1964

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

Utah Supreme Court

Phil L. Hansen; Attorney for Appellants;
A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;

(5)

Robert L. Schmid

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 RESPONDENT

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

A. PRATT KESLER
Attorney General
RONALD N. BOYCE
Chief Assistant Attorney General
State Capitol
Salt Lake City, Utah
Attorneys for Respondent

PHIL L. HANSEN
410 Empire Building
Salt Lake City, Utah
Attorney for Appellants

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STATEMENT OF NATURE OF CASE

The appellants were jointly tried for the crime of murder in the first degree, and convicted upon jury trial of murder in the second degree, from which convictions they have jointly appealed.

DISPOSITION IN LOWER COURT

The appellants were jointly charged by information with the crime of murder in the first degree in violation of 76–30–1&3, Utah Code Annotated 1953. Upon jury trial in the Third Judicial District, the Honorable Ray Van Cott, Jr., Judge, the appellants were found guilty of murder in the second degree and committed to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The respondent submits the judgment should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts as being more directly in accord with what was presented below.

On 4 November 1961, Robert Fernandez was knifed by a person he could recognize, but whose name he did not know (R. 164, 167). He was hospitalized for two months from the knife wounds. The appellant, Ted Gallegos had knifed Fernandez (R. 167). Fernandez periodically had looked for the person who knifed him and around 4 August 1963, he saw Ted Gallegos in Liberty Park (R. 168). Fernandez had learned Gallegos' identity sometime before. On 4 August 1963, a Sunday, Raul Yanes, Max James and Dave Albo were in the company of Fernandez when he saw Ted Gallegos (R. 168). Upon seeing Gallegos, Fernandez and some of his companions went to Fernandez's home and got some baseball bats (R. 169). They returned to Liberty Park where Fernandez encountered Gallegos and asked if he were "Albert Martinez" (R. 170). Gallegos said he was not and told Fernandez who he was, whereupon Fernandez struck Gallegos several times in the head with the bat, knocking him to the ground and rendering him unconscious (R. 171). David Albo struck Bob Rivenburgh who was standing with Gallegos (R. 190, 222). Raul Yanes was standing behind Fernandez and after Gallegos was knocked down, Yanes may have kicked him (R. 223). Fernandez and the others left and Gallegos was taken to the Salt Lake County Hospital where Dr. Gary Morrison gave him treatment for his injuries (R. 304).

Subsequent to Ted Gallegos' release from the hospital, the Salt Lake Police were contacted; however, Ted and

Ray Gallegos and others started to look for the assailant (R. 316).

On 10 October 1963, David Albo was in the El Prado Tavern in Salt Lake. Ray Gallegos, Ted Gallegos and Richard Jerome were all present (R. 191, 229). Jerome approached Albo and told him it was a lousy thing that had been done to Ted Gallegos and said that they were going to get him (R. 191). Thereupon, someone held Albo's arms behind him and Ray Gallegos hit him in the head with a bottle or a glass causing his head to bleed (R. 192, 237). Upon being hit, Albo ran out the door and down to the Hideout Bar (R. 192). He was followed by the appellants and Jerome (R. 233–236) and was threatened that they were going to get all of the park attackers (R. 193, 241). Albo remained in the Hideout. The bartender put down the disturbance and Albo left with some other friends.

Prior to this incident, the Gallegos brothers knew that one of the park assailants was a little man. Raul Yanes was only 4'9½" and weighed about 100 pounds (R. 155). On August 10, 1963, Yanes was seen at the Annex Bar around 10:00–10:30 p.m. Around midnight, Mike Hoopiiana, an ex-convict on parole (R. 257), saw Raul Yanes at the Crows Nest Tavern on 4th South and State Streets (R. 258). He gave Yanes a ride in his automobile to the Annex Bar at 7th South and State Streets (R. 259). Hoopiiana parked his car in a parking lot adjacent to a building on the northwest corner of 7th South and State Streets (R. 259–261). Yanes and Hoopiiana started to walk to the Annex when Hoopiiana heard a "few people" running towards him from behind (R. 260–261). Someone pushed Hoopiiana up against the building on the corner and told him to "stay out of it or you will get hurt" (R. 261). The person had a knife and was identified as Ray Gallegos.

Raul Yanes was knocked down by Ted Gallegos who then reached down and knifed Yanes in the heart (R. 262). Ray Gallegos made a pass at Yanes as he fell (R. 263). Thereafter, the Gallegoses and others ran off through the parking lot. Mike Hoopiiana then walked into the Annex Bar, stayed for a moment, and then left. Several persons observed some people running from the deceased as he fell (R. 250, 253, 254, 255).

Shortly after midnight, Keith Larsen left the Annex Bar (R. 245). He passed two persons as he went to his car. As he started backing his automobile, he heard footsteps and looked over and saw a man lying on the ground bleeding badly (R. 246–248). The area where the killing occurred was well lighted (R. 136, 137, 139, 247).

Subsequently, Hoopiiana contacted his attorney, Norm Wade, and identified the appellants as the killers (R. 290). Wade was concerned in case Hoopiiana may have been seen at the scene and could be charged (R. 277). Wade, therefore, contacted the County Attorney's office (R. 266) and Hoopiiana gave the police a statement. The statement (Exhibit 18) was read into the record, curiously enough at defense counsel's request. The statement given to the police on 13 August, 1963 (R. 283) recited:

> "Well, I went to a reunion at my mother's house, and I got there about 7:00PM. We was having a kind of get together or party, on Saturday, the 10th, and we stayed there until about 11:00PM. I don't know the name of this bar, but it's on 33rd South. We stayed there about 45 minutes. My sister became ill, and so I drove her home. I got her home at 12:00 Midnight. I left her house, and was driving home along State Street, when I seen Raul Yanes, walking between 4th and 5th South. Which was about 10 minutes after 12:00 Midnight. I stopped and asked him where he

was going, and he said to the Annex Bar. So I drove him down there. We parked the car in the parking lot that faces 7th South, and it was about between 10 and 15 minutes after. We got out of my car, and walked to the parking lot to State Street.

"We reached the street and all at once I heard running feet. I turned around, and there were four men with knives. The tallest of the four put the knife on me and said that if I moved he would cut my head off. I backed against the building and asked him what his beef was. Then at this time, I looked at Raul and this other man which I recognized as Ted Gallegos, said in an angry voice, "Hello Raul." And smacked him and then pushed him against the building and pulled him around the corner. And I seen his hand with the knife slashing horizontally at Raul's stomach. Then Raul fell down onto State Street. And as he was falling, the man who had the knife on me whom I recognized as Ray Gallegos, reached over and stabbed Raul in the back. As Raul was laying on the ground, Ted Gallegos reached down and stuck the knife in the left side of Raul's chest, two or three times. After I had seen this, I began inching my way along the building towards the door of the Annex Bar. The men seemed to be puzzled as to what to do. I got about ten feet away, inching along the building, and then I turned and walked to the door of the Annex and went inside. I stayed inside about two minutes, long enough to get my mind straight as to what had happened. Then I walked back out the front door and walked past Raul's body. Raul was laying on his back with his arms bent and his forearms in the air. At this time, I was positive he was dead. I walked through the parking lot, got into my car, and then went home."

Raul Yanes died of the stab wound in the heart (R. 160). The autopsy disclosed three wounds: one to the heart, one

in the left side, and one cutting wound across the upper stomach (R. 154).

The appellants did not testify, and the jury returned a verdict of guilty of murder in the second degree. Other pertinent facts will be discussed as they relate to the points urged on appeal.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN FAILING TO INSTRUCT THAT MANSLAUGHTER REQUIRED AN INTENT TO KILL SINCE

A. THE JURY RETURNED A VERDICT OF SECOND DEGREE MURDER AND THE ERROR ON THE LESSER OFFENSE COULD NOT HAVE PREJUDICED.

B. THE EVIDENCE DID NOT WARRANT AN INSTRUCTION ON MANSLAUGHTER.

The appellants in Point I of their brief challenge Instruction No. 11 (R. 346) given by the court on the crime of voluntary manslaughter. In *State v. Cobo,* 90 U.2d 89, 60 P.2d 952 (1936), this court ruled that one of the essential elements to the crime of voluntary manslaughter was that the killing be willful or intentional or that the infliction of great bodily harm be done willfully and intentionally. The *Cobo* case is somewhat inconsistent to the extent that at one point a disjunctive "or" is used and another point, conjunctive "and" is used when the elements discussed do not warrant the difference. Respondent admits that the trial court erred in Instruction No. 11 by failing to instruct that the killing must have been intentional or willful if the appellants were to be convicted of voluntary manslaughter. However, the respondent submits that the appellants were not prejudiced by the instruction that was given since (a) the appellants were convicted of murder in the second degree, which is a higher offense, and the jury must have necessarily found each of the elements required for the convic-

tion of the crime of second degree; and (b) that the trial court erred in giving the instruction on voluntary manslaughter in the first instance since the evidence before the court could in no way justify the submission of the lesser offense of voluntary manslaughter to the jury.

A. It is well settled that an erroneous instruction on a lesser offense of the charge of homicide cannot be claimed as error on appeal where an accused is convicted of a greater charge. 26 Am. Jur., *Homicide,* Section 556, it is stated:

> "Generally speaking, an accused cannot successfully complain of error in instructions which are favorable to himself. Consequently, one who has been convicted of a superior grade of culpable homicide is not to be deemed prejudiced by and cannot attack an erroneous charge in respect of a lower grade of homicide."

In 41 C.J.S., *Homicide,* Section 427c(2), it is stated:

> "Ordinarily error in instructions relating to a lower degree of homicide or assault than that of which accused is convicted is held to be harmless, and whether or not it is prejudicial is controlled by the facts and the nature of the error. Such error generally is harmless where the erroneous instruction relates to manslaughter and accused is convicted of murder or murder in the first or second degree, or where the instruction relates to involuntary manslaughter and accused is convicted of voluntary manslaughter. Where accused is convicted of murder in the first degree, the giving of erroneous instructions on a lower degree of homicide is not prejudicial to accused where the evidence is ample to support the verdict rendered, and where the instructions complained of could not have misled or confused the jury or have had any effect on their verdict, or where the instruction is more favorable to accused than it should have been."

In *People v. Cox,* 341 Ill. 111, 172 N.E. 64 (1930), the accused was convicted of the crime of murder. On appeal, it was contended that two instructions given to the jury on involuntary manslaughter on the request of the prosecution were erroneous. The Supreme Court of Illinois, in rejecting the contention, stated:

> "The plaintiff in error was found guilty of the major crime, and obviously he was not prejudiced by the instruction defining manslaughter."

In *King v. The Commonwealth,* 224 Ky. 822, 7 S.W.2d 228 (1928), the accused was convicted of murder. It was contended on appeal that the trial court erred in defining involuntary manslaughter. The Kentucky Court of Appeals ruled that the appellant could claim no prejudice stating:

> "Instruction No. 3, defining involuntary manslaughter is criticized, but the instruction is not susceptible of the interpretation placed thereon by counsel for appellant; but, even if it were, it was not prejudicial, since he was convicted of murder under an instruction concededly proper."

In *State v. Noel,* 133 A. 274 (N.J. 1926), the appellant was convicted of murder in the first degree. He contended that the trial court erred in instruction given on murder in the second degree. The New Jersey court agreed, but found that he could claim no prejudice, stating:

> "It is next insisted that the charge of the court was erroneous with respect to the definition of murder in the second degree. Admitting this to be so, it was not prejudicial to the defendant. The defendant was convicted of murder in the first degree. Murder in the first degree was properly defined in the charge. It therefore was immaterial whether murder in the second degree

was properly defined. The same question has arisen in two recent cases in this court where the definition of murder in the second degree was the same as that given by the court, in the present case. These are the cases of State v. Mosley, 131 A. 292 (not yet officially reported), and the case of State v. Martin, 132 A. 93 (not yet officially reported). In these cases this court held that no harm had been done to the defendant by incorrectly defining murder in the second degree."

In *State v. Zupkosky,* 127 N.J.L. 218, 21 A.2d 771 (1941), the appellant was convicted of murder in the first degree. Again the allegation was made that the trial court erred in its charge of murder in the second degree. The court ruled that no prejudice could arise from such an instruction. It stated:

"It is further contended that the court erroneously charged the jury upon the subject of second degree murder. The defendant, as we have already said, was convicted of murder in the first degree without recommendation, upon a charge with regard to the elements of that offense which we have found correct in the only respects questioned. The jury convicted the defendant of murder in the first degree, upon evidence that, without undertaking to review, we consider fully supports that finding. Further, the verdict, as we formally decide in the next paragraph, was not against the weight of evidence. Therefore, the judge's definition of murder in the second degree need not be examined or passed upon because, in the light of the jury's verdict, it could not have been harmful to the defendant. State v. Mosley, 102 N.J.L. 94, 131 A. 292, State v. Noel, 102 N.J.L. 659, 674, 133 A. 274. Even if we assume that point to be well made the error is not ground for reversal."

Recently, in *Connor v. State,* 225 Md. 543, 171 A.2d 699 (1961), the Maryland court was faced with a case where the appellant was convicted of second degree murder. He argued that it was err for the trial court not to distinguish between voluntary and involuntary manslaughter in instructions given to the jury. The Maryland court rejected any claim of prejudicial error stating:

> "* * * Secondly, although it appears that an instruction was given as to voluntary manslaughter (a higher grade than involuntary manslaughter), the jury found the defendant guilty of murder in the second degree, a finding which clearly indicates that the jury was convinced that the defendant was guilty of a greater degree of homicide than manslaughter of either grade. * * *"

In *State v. Vanell,* 106 P. 364 (Mont. 1910), the appellant, like the appellants in the instant case, was found guilty of murder in the second degree and claimed that the trial court has erred in instructing on manslaughter. The Montana court rejected a claim that the appellant could take advantage of the claimed error stating:

> "* * * Even so, the defendant cannot complain. He was found guilty of murder in the second degree, and these instructions upon the subject of manslaughter merely gave the jury an opportunity to find him guilty of a lesser offense. State v. Farnham, 35 Mont. 375, 89 Pac. 728."

In *United States v. Ransom,* 4 U.S.C.M.A. 195, 15 C.M.R. 195 (1954), the accused was charged with the crimes of murder and rape. He was convicted of the crime of premeditated murder and on appeal claimed that the trial court had erred in its instructions on unpremeditated

murder. The court, relying in part upon the authorities above quoted, stated:

> "Inasmuch as the instructions on premediated murder were correct and the court found the accused guilty of that offense, he could not have been harmed by an incorrect instruction on the lesser included offense."

Similarly, in *United States v. Henderson,* 29 C.M.R. 717 (1960), the accused alleged that the trial court had given an erroneous instruction on intent as it related to the offense of unpremeditated murder. The trial court had found the appellant guilty of murder in the first degree. Relying upon the *Ransom* case, above mentioned, it was held that no prejudicial error could be claimed. See also *Kemp v. Canal Zone*, 167 F.2d 938 (1948); *Blalack v. State*, 60 S.W.2d 231 (Tex. Crim. 1933).

Although the issue was not clearly considered, in *State v. Matteri,* 119 U. 143, 225 P.2d 325 (1951), the court ruled that an erroneous instruction as to murder in the second degree could not be claimed as error under the circumstances. The opinion seems to imply clearly that the conviction on the charge of first degree under the facts presented vitiated any claim for prejudice.

The appellants in the instant case are in no position to claim error because of the erroneous instruction on involuntary manslaughter. The jury was carefully and correctly instructed on murder in the second degree and murder in the first degree. In order to convict of murder in the second degree, it was necessary for the jury to find an intent to inflict great bodily harm. The elements necessary for the conviction of murder in the second degree necessarily en-

compassed the elements in voluntary manslaughter. Therefore, the appellants cannot claim prejudice.

B. It is submitted that the error of the trial court in failing to instruct on the element of intent in the offense of voluntary manslaughter cannot be deemed prejudicial error since the appellants, as a matter of law, were not entitled to an instruction of voluntary manslaughter. The evidence discloses that the appellants' defense was based upon a question of identity. No evidence was offered before the court that the killing took place during a quarrel or in the sudden heat of passion. The facts in this case show that the deceased participated in the beating of one of the appellants, Ted Gallegos, which was a revenge beating for Gallegos having knifed one of the deceased's friends. The beating occurred on August 4, 1963. The appellant, Ted Gallegos, was taken to the hospital and treated. Ray Gallegos was not involved in the fracas. The police were notified and undertook an investigation. Thereafter, the Gallegos brothers, along with other companions, deliberately sought out the deceased and Dave Albo in order to get even. At the time of the killing, the deceased and Mike Hoopiiana were walking from the latter's automobile to the Annex Bar. Yanes had said nothing to cause a quarrel, he had done nothing to provoke the response which occurred on the morning of the 11th of August, 1963, some seven days after the beating. He was approached from behind, knocked down and knifed through the heart. It is submitted that, on these facts, there was no evidence warranting the submission of a charge of voluntary manslaughter.

Section 76–30–5, Utah Code Annotated 1953, defines voluntary manslaughter as being the killing of a human being without malice. Section 76–30–5 (1) adds the following elements:

"Voluntary, upon a sudden quarrel or in the heat of passion."

In *State v. Cobo,* 90 Utah 89, 60 P.2d 952 (1963), this court observed as to the statutory definition, "This statutory definition is but declaratory of the common law." The court was manifestly correct in its conclusion. Clark and Marshall *Crimes,* 6th Ed., Section 10.11; Kenny's *Outlines of Criminal Law,* 18th Ed. (1962) Section 6. It is well established that if the circumstances show the killer acts not in the heat of blood but from malice, that no issue of manslaughter is raised. Clark and Marshall, supra, pages 620–21; 1 Hawkins, *Pleas of the Crown,* chapter 11, paragraph 18. Additionally, in *People v. Calton,* 5 U. 451, 16 P. 902 (1888), this court upheld an instruction on voluntary manslaughter which advised the jury that to reduce homicide to manslaughter on the grounds of passion or sudden quarrel, the provocation must be such that would give rise to an irresistible passion in the mind of a reasonable person. At common law, this provocation arose in four circumstances:

1. Violent assault.
2. Unlawful arrest.
3. A killing in mutual combat, provided no unfair advantages taken.
4. A killing by the husband of the wife's paramour upon the discovery of adultery.

(Clark and Marshall, supra, page 619).

In the instant case, the killing occurred in none of these circumstances. Although there was a previous assault on Ted Gallegos, the assault occurred seven days previous to the killing of Yanes. It is well settled that if the killing is done under circumstances which would show that the

"blood of the slayer had actually cooled" or that "there was reasonable time for such cooling," there can be no manslaughter. Clark and Marshall, supra, 619. In the instant case, the crime was done with malice and was done after there had been substantial opportunity for a cooling to occur. Indeed, the police had been notified and their investigation undertaken. Further, the evidence clearly shows there had been a cooling, so the killing was not done in passion but was done solely out of malice. Ray Gallegos was not the victim of an assault of any kind; and, therefore, could hardly claim the right to revenge against his brother's attacker. In Clark and Marshall, supra, page 632, it is noted:

> "It is not necessary, however, in all cases, to show that the blood actually did cool, in order to make out a case of murder. It is enough to show that there was a reasonable time for cooling, for the law requires that men shall act reasonably in controlling their passions. The reasonable time for cooling is the time within which an ordinarily reasonable man would cool under like circumstances. * * *"

The only evidence before the court in this case is such that no issue of manslaughter was raised.

In *State v. Mitchell*, 3 U.2d 70, 278 P.2d 618 (1955), this court considered, among other claims of error, the contention that the trial court erred in failing to instruct as to lesser included offenses where the defendant was convicted of second degree murder. The facts and circumstances in that case are somewhat similar to those in the instant case, although in that case it was not clear that the killing was done maliciously and that a reasonable period of cooling off had elapsed before the killing. This court held that the trial

court did not err in failing to instruct upon voluntary manslaughter. The court observed:

> "* * * Aside from the incredibility of defendant's testimony as to his movements, whereabouts and other activities, with which one is impressed in reading the record, there is no evidence from which reasonable persons could conclude that the victim had died from a simple battery, affray, in a sudden heat of passion or otherwise than with malice aforethought or as a result of a murderous intent. Under such circumstances, instructions as to lesser offenses would only confuse. * * *"

In 41 C.J.S., *Homicide,* it is stated:

> "Where the evidence does not warrant the giving of any instruction on a certain degree of homicide lower than that of which accused is found guilty, the giving of an instruction on that lower degree, whether correct or incorrect as an abstract statement of law, is not prejudicial or reversible error. The rule is applicable where the unauthorized instruction relates to murder in the second degree and accused is convicted of murder in the first degree; or where the instruction relates to murder in the third degree and accused is convicted of murder in the second degree; or where the instruction relates to manslaughter and accused is convicted of murder; or where the instruction relates to involuntary manslaughter and the conviction is of voluntary manslaughter; or where the instruction relates to aggravated assault and the conviction is of assault with intent to kill. * * *"

See also Am. Jur., *Homicide,* Sections 558, 559.

In *State v. Matteri,* 119 U. 143, 225 P.2d 325 (1951), the appellant was convicted of first degree murder. The trial court instructed the jury on the crime of second degree

murder and left out the possibility of the killing occurring from an intent to kill. The court noted that unless the evidence was such that a jury could reasonably decide in favor of second degree murder, that it would not be prejudicial to fail to give the correct instruction. The court found that the evidence did not reasonably raise the issue of second degree murder and concluded that the instruction could not have been prejudicial. The court noted, in part:

> "The only evidence bearing upon the killing of the deceased was that adduced by the State. There was no evidence direct or indirect of any mitigating circumstances. * * *"

The facts in the instant case are somewhat the same and under no construction of those facts could reasonable minds conclude that the appellants had only committed the crime of voluntary manslaughter. Consequently, in accordance with the *Matteri* case, it was not err to give erroneous instruction on a lesser offense. See *State v. Condit,* 101 U. 558, 125 P.2d 801; *State v. Mewhinney,* 43 U. 135, 134 P. 632; *State v. Thorne,* 41 U. 414, 126 P. 286; Warren *Homicide,* Vol. 4, page 403.

In summary, it must be concluded that although the trial court's instruction on involuntary manslaughter was erroneous, the appellants were in no way prejudiced by the error and as a consequence can claim no basis for reversal.

POINT II

THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION NO. 1.

The appellants contend the trial court committed error in refusing to give their requested Instruction No. 1. An

examination of the requested instruction (R. 30, 31) as against the instructions given, conclusively demonstrates that there was no error in refusing the requested instruction. First, paragraph 3 of the requested instruction was given in fact in several other instructions of the court. Thus, instructions 1, 8 and 9 (R. 32, 36, 41) which the court actually gave to the jury adequately set forth the requirement that proof to convict be beyond all reasonable doubt and that the prosecution must sustain the burden from the evidence to prove that guilt.

The fourth paragraph of the requested instruction was not applicable to the case. The evidence presented by the prosecution was primarily direct evidence and the prosecution did not rely substantially upon circumstantial evidence. The facts concerning the motive for the crime, the intent of the appellants, their activities immediately preceding the commission of the crime and the actual commission of the crime were testified to by witnesses who were aware of the facts by their direct knowledge. Mike Hoopiiana testified as to the identity of the killers. The appellants argue that the identity was not as certain as it should have been. This, however, is not circumstantial evidence but is merely the question of the weight to be given to direct evidence. What the appellants contend as circumstantial evidence is actually a measure of the weight to be accorded the direct testimony of the eye witness to the killing. Since the prosecution did not rely upon mere circumstantial evidence to prove the elements of the crime, it cannot be successfully argued that Instruction No. 1, and especially paragraph 4 thereof which implies that the prosecution relies totally upon circumstantial evidence, should have been given. Paragraphs 1 and 2 of the requested instruction are merely abstract principles of law unrelated to the facts of the case. In the

absence of explanation, the instruction is meaningless. In *State v. Thompson,* 110 U. 113, 170 P.2d 153 (1946), this court admonished against the giving of instructions in the abstract and stated:

> "Defendant urges that the court erred in giving general abstract instructions, using ancient and highly technical legal terms not understood by laymen, giving instructions which had no application to the facts in this case, and in not applying the law to the facts which were supported by the evidence, and that the jury was probably misled thereby and the case should be reversed on that account. We have repeatedly criticized the giving of abstract statements of the law to the jury, and held that it is the duty of the court to apply the law to the facts supported by the evidence and to not instruct on any question which is not involved in the case under the evidence. * * * We think that it cannot be too strongly emphasized that the court should apply the law to the facts as they appear from the evidence, and should instruct only on the law which has a bearing on facts, and in stating the necessary elements to constitute the crime charged it should submit to the jury the facts involved in the case and not merely generalizations, and where possible should avoid the use of technical legal terms and cumbersome definitions thereof, by using terms which will readily be understood by laymen. In that way, the jury will be given a much clearer understanding of its problems. Throughout this opinion we have attempted to observe these rules in our discussion of the legal questions here involved."

A giving of the appellants' requested instruction as it was submitted to the court would have violated the rule set out in *State v. Thompson.* This alone would justify the court in refusing to give the requested instruction.

Additionally, since the prosecution did not rely upon circumstantial evidence to any substantial degree to prove its case, it cannot be successfully argued that it was error to give the requested instruction. In *People v. Downer,* 57 Cal. 2d 800, 22 Cal. Rptr. 347, 372 P.2d 107 (1962), the California Supreme Court was faced with a similar condition in an incest case. The court rejected the contention of the appellant that the evidence relied upon was circumstantial. The argument made by the appellant in that case bears similarity to that made by the appellants in the instant case. The testimony in both cases is predominantly what the witnesses actually saw or heard and, therefore, direct evidence and not circumstantial evidence. In rejecting the appellants' contention, the court stated:

> "The bulk of the prosecution evidence consisted of direct testimony of the victim as to the acts of defendant on the night of December 16. Defendant made a statement when he entered his daughter's bedroom dressed only in his underwear that he 'wanted some relief.' This statement showed his intention to have sexual relations with his daughter. The words had a well-understood meaning for the daughter, because they were the same words he had used on a number of prior occasions when he forced himself upon her. Thus the jury could conclude, based upon defendant's own statement, that he had the requisite specific intent to perpetrate the crime of incest.
>
> "The prosecution did not rest its case wholly, or even substantially, upon circumstantial evidence, and hence an instruction on circumstantial evidence was not required. (People v. Williams, 155 Cal.App.2d 328, 331 [5]. 318 P.2d 106 [hearing denied by Supreme Court]; cf. People v. Ely, 170 Cal.App.2d 301, 302 [2], 338 P.2d 483; People v. Roberts, 167 Cal.App.2d 238, 242 [3], 334 P.2d 164.)"

The appellants cite no case which would favor reversal under the circumstances of this case. Indeed, the evidence as it was offered to the jury was testimony of witnesses as to what they actually observed. Witnesses testified directly as to the assault upon Ted Gallegos. They testified directly as to Gallegos' action immediately subsequent to the assault. There was testimony as to the actions of Jerome and the Gallegos brothers indicating that they would get even with those who had made the assault upon Ted Gallegos. The testimony of Mike Hoopiiana came in in two forms: first, the testimony on the stand and second, his statement to the police officers immediately after the killing. In both instances, his testimony is of facts and circumstances which he actually observed and heard. In both instances, he identifies the Gallegos brothers as the murderers. Under these circumstances, it is clear that there was no basis to warrant giving requested Instruction No. 1.

Finally, it must be observed that the court's instructions, when viewed as a whole, encompassed many of the aspects of the requested Instruction No. 1. As to each of the crimes instructed upon, the jury was charged that the appellants' guilt must be proved beyond a reasonable doubt. They were instructed that they were the sole judges of the guilt or innocence of the appellants and that if they could reasonably explain the facts given in evidence on any reasonable ground other than guilt, that they should acquit the appellants (R. 54). The instruction requested by the appellants, like their argument in Point 2 of the brief, bears no relationship to what actually occurred at trial. As a consequence, there is no basis for reversal upon the refusal of appellants' requested Instruction No. 1.

POINT III

THE TRIAL COURT DID NOT ERR TO THE PREJUDICE OF THE APPELLANTS NOR WERE THEY DENIED DUE PROCESS OF LAW.

In Point 3 of the appellants' brief, they contend that there is collective error on the part of the trial court to such an extent that they were denied a fair trial and, consequently, due process of law. The appellants have set out claims of error in Points A through H. The respondent submits that none of the claims of error are in any manner collectively or singularly such as to warrant reversal.

A. The appellants contend that the trial court erred by giving oral instructions. An analysis of the record shows that this is not correct. The trial court prepared written instructions which were given to the jury and which were served upon counsel (R. 32–54). Subsequent to the reading of the instructions, the trial court explained to the jury why the alternate juror was being discharged, it presented the verdicts to the court and advised them as to their liberties of deliberation. He also indicated that he would allow them to deliberate until 7:00 p.m. at which time he would consult with them and ascertain their desires so far as dinner was concerned. He explained to them how to contact the bailiff should they desire to go to the lavatory (R. 361–362). It is submitted that none of these things in fact constitute instructions on the case. They were not instructions on the law nor on the evidence, nor actually in any way related to what is commonly considered the instructions to the jury on the law of the case. At best, they could be considered as admonitions to the jurors and a statement of some of the practicalities concerning their deliberations. Even if it could be assumed that these were oral instructions, the appellants

may not claim error of any kind on that basis for a variety of reasons.

First, subsequent to the court's statements, counsel for the appellants took an exception (R. 362). Counsel said he would withdraw exceptions if the jury would be called back and advised that a desirable verdict should be rendered to the defendants as well as the state and that a previous informal request of counsel for the appellants be submitted to the jurors (R. 363–364). Thereafter the jurors were recalled and advised as appellants' counsel had requested (R. 364) and appellants' counsel expressly stated that he had nothing further to add concerning the matter. Consequently, an express waiver of any error appears in the record.

Second, it is submitted that there is no requirement that the jury be instructed in writing. Section 77–31–1, Utah Code Annotated 1953, establishes the order of trial. Subsection 5 of that provision provides: "When the evidence is concluded, the court must charge the jury as in civil actions." This provision was enacted into law by Section 4845 of the Revised Statutes of 1898. The compiled Laws of 1917, Section 6802, set out the mode of instructing jurors in civil cases. It provided that the court "shall instruct the jury in writing upon the law applicable to the case." This provision was repealed with the promulgation by the court of the rules of civil procedure. Rule 51 of the Utah Rules of Civil Procedure was substituted for 104–24–14, Utah Code Annotated 1943. Contrary to the assertion of the appellants, Rule 51 *does not* use the same language as the previous provision. It absolutely does not say that the jurors shall be instructed in writing. It provides that the court shall inform counsel of its proposed action on request prior to instructing the jury and that it shall furnish counsel with

a copy of its proposed instructions unless the parties stipulate that instructions may be given orally. It then provides that if instructions are to be given in writing, all objections must be made before the jury is instructed. This court has never ruled as to what Rule 51 requires. It is submitted that it requires the following:

First, that the court may instruct either orally or in writing. However, if the instructions are to be given in writing, he need only serve counsel with copies of the instructions prior to their being given to the jury. If this is completed, the requirement of Rule 51 is met. Counsel may waive written instruction at which time no instructions need be served upon counsel. In the instant case, counsel expressly waived written instructions if the court would recall the jury and advise them, as the court in fact did.

Additionally, Rule 51 would not seem to prohibit the court in giving oral instructions which are not those "on the law."

Finally, it should not be noted that everything the court in fact did was taken down.

In *Van Cott v. Wall,* 53 U. 282, 178 P. 42, this court indicated that under the previous provisions of Section 104–24–14, Utah Code Annotated 1943, that if the instructions were incorporated into the record on appeal and if they appeared to correctly state the law applicable so that no prejudice results, reversal is not warranted. In *State v. Finney,* 141 Kan. 12, 40 P.2d 411 (1935), the Kansas Supreme Court (where the trial court gave almost identical instructions to the jury as those given here) held that such instructions do not violate the requirement that instructions be in writing. Instructions given in the Kansas case were to the jury as to how they should mark their ballot. See also *Anderson v. The Commonwealth,* 205 Ky. 369, 265 S.W. 824. It

appears that appellants can claim no basis for error on the form of the court's instructions.

B. Appellants' argument that the trial court's ruling prejudiced them because it denied them their motion to dismiss where the motion was made under the understanding that it was made as if it were at the conclusion of the defense's request, is without merit. If the prosecution had presented a prima facie case, then no matter what the defense presented, the issue would be one for the jury's deliberation. In the instant case, the prosecution had established a killing, that the killing was under felonious circumstances, and that the appellants were the murderers. The prosecution had at the time of the ruling made out a case upon which it was entitled to go to the jury and, consequently, the trial court correctly overruled the defendants' motion to dismiss. Further, this in no way could prejudice the appellants since the evidence that was offered in their defense in no way detracted from the validity of the court's ruling. In fact, the defense evidence could best be categorized as innocuous as respects its effect upon the case the state had presented.

C. The trial court definitely did not err in giving Instruction No. 9. The appellants argue that the instruction was prejudicial because it allowed the jury to find the appellants guilty of second degree murder because of their "intending injury without death." In *State v. Russell,* 106 U. 116, 145 P.2d 1003 (1944), this court indicated that the intention was:

> "(1) An intention or design previously formed to kill or cause great bodily injury; or (2) an intention or design previously formed to do an act or omit to do an act, knowing that the reasonable and natural consequences thereof would be likely to cause death or great bodily injury; * * *."

Thus the *Russell* case adopted the recognized rule that unpremeditated murder can be satisfied by one of two intentions: first, the intent to kill, or second, the intent to do great bodily harm. The finding of either intent will be sufficient to warrant a conviction. In the instant case, the jury was instructed:

> "3. That when the defendants, or either of them, struck the fatal blow he or they had a specific design or intention, thought out beforehand, to cause great bodily injury to the deceased, OR an intention or design thought out beforehand to do an act, knowing the reasonable and natural consequences thereof would be likely to cause great bodily injury to the deceased;"

This instruction was directly in line with the alternative instructions set out in the *Russell* case. The trial court was apparently of the opinion that there was no intention to kill on the part of the appellants but that they intended to inflict great bodily harm. In so instructing the jury, the instruction was to the advantage of the appellants since if the jurors felt that the appellants had intended to kill and not merely inflict great bodily harm, they might have acquitted. It is clear that the jury did in fact find an intention on the part of the appellants, which readily appears from the evidence, to inflict great bodily harm upon the deceased.

In *State v. Jensen,* 120 U. 531, 236 P.2d 445 (1951), Justice Crockett stated the intent required for second degree murder:

> "With respect to his intent: It is the established law of this state that in order to make the crime of second degree murder the defendant must have intended to either (a) kill, *or* (b) do great bodily harm, *or* (c) do an act which would naturally and probably cause

> death *or* great bodily harm to the deceased. State v. Thompson, 110 Utah 113, 170 P.2d 153; State v. Trujillo, Utah, 214 P.2d 626."

This decision appears to be the most recent expression of this court as to the intent required in second degree murder and clearly the language of the opinion is couched in alternative terms. In *State v. Thompson,* 110 U. 113, 170 P.2d 153 (1946), this court again stated that the element of murder was in the alternative. It commented:

> "* * * 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. * * *"

In *State v. Trujillo,* 117 U. 237, 214 P.2d 626 (1950), Justice Pratt stated that the failure of the court to instruct upon the requirement of intent in charging of murder in the second degree could be prejudicial by misleading the jury in thinking that if they found an intent to kill, they must find the defendant guilty of murder in the first degree. The court reversed the *Trujillo* case where the jury in fact had convicted of murder in the first degree. The opinion of Justice Pratt, which is the only opinion of the court on the matter, was concerned with the prejudice of the instruction on the conviction of first degree murder feeling that the erroneous instruction would compel a conviction of first degree murder if the jury found an intent to kill. He stated:

> "* * * The effect of such a limitation is to impress the jury with the thought that if the intent to kill was present, then the offense must be murder in the first

> degree; whereas, if the intent is that of doing great bodily harm, it is murder in the second degree, depending of course, upon the other elements necessary.* * *"

Such is not the case in this situation since the jury convicted the lowest crime which was raised by the evidence. The absence of an intent to kill in second degree murder and instruction upon the intent to inflict great bodily harm as noted above, would not have prejudiced the appellants, but in fact would only have helped them. The *Trujillo* case is no precedent for claiming error in this case and indeed the opinion of the majority does not seem to be the law in this jurisdiction since only Justice Pratt appeared to follow that view. Justices Wade, Wolfe and McDonough concurred separately and Justice Latimer dissented.

It would seem obvious that the primary difference between first and second degree murder is that in the latter case, there is an absence of premeditation and deliberation. The failure to instruct upon intent to kill could only be prejudicial in a conviction for first degree murder. It is submitted that it would be as erroneous for a trial judge to instruct in the alternative of an intent to kill or inflict great bodily harm where the evidence did not raise the issue of an intent to kill, as it would be in any other case to instruct upon an element which is not raised by the evidence. In any event, since the appellants were found guilty of murder in the second degree and murder in the second degree requires either the intent to kill or the intent to inflict great bodily harm, the instruction of the trial court could not have been prejudicial.

D. The appellants contend that the giving of Instruction No. 12 was improper. The instruction was wholly proper because the question of intent to kill was raised by the

court's instructions on first degree murder (R. 39). The instruction, therefore, was proper with reference to that charge. Paragraph 3 of that instruction was directly in accord with this court's decision in *State v. Thompson,* supra, *State v. Trujillo,* supra, and *State v. Jensen,* supra. It is a correct evidentiary statement. The appellants' final contention with reference to Instruction No. 12 that there is no definition for the jury of the word "assailed" can be answered by pointing out that it is a term of general recognized meaning and requires no specific definition since it is intelligible to the layman. Additionally, the appellants requested no definition from the court nor did they except to the failure of the court to define the term. They are, therefore, procluded from having the matter reviewed on appeal.

E. The appellants' contention that given Instruction No. 15 was prejudicial as to Ray Gallegos because there was no evidence of his participation is erroneous. Suffice is to say there was substantial evidence of Ray Gallegos' participation. Hoopiiana testified that Ray Gallegos took a cut at Yanes as he fell to the ground. Further, Ray Gallegos held a knife on Hoopiiana to keep him from interfering. Appellants' argument that this is "prevention" and not "participation" is too absurd to warrant answer.

F. Given Instruction No. 16 was excepted to because the word "defendant" was used. However, Instruction No. 3 was sufficient to advise the jury that where "defendants" is used, it is referable to one or both of the defendants and no intelligent person could claim confusion on that matter.

G. Appellants contend that given Instruction No. 18 was erroneous because they allege that the court instructed the word "wilful" was synonymous with "intentional." A reading of Instruction No. 18 (R. 49–51), discloses that

this is not a correct interpretation of the instruction. The word "wilful" was defined as follows:

> "The words 'wilful' and 'wilfully' when applied to the intent with which an act is done imply simply a purpose or willingness to commit the act, and do not require any intent to violate the law, or to injure another, or to acquire advantage."

The words "intent" and "specific intent" were defined as follows:

> "The word 'intent' means intention, design, resolve; a determination of the mind.
> "The term 'specific intent' means a fixed direction of the mind to a particular object, or a determination to act in a particular manner."

It is obvious, therefore, from a mere reading of the instructions, that the court did not instruct that "wilful" was synonymous with "intentional." Further, the exceptions which the appellants took in the trial court to Instruction No. 18 did not allege such a grounds as a defect. Having failed to specify such a ground in exception at the trial level, the appellants may not claim error on review.

H. The appellants contend that it was error for the trial court to give Instruction No. 20. Instruction No. 20 advised the jury on two points: One, that physical retaliation for the purposes of revenge is not a defense to the commission of murder; and two, that evidence of physical retaliation for defense purposes could be used to establish motive. Both of these elements in the instruction are correct statements of the law. Indeed, the appellants' argument under Section H of their brief leaves some question in the mind of the reader as to just what the appellants are protesting against. Ap-

parently the appellants contend that this instruction was not warranted by the evidence. This is, of course, without merit. The evidence disclosed Yanes' participation in the assault on Ted Gallegos, it also disclosed that the Gallegos brothers and others were bent upon revenge for all persons who had participated in the assault. It is a correct statement of law that revenge is not a defense to a crime. See authorities infra, page 13. It is equally well established that motive may be considered as evidence in determining guilt or innocence.

In summary, it is submitted that the contentions made in the appellants' brief A through H, are wholly without merit. For the most part, the claimed errors are not errors at all and would provide no basis in any common law jurisdiction to allow the appellants to escape punishment for their crime. Secondly, those claims which may show some minor impropriety are substantially far removed from any situation where specific prejudice could be claimed. Section 77–42–1, Utah Code Annotated 1953, 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."

In the instant case, there is absolutely no evidence of record which would lead a reasonable man to conclude the appellants were not afforded a fair trial.

CONCLUSION

The factual record of this case discloses a senseless, revengeful murder which is intolerable in any civilized society. The criminal conduct which permeates this record is reprehensible in the extreme. The district attorney who prosecuted the case did an excellent job in presenting to the jury the motive and background for the murder and clearly proved the appellants' guilt beyond all reasonable doubt. The legal errors which the appellants claim warrant reversal either do not exist or are totally without prejudicial effect.

Jurors are no less conscious of their duty with respect to determining the guilt and innocence of persons accused of murder than are judges who oversee the cases. There is no showing of any substantial error to warrant this court in granting the appellants' relief. This court should affirm.

Respectfully submitted,

A. PRATT KESLER
Attorney General

RONALD N. BOYCE
Chief Assistant Attorney General

Attorneys for Respondent