

1964

State of Utah v. Anastacio Gallegos and Juan Balles Gallegos : Brief of Appellants

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH

Plaintiff and Respondent,

vs.

ANASTACIO GALLEGOS, aka
TED GALLEGOS, and
JUAN RALLES GALLEGOS, aka
RAY GALLEGOS,

Defendants and Appellants.

Case No.
10109

BRIEF OF APPELLANTS

Appeal from Convictions of the District Court of Salt Lake
County, Honorable Ray Van Cott, Jr.

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Defendants and Appellants,

Case No.
10109

BRIEF OF APPELLANTS

Appeal from Convictions of the District Court of Salt Lake
County, Honorable Ray Van Cott, Jr.

NATURE OF THE CASE

This is a criminal action. The brother Appellants were charged jointly with Murder In the First Degree (76-30-3, U.C.A., 1953).

DISPOSITION IN LOWER COURT

The case was tried to a jury of 12 men in the District Court of Salt Lake County. Judge Ray Van Cott, Jr. presided.

The Appellants were convicted of the included offense of Murder In the Second Degree (76-30-3, U.C.A., 1953) and appealed.

RELIEF SOUGHT ON APPEAL

The Appellants seek reversal of the judgments and dismissal of the informations, or, that failing, a new trial.

STATEMENT OF FACTS

At about the hour of 12:30 a.m., August 11, 1963, on the sidewalk near the Annex Bar, 666 South State Street, Salt Lake City, Utah, Raul Yanes was killed as a result of having been stabbed.

Mike Hoopiiana was the sole eye witness to testify to the *scuffle* (T. 182) which resulted in death. He testified that he *thought* (T. 181) it was the Appellant, Juan Ralles Gallegos, hereinafter to be referred to as Ray, who held him at knife point to *stay out* (T. 181) of the *scuffle* (T. 181) *around the corner* (T. 190) between Yanes and whom he *thought* (T. 183) to be the Appellant Auastacio Gallegos, hereinafter to be referred to as Ted.

Hoopiiana testified that he *didn't see how the scuffle started* (T. 190) but that towards the end of it he *thought (not too sure: T. 183)* it was Ted who stabbed Yanes in the *heart* (T. 182) *three times* (T. 184) and Ray who stabbed him in the *back* (T. 204), from 4-6 feet away (T. 182), *from a distance beyond where his arms could extend* (T. 188), while 2 or 3 other idle possessors of knives stood *as closely by as himself* (T. 188) but did nothing (T. 184) and were *not identified* by him (T. 189), although the *same circumstances and powers of perception were presently available in equal proportion for him to observe the others as well as Appellants.*) (T. 189) *Actually* Yanes had but 2 wounds, with *none in the back*. Hoopiiana was *confused and drunk* (T. 191); took but *one glance* (T. 189); saw *no faces* (T. 183), *no marks of identity* (T. 189), etc., as is to be noted in more detail in discussion of Point II.

The state relied on a Dick Jerome being with the Appellants that night (T. 111). Hoopiiana knows him (T. 189) but gave no identifying testimony of his being present. *If* he had been there he would have seen him (T. 189).

Jerome, Yanes and both Appellants are Mexicans; Hoopiiana is Hawaiian; and all had been to some of the same bars (El Prado, etc.); but Appellants were steadily employed (Ray at Hill Air Force Base and Ted a barber) while Hoopiiana was an unemployed felon on parole and Yanes on welfare.

Hoopiiana testified that he entered the Annex Bar after Yanes was stabbed (T. 184) *to get his mind straight* (T. 204) before *walking away* from his *positively dead*

friend (T. 204) on his way to the Blackhawk Lounge *to establish his alibi* (T. 192)

Hoopiiana, though unemployed, (T. 186), still had a valuable friend in his dedicated lawyer who has served him so well, for so long, for so little. He called him Sunday evening (almost 24 hours after Yanes was killed) and was advised *he* could be charged with murder (T. 196). At that time Hoopiiana did not tell his lawyer that the Appellants had knifed Yanes (T. 210). An appointment for the next morning was made between the two, the result of which was (for the first time) Hoopiiana pointed the finger of blame toward the Appellants (as his bargained-for consideration, in return for *promises* from the law enforcement agencies: of *exoneration* for his implication in the death and his flight from the scene to conceal such; *termination of his parole*; and his *feeling of importance and acceptance* by those in authority, who had heretofore chased, caught, convicted and condemned him throughout his crime-crowded life. (Hoopiiana must have immediately recognized his “take” to be in excess of the paltry, proverbial 30 pieces of silver. God’s mills turn slowly. But not His people.)

Other pertinent facts shall be referred to as they become applicable to the points of law hereinafter discussed.

ARGUMENT

POINT I

PREJUDICIAL ERROR RESULTED IN DENIAL OF DUE PROCESS OF LAW BY OMISSION OF ELEMENT OF INTENT FROM VOLUNTARY MANSLAUGHTER IN INSTRUCTION NO. 11.

The trial court's given Instruction No. 11, to which the appellant excepted (T. 287), stated the necessary elements to be proved for a guilty verdict of voluntary manslaughter, an included offense charged. In short effect, those elements are listed below:

1. . . . defendants killed the deceased . . .
2. . . . killing was unlawful . . .
3. . . . killing was *voluntary* upon a sudden quarrel or in the heat of passion . . .
4. . . . killing was without malice . . .

Voluntary Manslaughter is defined in 76-30-5, *U.C.A.*, 1953, as being the unlawful killing of a human being without malice upon a sudden quarrel or in the heat of passion.

This statutory definition is but declaratory of the common law. At common law, to constitute voluntary manslaughter the *killing* must be *willful or intentional*, or there must exist an *intention* at least to do great bodily harm. The *intention* may be inferred from the use of a deadly weapon or from other and additional evidence. (29 *C. J.* 1128, *Sec. 116*, and cases cited; 13 *R.C.L.* 785, *Sec. 90*, and cases cited. *May be inferred* or not, intent *must* be an element to be present before guilt.

Our statute was copied from California, where it has been held that in order to constitute voluntary manslaughter, the *intent to kill must exist*. (*People v. Miller*, 114 Cal. App. 293, 299 P. 742.) In construing an identical statute, the Supreme Court of Arizona held that an *intent to kill*

was a necessary element of voluntary manslaughter. (*Harding v. State*, 26 Ariz. 334, 225 P.482.)

This court held in *State v. Cobo*, 90 U. 89, 60 P.2d 952, cited in 26 *Am. Jur.* 167, fn. 11 and in 44 *Words and Phrases* 412, that the omission from the instruction on voluntary manslaughter that the *killing must have been willful or intentional*, or that death must have been the result of *willful and intentional* infliction of great bodily harm, amounted to *prejudicial error, notwithstanding the definition in another instruction* of voluntary manslaughter as the *intentional* killing upon a sudden quarrel or in the heat of passion, and notwithstanding the failure of counsel to except thereto.

Although, relative to the failure to except (or request), the rule of the *Cobo Case*, supra, has become more stringent, (*State v. Mitchell*, 3 U. 2d 70, 278 P.2d 621, (8)) its *requirement* that the killing be *intentional* remains firm. (*State v. Trujillo*, --- U. ---214 P.2d 634 (8); (*State v. Jensen*, --- U. ---; 236 P.2d 448 (8)). And it is supported by the great weight of authority, e.g.:

Pixley v. State, 203 Ark. 42, 155 S.W. 2d 713; *State v. Clark*, Mo. Sup., 111 S.W. 2d 101; *State v. Carter*, 345 Mo. 74, 131 S.W. 2d 546; *Comm. v. Lisowski*, 274 Pa. 222, 117A. 794; *Comm. v. Guida*, 208 Pa. 370, 148A. 501; *State v. Heinz*, 223 Iowa 1241, 275 N.M. 10, 114A. L. R. 959; *Mixon v. State*, in 7 Ga. App. 805, 68 S.W. 315; *Hawpe v. Comm.*, 234 Ky. 7, 27 S.W.2d 394; *Harrington v. State*, 83 Ala. 9, 3 So. 425; *Ketring v. State*, in 209 Ind. 618, 200 N.E. 212; *State v. Pond*, 125 Me. 453, 139A. 572; *United States v. King*, 34 F. 302, 309; *State v. Crawford*, 66 W. Va. 114, 66 S.E. 110; I Wharton's Criminal Law and Procedure 580-583, citing many cases.

The trial court's given Instruction No. 12 states that the law *presumes* that a person *intends* the ordinary, natural and probably consequences of his *voluntary* acts, though no definition of the word *voluntary* appears anywhere throughout the instructions.

By that, are we to *presume* a necessary element (*intent to kill*) without proof *beyond a reasonable doubt*? Hardly! All presumptions, independent of *evidence*, are in favor of innocence, not guilt. *Evidence* is necessary to prove intent et al *elements* of a crime. And the jury *may infer . . . not not presume . . .*

Or, are we led to *presume* that the words *voluntary* and *intentional or willful* are synonomous? Precisely not!

Neither are the words *presumption* and *inference* synonomous.

Moreover, notwithstanding *presumptions, inferences*, etc., the *intent to kill* remains a *necessary element* for voluntary manslaughter. Instruction No. 11 fails to so include it; instead, the element *voluntary* stands alone with respect volition. This will not suffice.

In *every crime*, there must be an act and *intent* or criminal negligence. Involuntary manslaughter applies to the criminal negligence aspect of this fundamental law. But voluntary manslaughter requires the application of *intent*. The matter, really, is that elementary.

Intent, being somewhat syonomous with *willful* and *designed*, does not mean merely *voluntary* with respect to

voluntary manslaughter. It means more. In a penal sense it means with a bad *purpose* (*Miller v. State*, 3 Okla. Cr. 575, 102 P. 948), a free exercise of the *will*, done by *design* and with a *purpose*. (*Murphy v. State*, 31 Ind. 511, 513.) It means something more of *determination* to execute one's own *will* in spite and defiance of the law than *voluntary*. (*State v. Alexander*, S.C., 14 Rich. Law, 247, 254.) *Malice aforethought* necessarily includes the idea that *murder* was a result of the *voluntary* act of the defendant. (*Vernon's Ann. C.C.P.*, Art. 410; *Crutchfield v. State*, 110 Tex. Cr. R. 420, 10 S.W. 2d 119, 120.)

Willfully means something more than a *voluntary* act, and more than an *intentional act done with a wrongful purpose*, or with a *design* to injure another, or one committed out of *mere wantonness or lawfulness*. (*People v. Gillies*, 109 N.Y.S. 945, 946; 57 Misc. 568.)

Voluntary manslaughter is committed suddenly (30 seconds: T. 190) and repels the supposition that it is the result of premeditation or a prearranged plan to kill, but *necessarily involves the intention to deprive* another of *life*. The *design to kill* is a distinguishing characteristic of voluntary and involuntary manslaughter. Although, of course, the *act* resulting in death must have been *voluntary*, the *death itself* must have been *willful* and *intentional* for voluntary manslaughter (*I Wharton's Criminal Law and Procedure* 582, 583.)

An essential of voluntary manslaughter is a *willful and intentional killing*, or the *willful and intentional infliction* of great bodily harm resulting in death. As is seen, the

court's given Instruction No. 11 wholly eliminated that *essential and dominant* element of voluntary manslaughter. (*Cobo* case, et al, supra.)

True, *intent may be inferred* from the use of a deadly weapon or (knife). In the court's given Instruction No. 11, the lower court spoke of a *voluntary killing* (not voluntary act of use of knife) but made no statement of what *intent*, as to *injury* to the victim or *death* to the victim, might be *inferred* from the use of that deadly weapon. There is danger in such an instruction. It tends to lead the jury to believe that an *intention to kill*, as distinguished from an *intention to do great bodily harm*, of necessity, places the offense in the class of *first degree murder*, rather than manslaughter. (*State v. Trujillo*, ___ U. ___ 214 P.2d 634)

In the instant case, Yanes was *killed voluntarily* (T. 182) upon a sudden (T. 180, 181) quarrel (T. 182 . . . "Hello, Raul," . . . in an angry voice.) or in the *heat of passion* (T. 183 . . . scuffle . . .) with provocation such as would give rise to irresistible passion in the mind of a reasonable man. (*State v. Calton*, 5 U.451, 459, 16 P. 902, rev'd. on another point in 130 U.S. 83, 32 L.#d. 870, 9 S. Ct. 435) as we consider the beatings (T. 90, 91), fights (T.111) and quarrels (T. 111). The trial court thought same to be a jury question, or it would not have instructed on voluntary manslaughter (as it did not on involuntary manslaughter.)

Had the jury been properly instructed concerning the *intent* . . . the verdict might well have been less than murder in the second degree—reduced to at least voluntary

manslaughter—or even all the way to not guilty—had the state been put to its proper burden of proof requiring an *intent to kill* rather than a mere *voluntary act*, which could be simple or gross negligence . . . anything short of total loss of self control, really.

In circumstances where the court's instructions might lead to different results, the instructions are inherently defective and erroneous (*State v. Waid*, ___ U. ___, 67 P.2d 652) and constitute prejudicial error, dictating reversal of the judgment of the lower court.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANTS' REQUESTED INSTRUCTION NO. 1 ON DEFINITION OF KINDS OF EVIDENCE.

Mike Hoopiiana testified that he was an eye witness to the stabbing of the deceased (T. 182).

None of the other nineteen witnesses for the state, nor any of the seven witnesses for the Appellants, testified directly of his own personal perception of any of the main facts to be proved.

It might be conceived that some of the testimony of Hoopiiana could be classified as being *direct* evidence; while, all other testimony and exhibits would be *circumstantial* evidence, from which the ultimate facts in dispute must be inferred if proved.

The above distinction between *direct* and *circumstantial* evidence is sometimes drawn; however, in a more

realistic sense, *no evidence* is admissible in a court of justice that does not depend more or less on *circumstances* for credit. (I Wharton's Criminal Evidence, 11, 12 and 13, fn. 19, citing (*Comm. v. Harman*, 4 Pa. 269.)

It is elementary that the jury is the trier of *facts*, which makes it apparent that it must deliberate on *evidence*. Consequently, for the jury to deliberate in a fair and meaningful manner to insure constitutional safeguards to those standing trial for their very lives for first degree murder, the trial court has the duty to instruct adequately the jury on the law applicable to the particular *fact* situation being tried and the required manner in which the jury must so conduct itself.

Necessarily, the court must instruct the jury with legal definitions of terms used, which includes the term *evidence*, and supply the jury (for its deliberation) with a ("Mapp to") guide for the application of those terms.

Notwithstanding that many of the trial court's instructions included such terms as *evidence*, *circumstances*, *facts*, *inferences*, *presumptions* and combinations of those et al, not only did the trial court fail to give the Appellants' Requested Instruction No. 1, which defined *evidence* and supported the *Appellants' theory of defense*, but also, the trial court failed to instruct at all with respect to this basically required principle of the law. Appellants' Requested Instruction No. 1 read:

INSTRUCTION NO. 1

You are instructed that evidence is of two kinds: direct and circumstantial. Direct evidence is

where a witness testifies of his own personal knowledge of the main fact or facts to be proved. Circumstantial evidence is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected facts which usually and naturally follow according to the common experience of mankind.

Circumstantial evidence is competent, and may be regarded by the jury in all cases. It should have its just and fair weight with you. You are not to fancy situations or circumstances which do not appear in the evidence. You are to make only those just and resonable inferences from the circumstances proved which the guarded judgment of a reasonable man would ordinarily make under like circumstances.

If, in connection with the other evidence before you, you have no reasonable doubt as to the defendants' guilt or the guilt of either defendant, you should convict them or him, whichever your deliberations dictate. But, if you entertain a reasonable doubt, you should acquit them or him, whichever your deliberations dictate.

To warrant a conviction on circumstantial evidence, each fact necessary to establish the guilt of the accused must be proved by competent evidence beyond reasonable doubt. And the facts and circumstances proved must not only be consistent with the the guilt of the accused, but they must be inconsistent with any other reasonable hypothesis or conclusion than that of guilt to product a moral certainty that the defendants, or either of them, committed the offense. If the facts of the case can be reasonably explained in a manner tending to establish innocence, even though they can be reasonably explained in a manner tending to establish guilt, then you must, as a matter of law, find the defendants' or either of them, not guilty. (3 Wharton's Criminal Evidence, 473-477).

Without the jury having adequate instruction from the trial court, how are the Appellants assured of their constitutional rights to due process to a fair and impartial trial by jury? Impossible! Without a common framework within which to function, there humanly results twelve scattered, self-satisfied minds (con)fused together in their attempt to determine the fate of the accused. Russian Roulette!

Let us for a moment illustrate just how very much of even Hoopiiana's testimony is of the nature of *circumstantial* evidence, rather than *direct*, as first impression would dictate, in an effort to show the need for such as the requested instruction to help the jury to decide what weight should be given different kinds of *evidence, presumptions, inferences, facts, circumstances*, etc.

Does any of the following excerpts from the testimony of Hoopiiana indicate that he is testifying *directly* of his own preception as to the main facts to be proved? Of course not! Most of his conclusions are based on other circumstances or *inferred* from the facts not ultimate themselves to warrant proof of required elements.

... running footsteps from *behind* (T. 180, 181). . . *someone* . . . (at the time I *thought* to be Ray) had a knife and told me to *stay out* of it (T. 181). . .
 . . . *Another boy* (T. 182) . . . at the time I *didn't* see *his face* (T. 183) . . . just a *hat* (T. 190), a derby (T. 206); *not* the only one Ted ever wore (T. 241); was wearing that very night at the El Prado Bar (T. 238); was wearing when he surrendered himself to the officers (T. 231); was taken as evidence (T. 231); was shown to me by the prosecuting

attorney to identify; *not* the one I saw the night of the stabbing (T. 190); was attempting to be suppressed (T. 241), but was finally admitted (T. 242, to save the prosecutor being called as a witness to prove right the very matter which he was so adamantly resisting (T. 241, 242) . . .

. . . I *thought* it Ted . . . said, "Hello, Raul," in an *angry* voice, *scuffled* and *stabbed* him in the *heart* (T. 182) . . .

. . . I see the knife go into Raul's *chest*, I *thought*, three times. . . (T. 189)

. . . didn't see how the *scuffle started* . . . lasted about 30 seconds . . . *around the corner* (T. 189)

. . . *not too sure* . . . *pretty scared* . . . didn't see what he did with the knife *at all* (T. 183) . . .

. . . was *drunk* (T. 191—fifth of bourbon) . . .

. . . was just looking at four or five knives . . . kept my eyes on them *all* the time (T. 184) . . .

. . . not very good look . . . took *one glance* . . . *that's all* . . . eyes on knives only (T. 189) . . .

. . . don't know how many guys were there for sure as I moved sideways to *creep* out of there so as it wouldn't *excite* anybody, you know . . . kind of turned and walked slowly away, and then I looked over my shoulder, and they was standing there, about four or five guys standing around Raul. Then I went up to the Annex Bar . . . went in . . . stayed not more than a minute and a half or two minutes . . . then walked out the door and down the street (T. 184) . . . Raul was laying on his back . . . those *two guys* that walked *out* (of the Annex) was looking at him at that time. I walked by and looked at him (*appeared* dead . . . *yes, sir*) (T. 185) . . . I was *positive* he was dead (T. 184) . . . I got into my car and went *home*. (T. 185, 192, 193, 204, 205.)

Note Carefully! Last question and answer or cross examination (T. 192):

Q: Isn't it a fact, Mr. Hoopiiana, that rather than your leaving then and going *home*, that you, in fact, went to the *Blackhawk Lounge* for the purpose of establishing an *alibi* if you were asked your whereabouts that night?

A. *Uhm huh. I went out to the Blackhawk for a few minutes, yes.*

Q: That is all.

... didn't volunteer any information at all ... kept my mouth shut ... *I figured somebody else had seen it (T. 197) ... I was positive he was dead (T. 204) ... why should I get implicated if I didn't have to? (T. 197)*

After all, Yanes was Hoopiana's friend (T. 204), whom he left—positively dead on the sidewalk—and just drove away—into the night to establish an alibi. (T. 192).

Why, of course, no need to get implicated—until have to. (... I figured somebody else had seen it (T. 197) ... I could be charged with murder (T. -----)

... I thought afterwards if anyone had asked me I would say I was either at the Blackhawk or at home because *no one knew where I was*. (T. 193)

... I knew the *barmaid* at the Annex and had *waved to her* (T. 207) ... while *I got my mind straight* (T. 204) ... to leave his positively dead friend to go to the Blackhawk to establish an alibi (T. 192) ...

. . . before alone causing Ted and Ray to get *implicated* because of statements to police and prosecutor for a price: parole termination and not being *implicated* (charged with murder, as advised by counsel—(T. 196) . . . and receiving the promise . . . that the well bargained for information would be kept a *secret* for *as long as possible*, (T. 203) and no testimony to be given unless *absolutely necessary* (T. 202) . . . and when it became necessary at the preliminary hearing, first time was purposely out of the county to avoid testifying (T. 187) and second time, bargained for no greater charge than second degree murder against Ted and Ray before testifying, (T. 214), even after being taken into custody to assure appearance. (T. 187)

Death penalties stir the worst blemished consciences, pronouncedly, when in conflict with doubt or truth.

It is within the province of the jury to *disbelieve eye witnesses* and base its conclusions on the *inferences* to be drawn from *circumstances*. (*People v. Collins*, 117 Cal., App. 2d 175, 255 P.2d 59).

Circumstantial evidence is admissable although direct evidence on the same point is also admitted. (*Silverfork v. United States*, 40 A.2d 82, Off'd 80 App. D.C. 158, 151 F.2d 11).

The jury should have been so instructed in the instant case. To leave the jury floundering without judicial guidance in a court of law is decidedly prejudicial error to the Appellants.

POINT III

THE TRIAL COURT ERRED COLLECTIVELY SUFFICIENT TO DENY APPELLANTS DUE PROCESS OF LAW IN GIVING ORAL INSTRUCTIONS WITHOUT WAIVER; IMPROPER WRITTEN INSTRUCTIONS NOS. 9, 12, 16, 18 AND 20; AND IN IMPROPER RULINGS PREJUDICIALLY HARMFUL TO APPELLANTS.

A—Oral Instructions:

The trial judge completed reading to the jury the written instructions given (T. 280); then he went forward to further instruct the jury *orally* (T. 281, 282) without stipulation or waiver, but on the contrary with appellants excepting thereto (T. 282), when he told them to deliberate until 7:00 p.m. before eating (T. 282) and to return a verdict . . . (T. 281).

The court returned the jury in an attempt to cure the error. (T. 284)

Further oral instructions were given without stipulation or waiver with reference to the possible “hung jury” (T. 289); however, no effort was made to leave the jury *unrestricted in time* for eating or deliberating.

Rule 51, Utah Rules of Civil Procedure, which in the instant matter are surely equally applicable to the trial of a criminal matter such as the one now before this court provides that *all instructions* to the jury shall be *written* unless the parties stipulate that such instructions may be given orally, or otherwise waive this *requirement*. (Mandatory!)

The court instructs the jury on the law (77-31-31, U.S.A., 1953) it is to hear (77-31-32, U.C.A., 1953), and the *written* instructions given may be taken to the jury room (77-32-2, U.C.A., 1953).

B. Prejudicial Rulings:

The appellants moved for a dismissal of the information at a time prior to the formal resting by the state, while awaiting the arrival of the state's last witness, with the full understanding that such motion was to have the same force and effect as if made following the state having rested. (T. 199).

The trial court denied the motion. (T. 200).

The appellants incorporated the same grounds and reasons in their similar motion which was stipulated and approved to be of effect after the defense had rested. (T. 200).

Likewise, the trial court denied that motion (T. 200).

It is contended by appellants that the trial court should have taken the respective motions under advisement, to rule thereon *after* all the appropriate evidence has been admitted. Otherwise, prejudice is impliedly projected against the appellants as a foregone conclusion, necessitating a reversal of that trial court's judgment which was adverse to the appellants.

It is impossible for the court to lay down the law to the jury on the facts (77-31-31, U.C.A., 1953) until the

court has heard the facts. By analogy, the court cannot lay down the law to the appellants until it has heard the facts.

C. Given Instruction No. 9:

Given Instruction No. 9 was excepted to as being in accordance with *State v. Russell*, 106 U. 116, 145 P.2d 1003, re: specific intent to do great bodily harm, but not in full accord with *State v. Thompson*, 110 U. 113, 170 P.2d 153, and *State v. Trujillo*, U., 214 P.2d 626.

Both the Thompson and Trujillo cases are in accord with the *Russell Case*, supra, to the extent of “. . . intention or design knowing the reasonable and natural consequences that would likely cause great *bodily injury*” but both cases immediately following the word “*injury*,” insert the *additional element* by adding the words “or death,” i.e. “. . . likely cause great *bodily injury* or *death* . . .”

The court's instruction was prejudicial in this aspect. It compelled the jury to find the appellants guilty of second degree murder because of their intending injury without death (receiving a sentence of 10 years to life) rather than guilty of the *lesser* included offense voluntary manslaughter, because the court's instructions No. 11 required a voluntary *death* (whereby they would have received a sentence of but 1 to 10 years).

D—Given Instruction No. 12:

Given instruction No. 12 was excepted to as being too restrictive in that it implies that every accused who

has violently assailed another with a dangerous weapon in a manner likely to cause death . . . is presumed to have *intended* to kill or do great bodily harm.

Note how the court's given Instruction No. 12 includes the added element (or kill) for second degree murder as it confusingly conflicts with the court's given Instruction No. 9 as to the elements of second degree (injury only). Abstractly, the discussed part of the court's given Instruction No. 12 is not to be challenged. However, it does not apply to the facts and other instructions of the case, e.g. *intended* to kill or do great bodily injury as compared with *voluntarily* killed (no mention of *bodily injury*).

Nor does the court's given Instruction No. 12 provide a definition for the jury of the word "assailed," thereby leaving to the lay jury no possibility of justifiable or excuseable homicide in any conceivable manner.

E. Given Instruction No. 15:

Given Instruction No. 15 was excepted to as being prejudicial to at least Ray in that there is no evidence to warrant the jury considering him as "aiding" ("assisting") or "abetting" ("encouraging," "advising," or "instigating").

At worst, he held Hoopiiana at the point of a knife to cause Hoopiiana to "stay out" of the scuffle. This amounts to "prevention," not "participation." Wherein is there shown in the entire trial any facts sufficient to warrant such an insinuating instruction. (Surely not just because Ray and Jerome had encountered Albo and the El Prada earlier the same night . . . and were seen later

with Ted walking in a southerly direction! True, the Annex Bar is to the south of the El Prado—quite a few blocks. It is also east. But there are many places to the south of El Prado, pray tell.

F. Given Instruction No. 16:

Given Instruction No. 16 was excepted to as being prejudicial because of its making mention of the word “defendant” (singular) in this joint trial of “defendants” (plural), and *conflicted* with given Instruction No. 3, which instructs only in a manner when the word “defendants” (plural) is used. (*State v. Waid*, supra.)

G. Given Instruction No. 18:

Given Instruction No. 18 was excepted to as being prejudicial in that it improperly states that the word “willful” is synonymous with the word “intentional,” both implying “simply” a purpose or willingness to commit the act.

Such is not the law as the words are used in the penal sense.

“Wilful” requires a stronger desire than “intentional,” and “intentional” requires a stronger desire than “voluntary” which, likewise, should have been defined specifically before the use of the word be permitted to be used in given Instruction No. 12 to imply its being synonymous with “intentional.” (See 44 *Words and Phrases* page 412 and cases cited in Point I, supra.)

H. Given Instruction No. 20:

Given Instruction No. 20 was excepted to as being prejudicial against the appellants because of the categorical denunciation of the physical retaliation because of receiving a former injury.

As is obvious throughout the entire trial of the case, the state insinuated a motive of cold-blooded execution in retaliation for Ted having been beaten near to the point of death himself by another at Liberty Park the week before, wherein the deceased had participated.

So had Albo, Far more than Yanes! Had revenge by death been the motive, why was Albo spared earlier the same evening? (T. 111)

The instruction emphasizes “retaliation” and “former injuries,” and though subtly includes “revenging,” still leaves the lay juror with no choice for “excusable” or “justifiable” homicide, some of which include “retaliation” in “revenging” . . . a “former injury.”

The court prejudicially emphasized that, because of a reason to be human and not Godly enough to forgive after having been brutally beaten with ball bats, stomped, kicked and left to die, Ted and Ray necessarily had a motive to kill Yanes—because Yanes is dead, and reliable (?) Hoopiiana said so. (The same Hoopiiana who said he had given Yanes a ride to the Annex Bar—when he was already there at 11:00 p.m. (State’s witness Martinez: T. 164) and 12:00

midnight (Defense witness Arenez: T. 244) just minutes before he was killed and those two guys that walked out of Annex (T. 184) were looking at him.) Why were not Albo et al killed? Why were they not prosecuted for assault with deadly weapons?

All initial injuries become *former* to their provocative successors. See homicides without penalty or fault wherein defilement of wife et al are at issue, wherein there has been no reasonable time for a sufficient cooling of passions, self-defenses, etc. And it shall be seen that the instruction is too pointedly directed "toward Liberty Park," without consideration for acceptable alternative routes of travel, other than those discreetly recommended by the state in its road sign instructions of one way travel for the jury to join the prosecution for their synchronized arrival at the preordained point of destruction in the vehicle of immunity because of sovereignty—with further assurance of no need for insurance. By our "guest"!

Be our "guests"! . . . until judicially appealing enough at the junction of justice to compel us to put 'er in REVERSE.

CONCLUSION

The defendants have been denied due process of law which is guaranteed by our State and Federal Constitutions and Statutes. They have been deprived of a fair trial before an impartial jury. Their conviction is not sus-

tained by the evidence. The trial and verdict constitute a miscarriage of justice and should be reversed.

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