IN THE SECOND DEGREE.

The Appellant contends that the State failed to prove beyond a reasonable doubt and present evidence sufficient to sustain the verdict of Murder in the Second Degree. Title 76, Chapter 30, subsection 1, Utah Code Annotated, as amended, defines murder as follows: "Murder is the unlawful killing of a human being with malice aforethought."

Title 76, Chapter 30, subsection 3, Utah Code Annotated, 1953, as amended, defines the degrees of murder as follows:

> "Every murder perpetrated by poison, lying in wait or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpe-

trate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life;—is murder in the first degree. *Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.*" (Emphasis added.)

"Murder at common law is the killing of one human being by another with malice aforethought, either expressed or implied, i.e. with deliberate intent or formed design to do so." 26 American Jurisprudence 161 Section 11 and cases cited thereunder. Section 12 of the same citation points out the common law distinction between murder and other grades of homicide. "Felonious homicide at common law is divided into murder and manslaughter. The element which distinguishes murder from manslaughter or marks the boundary between the two grades of homicide, i.e. is malice. Unless there is a killing with malice there can be no murder of any degree. Lacking this element the offense is nothing higher than manslaughter . . . "

The trial court instructed the jury in Instruction No. 16 (R55) that six elements had to be proven beyond a reasonable doubt before the Appellant could be convicted of murder in the second degree. The elements listed were: (1) that the Appellant killed Douglas Holland on May 10, 1965; (2) that the killing was with malice aforethought; (3) that the Appellant intended to kill Douglas Holland or that the Appellant intended

to do great bodily harm to Douglas Holland which resulted in death; (4) that the killing was unlawful; (5) that the killing was felonious; and (6) that said Douglas Holland died within one year. The Instruction further stated,

> "If you are satisfied beyond a reasonable doubt that the State has proved *each and all* of the allegations of the Information as summarized above, then it is your duty to convict the defendant of the crime of murder in the second degree. If, on the other hand, you believe from the evidence that the State has not proved *one or more* of the said elements beyond a reasonable doubt then you should find the defendant not guilty of the crime of murder in the second degree."

The Trial Court in Instruction 13a (R51) instructed the jury: "The term 'malice aforethought' means *pre-existing malice. 'Malice'* means that condition of mind which prompts a person to do a wrongful act intentionally, *without justification* or *excuse* . . ." (Emphasis added).

> " 'Malice' may be express or implied. It is express where there is manifested a deliberate intention unlawfully to take the life of or cause great bodily injury to a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned or malignant heart."

Immediately upon the arrival of Appellant and three others at the office of the deceased, the father of the deceased came out on the lawn, approached the car and advised the Appellant and others in the car, "You

guys better clear out of here or you're going to be in real trouble. (R262, 317, 395, 425.) Within seconds thereafter the deceased came out onto the porch and without warning fired a shotgun at the Appellant. (R263, 270, 318, 325, 395, 425.) The evidence shows that the shot hit the lawn but that it was in a direct line from the porch to the car in which the Appellant was sitting. (See Exhibits P-3 and P-21.) The Appellant saw the deceased pump the shotgun, putting a shell into the firing chamber, and swing the gun around, pointing it at the Appellant to shoot a second time. (R396, 399, 426.) Gordon Adamson found a rifle in the back seat of the car (R289) and handed it up to the Appellant. (R263, 270-271, 396, 426.) The Appellant took the rifle, seeing it for the first time (R403), and testified, "I fired at him to save my life to prevent him from shooting me . . . to scare him or to wound him to stop him from shooting me." (R400, 427, 428.) The Appellant backed out of the driveway from the office of the deceased. (R397) As the Appellant was driving away, the father of the deceased pointed the gun at the car and attempted to shoot the Appellant (R397); then handed the gun to the deceased who fired the shotgun a second time at the Appellant. (R265, 326, 397.)

It is submitted that the evidence wholly fails to support a finding that the State proved beyond a reasonable doubt three of the necessary six required elements of second degree murder as set out in the Trial Court's Instruction No. 16 (R55). There is no evidence in the record from which "malice aforethought" could be con-

cluded. "Malice" as defined by the Court's Instruction No. 13a in this case could not be "express" nor "implied." (R51)

The only evidence in the record which in any way touches upon the Appellant's state of mind is the testimony of the Appellant which completely negates a finding of malice. The very circumstances surrounding the shooting itself preclude a finding that the Appellant acted with malice aforethought or that he had malice as defined by the Trial Court. The Appellant, knowing the vicious nature of the deceased (R413, 415, 416) and knowing the deceased had threatened to "kill you (Appellant) if I ever see you again" (R436, 386) returned the shot of the deceased only after the deceased had shot at him and "was pumping the gun and turning back around and facing the car again and pointing the gun at the car." (R399, 426, 396.) It should be remembered that the deceased fired a second shot at the Appellant. (R265, 326, 397.)

Malice could not be express as defined by the Instruction of the Court because the Appellant under the circumstances of the shooting could not have formed "a deliberate intention." Malice could not be "implied" as defined by the Court because to be implied there must be "no considerable provocation." This Court defines and adopts a definition of provocation in the case of State v. Johnson, 112 Utah 130, 185 Pac. 2d 738 in which this Court refers to a Wisconsin case Ryan v. State, 115 Wisc. 488, 92 Northwest 271, wherein the court said:

> " . . . A learned text writer speaking upon the subject, says: 'In general, provocation consists in circumstances of such nature as are calculated to produce and do produce, such excitement and passion as might obscure the reason of an ordinary man and render him liable to do the act which causes the homicide . . . The provocation should be sudden and sufficiently great, —that is, calculated to exasperate both in its character and in respect to the person to whom it is directed . . . ' "

It is urged that nothing could be more provocation than the deceased's shooting at the Appellant after threatening to kill the Appellant, especially where Appellant was aware of the vicious nature of the deceased. (R413, 415.) The instantaneous reaction of the Appellant when, without warning, he was shot at by the deceased (R318, 325, 395, 425), and the Appellant's evidenced intention to save his own life (R400, 427), his reaction out of fear for his life (R428), and the threat of death from the deceased (R417), when combined eliminate the finding of malice or malice aforethought as required to find the Appellant guilty of murder in the second degree.

This Court has held in the case of State v. Thompson, 110 Utah 113, 170 Pac. 2d 153, referring to the case of State v. Russell, 106 Utah 116, 145 Pac. 2d 1003, and quoted, "Thus there can be no murder, either in the first or second degree, without a planned designed or thought out beforehand intention to kill or cause great bodily injury, or to do an act knowing that the natural and probable consequences thereof would be to

cause death or great bodily injury to some other person, or to commit certain types of felonies. Anything less does not have malice aforethought."

The only evidence at the trial from which to determine whether or not the defendant acted with malice is that of the Appellant. The Appellant testified why he went to the home of the deceased, ". . . somebody suggested that we go up there to see Doug (the deceased) and see if he wanted to pay for my (the Appellant's) clothes that he tore up" (R398). The Appellant further testified:

> Q. Now, when you were talking about collecting from Doug Holland on these clothes, are these the clothes you are referring to? (displaying exhibits 30 and 31. R403).
>
> A. Yes.
>
> Q. What did you intend to collect?
>
> A. Money.
>
> * * *

When asked by the District Attorney on cross examination, the Appellant testified (R418):

> Q. What did you go up to his (deceased) house for then?
>
> A. To ask him if he would pay for my clothes.
>
> * * *
>
> Q. Why did you get three to go with you?
>
> A. I was afraid of him.

As to the intention or the state of mind of the Appellant at the time of the shooting, the only evidence again is that of the Appellant. He testified (R400):

> Q. I see. What did you feel the exact time he fired?
>
> A. I was scared.
>
> Q. Scared of what?
>
> A. Scared of losing my life.
>
> Q. And at the time that you had the gun and you fired at him, what were you thinking?
>
> A. I was thinking maybe I could stop him from shooting at me again if I shot by him or wounded him.
>
> Q. I want you to listen carefully to this question. At the time you fired did you intend to kill Doug Holland?
>
> A. No, I did not.
>
> Q. What did you intend to do?
>
> A. To either scare him or wound him to prevent him from shooting me.

The testimony is that the Appellant aimed low (R427), aimed at the deceased's legs (R426) and further testified on cross examination (R428) as follows:

> Q. Isn't it true that you went up there to fight him?
>
> A. No, it is not.
>
> Q. Now you knew you had hit him in the hip or leg, didn't you?

A. I thought I had hit him in the leg.

Q. What made you think that?

A. Because I pointed the gun low.

Q. Didn't you think if you just shot another shot back that he wouldn't shoot back at you?

A. I didn't know what he would do. Like I said, it was just instantaneous and that was the only thing that come into my mind to stop him from shooting me.

Q. You knew this wasn't any self defense at that time, don't you?

A. I was doing it to save my life is what I was doing it for.

* * *

Q. Of self defense?

A. This is the way it's been all along. That's the only reason I fired a shot was to save my life.

This Court has been uniform in holding that a homicide is justifiable if there exists in the mind of the slayer reasonable belief of the necessity of the killing. See the cases of State v. Terrell, 55 Utah 314, 186 P 108, 25 ALR 497, and State v. Harris, 58 Utah 331, 199 P 145. See also Warren on Homicide, Vol. 3, 322 and paragraph 314, page 588 and notes thereunder.

In discussing the necessary elements of self-defense as justifying a homicide, this Court held in the concurring opinion of State v. Law, 106 Utah 196, 147 P2d 327:

* * * The element of self defense, or justifiable homicide, is predicated upon two propositions: (a) That the circumstances and surroundings were such that a man might reasonably believe he was in imminent fear of death or great bodily injury. (b) That the actor did believe he was in imminent peril of death or great bodily injury.

* * *

" * * * but under statutes such as ours, the decisions have modified this rule, and it is now generally held that a homicide is justifiable if accused acted as a reasonable man with apparent good cause for shooting. (cases cited); the necessity for homicide need not be real but need be only reasonably apparent, that is, based upon reasonable grounds of belief that such is the case. (case cited) * * * "

Sec. 76-30-10, Utah Code Annotated, 1953, as amended, reads:

"Homicide is also justifiable when committed by any person in the following cases:

(1) When resisting any attempt to murder any person, or to commit a felony or to do some great bodily injury upon any person.

(3) When committed in the lawful defense of such person * * * when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury and there is imminent danger of such design being accomplished * * * "

Sec. 76-30-12, Utah Code Annotated, 1953, as amended, reads:

"When the homicide appears to be justifiable or excusable, the person charged must, upon his trial, be fully acquitted and discharged."

It is submitted that the State failed to present evidence sufficient to prove beyond a reasonable doubt that the Appellant was guilty of Murder in the Second Degree, and that the Appellant acted in self-defense. The trial court should have directed a verdict of Justifiable Homicide and acquitted the Appellant.

POINT II

THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTION AND ADMITTING HEARSAY EVIDENCE.

The testimony which the trial court erred in admitting was a purported telephone conversation received by the deceased several hours prior to the shooting, allegedly from one Gordie Adamson, not the Appellant (R253). The only testimony of the call was that of the father of the deceased, which was admitted over the objection of the Appellant. The father testified to parts of conversation overheard from the deceased, as follows: (By Mr. Banks) (R253-254).

Q. So, now, at this time I want to ask you as nearly as you can recall just what your son said into the phone at that time.

A. "No, but how about starting with you?" and then there was a pause and, "You are doing a lot of talking. Who am I talking to? Gordie,

> Gordie who? Gordon Adamson." And the there was some conversation I didn't get an he didn't say anything. It ran for a little whil and then he said: "It doesn't make any differ ence who can lick who but one way or anothe something has got to be done to stop this makin a hangout of my home." And then there was no much said then for a little while and then "Wipe me out, huh? Just where are you? 1210 Pacific Avenue, huh? How long are you goin to be there? How about meeting you there in thirty minutes?" And that was about all that I recall."

The trial judge admitted the testimony under the "state of mind" exception to the hearsay rule offered by the state supposedly to show the state of mind of the deceased and not for the truth of the matter asserted within the statement (**R253**).

It is submitted that this testimony should not have been admitted under the "state of mind" exception or any other exception because (1) the alleged telephone call was not made by the Appellant, (2) the testimony is not trustworthy enough for the jury to consider, and (3) any probative value it might have had was far outweighed by the extremely prejudicial nature of the hearsay statements.

Appellant's first contention is that the requirements for admissibility under the "state of mind" exception have not been met. It was encumbent upon the state to lay a proper foundation showing the alleged phone call was relevant to the matters in issue. 26 Am. Jur. 419. The state of mind of the deceased is in issue only as

it relates to the Appellant. The authorities agree that the proper foundation for making threats by a third person relevant consists of proving, by independent testimony, that (1) the *accused had knowledge* of the threat at the time of the shooting, and (2) that the particular *person who made the threat* was closely connected with the crime; otherwise, it is inadmissible. State v. Smith, 115 Wash. 405, 197 Pac. 770; Karnes v. Comm., 125 Va. 758, 99 S.E. 562, 4 ALR 1509, 40 C.J.S. Sec. 238.

Appellant submits that the record is wholly void of any proof that the accused was aware of the alleged phone call. The prosecution failed to lay any proper foundation before or after the admittance of the hearsay in question to show the accused was aware of a threat or phone call to the deceased. The Appellant denies all knowledge of any phone call and this goes uncontradicted throughout the trial. (**R398-399**).

The prosecution failed to establish any foundation that the particular person who made the call was closely connected with the crime charged. The trial court overlooked the fact that there was no admissible proof whatsoever to establish who made the phone call. The identity of the caller rests solely on the basis of the double hearsay evidence admitted. The state introduced no independent testimony to prove Gordie Adamson made a telephone call to the deceased. Gordie Adamson himself was not called by the state to testify. The only evidence that Gordie Adamson was the name of the caller comes

from the admitted hearsay testimony. The declarant himself had no first-hand knowledge of who was on the other end of the phone. The deceased's declarations were based on hearsay because he had no personal knowledge whatever as to the real identity of the caller. The trial court allowed this hearsay evidence to be the basis for further hearsay testimony of the father resulting in double hearsay. The state of mind exception may be valid to admit that which the declarant had first-hand knowledge over or evidences his own intention, Sine v. Harper, 222 P.2d 571, 118 Utah 415, but not that which is hearsay to the declarant himself. Had the trial court excluded the name of the alleged caller, as hearsay, then the record failed to prove who made the phone call. Without such proof, the foundational requirement of connecting the person who made the call with the accused wholly fails therefore none of the telephone testimony would be admissible. On the same principle it has been held that a threatening anonymous letter was inadmissible because it was not sufficiently connected with the accused. Karr v. State, 100 Ala. 4, 14 So. 851.

The Appellant further contends that the declarations which the father attributed to the deceased are too untrustworthy to qualify as credible evidence. People v. Hamilton, 55 Cal. 2d 881, 362 P.2d 473 (1961). In addition to the hearsay admissions there are other factors casting doubt upon the credibility of this testimony. The only testimony as to the contents of the call or to the fact that deceased received a phone call is the

deceased's father. The prosecution made no attempt to corroborate even the fact that a call was made. Here the jury can only speculate as to the real import of the words and effect on the deceased. Part of the phone conversation testified to was "Wipe me out, huh" (R-253). The jury is left on their own to speculate as to what constitutes a "wipe out." Without some corroboration from an independent witness testifying as to what the deceased himself thought the caller meant, words such as "wipe me out, huh" are too speculative and the actual state of mind of the declarant is too undetermined leaving the jury entirely on their own to guess.

Because of his relationship with the deceased, the father's competence as a witness should be examined carefully to determine the credibility and trustworthiness of this testimony. The witness was unable to follow instructions and was admonished several times by the judge to not give his own opinion or repeat the words of the deceased. (**R254, 256, 259-260, 261**). The witness was obviously prejudiced and biased against the Appellant. The father's testimony evidences a poor memory. (**R267-268, 271-272, 273, 277, 280**). Yet he testified with astounding accuracy as to the alleged exact utterances by his son and even includes names and addresses which prior to the phone call were foreign to him (**R253**), even though heard under extreme circumstances.

Appellant further contends that the hearsay evidence was inadmissible because it was extremely prejudicial. It has been ruled in both state courts and the

U.S. Supreme Court that admittance of extremely p judicial hearsay is error when the probative value the testimony is far outweighed by the prejudicial nat of the hearsay statements. Shepherd v. U.S., 290 U 96 (1933); People v. Hamilton, 55 Cal. 2d 881, 3 P.2d 473 (1961); People v. Purvis, 56 Cal. 2d 93, 3 P.2d 713 (1961).

It is submitted, that the danger when hearsay sta ments are admitted to show only the declarant's state mind and the testimony is explosive in nature is th an untrained and inexperienced jury cannot possib disentangle the state of mind from the truth of t accusations. The trial court admonished the jury technical language that:

* * *

". . . the answer given is not proffered by the st to prove the truth of the facts contained within the sta ment that will now be made but as evidence of thin that were said of the condition and state of mind of t deceased at the time when these statements were mad (R253). It is submitted that no lay mind is capab of hearing the above admonition and then applying in the present case. The statements amount to forced accusations by a man since deceased and regardless the admonition from the trial court. "How can this jur avoid the 'reverberating clang of these accusations fro the grave'." People v. Hamilton, 55 Cal. 2d 881, 3 P.2d 473 (1961).

The Appellant submits that the admitted sta ments were unnecessary to prove the deceased's state

mind. There is ample testimony in the record by the father from his personal observations that the deceased was nervous, excited, and agitated after the telephone call. (R259, 254). His subsequent actions sufficiently demonstrated the deceased's state of mind. The hearsay statements in question added nothing to that which could not be sufficiently established by the father's first hand observations. "Under such circumstances, where the true evidentiary bearing of the evidence is at best slight and remote, and yet the evidence is of a nature such as to make it very prejudicial to the party against whom it is offered, the evidence should be excluded." Estate of Anderson, 185 Cal. 700, 719, 198 Pac. 407, 415.

The Appellant submits that the court was erroneous in overruling Appellant's objection and admitting the hearsay evidence which resulted in great prejudice against the Appellant.

POINT III

THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTION AND REFUSING ADMITTANCE OF EVIDENCE OF THE DECEASED'S CHARACTER AND REPUTATION FOR VIOLENCE IN SUPPORT OF SELF-DEFENSE.

The Appellant made a proffer of proof to present evidence of several witnesses to testify about certain instances demonstrating the violent and vicious nature

of the deceased. The Trial Court ruled that the evidence was of the nature that would fall within an exception of the hearsay rule but further ruled that the evidence of the trial at that time was not sufficient to meet the foundational requirements for such evidence (R448-450). Appellant contends the Trial Court's ruling was in error.

The general rule with regard to evidence of the violent and vicious nature of the deceased is set out in 121 ALR 390 and the numerous cases listed thereunder:

> "Where there is some evidence of self defense the defendant was allowed to introduce evidence as to unlawful acts of violence by the deceased against the defendant and other persons, if prior to the homicide defendant knew of these acts either through his own observation or through communication with others.
>
> "The majority of the jurisdictions held that this type of evidence bears on the question whether the defendant was reasonably apprehensive of danger of his life."

Jones v. State, 83 So. 2d 68, Alabama.

> "Evidence of the violent, turbulent, bloodthirsty, dangerous character is received for the purpose of illustrating or explaining the circumstances of the killing, or to give meaning to conduct of the deceased, * * * or to justify a resort to more prompt measure of self preservation."

Demsey v. State, 266 SW2d 875, Court of Criminal Appeals.

> "In murder prosecution in which defendant

claimed he acted in self defense defendant could properly testify as to any act of violence or conviction therefor by the deceased of which defendant had knowledge at the time of the homicide—and to any information or report of such act or conviction which had been communicated or made known to him before the killing; such evidence being admissible upon the question of defendant having a reasonable apprehension of death or serious bodily injury."

State v. Finn, 243 SW2d 67.

"Where the evidence supports the defense of self defense, evidence of both communicated and uncommunicated threats made by the deceased are admissible. They are held admissible as explaining the conduct and apprehension of defendant, the conduct and attitude of deceased, and as shedding light on who was the aggressor." (Additional cases cited.)

See also C.J.S. Homicide Sec. 222, p. 1138, et seq., and 26 Am. Jur. 389 et seq.

Inasmuch as the Trial Court ruled that the evidence proffered could be admitted under an exception to the hearsay rule, the evidence presented at the trial should be examined to determine if sufficient foundational evidence was presented to allow testimony of the violent and vicious nature of the deceased.

To qualify under the exception, the evidence must show that the Appellant had knowledge of the violent nature of the deceased at the time of the homicide.

At the time the trial court ruled (R450) the record had abundant evidence of specific instances of the violent

and vicious nature of the deceased which were kno by the Appellant at the time of the homicide. The A pellant, the wife of the deceased, and a neighbor, Ard Wiley, all testified about the incident on April 22, 19 two weeks prior to the homicide, when the decea threatened to kill the Appellant. (R346, 386, 387, 4 417, 435, 460). The testimony of the Appellant ab that incident was:

> "Q. And would you tell the Court what to place at that time?
>
> A. Well, Doug walked in and walked out in the back room somewhere, one of back room and came back into the living room with a ha mer in his hand and told me to get out of h house and stay out of his house and that if I ever seen me again he would kill me." (R38

It should be noted that the police came to the hou on this occasion (R346).

It is clear from the evidence that the Appella knew at the time of the homicide that the deceased h violently and viciously slashed up and destroyed t clothes of the Appellant on May 9, 1965, the day pri to the homicide. The wife of the deceased testified th prior to the homicide she told the Appellant that t deceased had ripped and destroyed his clothes (R34 368, 421.)

Further, testimony of the Appellant indicates h knowledge of several other instances which demon strated the violent nature of the deceased. (R405, 41 415, 416.) Appellant testifies:

"Q. (Mr. Lund) Did you have an opportunity to observe him around his wife and observe his nature?

A. Yes, I did.

Q. And when was this?

A. In April.

Q. Of '65?

A. Yes.

Q. Did you have an opportunity to observe on that day his nature toward his wife?

A. Yes, I did.

Q. And what was that?

A. It was quite violent.

Q. Did you know whether or not he had a reputation for being violent?

A. That is all I have ever heard about the man is that he is extremely violent and constantly waving guns around at people and threatening to kill them."

The testimony of the wife of the deceased about the Appellant staying at her home several nights during the week prior to the homicide, because she was frightened of the deceased, could logically result in the inference that the Appellant was aware of the violent nature of the deceased toward his wife and that the Appellant had this knowledge prior to the homicide (R351, 352, 353, 405). Further, the borrowing of the loaded rifle by the deceased's wife from the Appellant, "to frighten Doug if he came back again" (R351) "because I was

frightened * * * of Doug" (R353) could result in on one conclusion, that the Appellant knew of the viole acts of the deceased which frightened the wife of t deceased.

It is urged that the only conclusion that can reached from the evidence as set out in detail abo (R416) is that the Appellant had knowledge of t instances of the violent nature of the deceased prior the homicide. The language of the Appellant's testimo is that *he knew* (R413, 415, 435) or *had heard* (R4 415) of other instances of the violence of the decease The Appellant in fact referred to several instances same (R415).

From the evidence, the homicide took place on t 11th of May, 1965 (R101) and the Appellant w arrested on the 14th day of May (R77). During t three days between the homicide and the arrest, t Appellant was hiding out (R428, 429). After the arre the Appellant was in jail or confined in the state pris (R68, 69, 77). It is urged that the instances of t violent nature of the deceased testified to by the App lant (R415) by necessity had to be knowledge obtain prior to the homicide, because after that time he had opportunity whatever. It is submitted that in consid ing the evidence and the record as a whole, the only co clusion that can be reached is that the Appellant did fact know of the violent nature of the deceased pri to the homicide.

The Appellant had subpoenaed and available

witnesses, five Salt Lake County Deputy Sheriffs and two Justices of the Peace of Salt Lake County, Utah (R18-31) to testify as to the particular instances involving the violent nature of the deceased which instances were referred to by the Appellant (R415). The ruling of the Court prohibited their testimony on the Appellant's behalf.

It is submitted that the testimony on record was sufficient foundational evidence to allow the proffered evidence, and by denying the proffered proof of the evidence the Trial Court erred.

POINT IV

THE TRIAL COURT ERRED BY GIVING AN INSTRUCTION ON SECOND DEGREE MURDER.

The Appellant contends that the Trial Court erred by giving the instruction on Murder in the Second Degree because the elements of that charge were not supported by evidence during the trial. The burden of proof imposed on the State to prove each element of the crime of Murder in the Second Degree wholly failed.

The discussion and case citations set out in the argument of Point I of this brief discusses in detail the total lack of proof on several of the elements necessary to find the Appellant guilty of Murder in the Second Degree.

The weight of authority provides that in the absence of evidence to prove any element of the crime

charged, the trial court should not give an instructi on that particular crime. See the annotations in 26 Am Jur. 546 et seq.

In the case of Mills v. Colorado, 362 Pac.2d 1; the court allowed (cases cited): State v. Carabaj 26 New Mexico 348, 183 Pac. 406, 17 ALR 109 Arrejo v. People, 134 Colorado 344, 304 Pac. 2d 63

> "In order to avoid any misunderstanding, w feel it necessary to point out generally it is in proper to instruct on a degree of homicide n sustained by the evidence." (Further cases cited

In the case of Tate v. People, 125 Colorado 52 247 Pac. 2d 665, the court remanded the case for rehea ing on a verdict of Murder in the Second Degree, citin as error the Trial Court's giving an instruction on Mu der in the First Degree when the evidence did not su tain the charge. The court held:

> " * * * with equal force we have stated that th Trial Court should not instruct on a degree homicide not sustained by the evidence. (Cas cited.) * * * When this Court holds in a majorit of cases that a Trial Court should not instruct a degree of homicide not sustained by the ev dence, then in this case, we must say that by suc an instruction here, error obtains. The fact tha the Trial Court gave an instruction on Fir Degree Murder when the essential elements wer missing in the proof, it must be said that the jur could easily infer by the giving of such an instruc tion that these elements were present in the cas It presents a fertile field for discussion amon jurors not skilled in legal technique, for findin a welcome opportunity to compose differenc and agree upon a compromise verdict. * * * "

In Brooker v. State, 312 Pac. 2d 189, the Criminal Court of Appeals held:

> "If evidence in a prosecution for homicide fails to prove any element of murder, Trial Court should not give an instruction on Murder but confine the instructions to the degree of homicide which the evidence tends to establish."

It is submitted that the argument of Point I clearly points out that the State failed to prove, beyond a reasonable doubt, the element of "malice aforethought," as charged, and further places severe doubt that the State proved it was either "felonious" or "unlawful" because the evidence clearly established that the Appellant acted in self-defense. On this basis, it was clearly error by the Trial Court and very prejudicial to the Appellant to have the Court give an instruction on Murder in the Second Degree where the evidence presented at the trial did not establish the necessary elements of that crime.

CONCLUSION

It is respectfully submitted that the evidence submitted at the trial was not sufficient to support a verdict of Murder in the Second Degree, and, further, that the Trial Court erred by admitting hearsay evidence and disallowing evidence of the deceased's character and reputation for violence.

Respectfully submitted,

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