1967

State of Utah v. Roy Lee Poe : Brief of Respondent

In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

- vs. -

ROY LEE POE,

Defendant-Appellant.

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Court for Salt Lake
Honorable C. Nelson

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STATE OF UTAH,

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- vs. -

ROY LEE POE,

Defendant-Appellant.

Case No. 10716

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

Appellant was convicted of the crime of murder in the first degree in violation of Utah Code Ann. § 76-30-3 (1953). The Honorable C. Nelson Day presided over appellant's jury trial in the Fifth Judicial District Court of Washington County, State of Utah, and, because of the absence of a jury recommendation of leniency, appellant was sentenced to be executed.

DISPOSITION IN THE LOWER COURT

On January 14, 1966, appellant was arraigned in the district court of the Fifth Judicial District, Washington County, State of Utah, on the charge of mur-

der in the first degree. At arraignment, appellant entered a plea of not guilty. A jury trial resulted in a verdict of guilty of murder in the first degree and, no recommendation for leniency being made by the jury, the Honorable C. Nelson Day passed sentence that the appellant be executed. The Honorable C. Nelson Day has ordered a stay of execution pending the appeal to this court.

RELIEF SOUGHT ON APPEAL

Respondent submits that the conviction should be affirmed.

STATEMENT OF FACTS

Respondent basically agrees with appellant's chronological summation of the evidence adduced at appellant's jury trial. An additional factor that must be noted is that the prosecution contended and the evidence verified the fact that at the time of death, the deceased was reclined on a bed with his head propped up by a pillow and his hands folded across his chest, sound asleep (T.339, 738-739).

However, certain characterizations of the nature of the evidence contained in appellant's brief are repudiated by respondent and, because these characterizations constitute part of appellant's legal argument, respondent will rebut them in the following arguments.

As to the facts relative to the composition of the jury, those prospective jurors acquainted with wit-

nesses for the prosecution, those acquainted with the deceased and his brother, those acquainted with the prosecutors, those acquainted with the defendant, the pretrial opinions, discussions, and exposure to purported facts and the community attitudes as contained in appellant's brief, respondent submits that such matters are relevant and material only so far as those matters relate to the legal points raised on appeal. Therefore, respondent will limit its discussion to these points to the extent that they relate to the legal issues.

However, as a preliminary matter, it must be noted that in a community the size of St. George, Washington County, Utah, it is only natural that the citizenry will be acquainted with the county sheriff, county attorney, and other public officials chosen to represent them. It is also natural the individuals of the community are well acquainted with each other and know and discuss events as they relate to the community.

Appellant also neglects to advise the court that an examination of the record indicates that most, if not all, of the prospective jurors knew and respected appellant's trial counsel. Although the lengthy narration set forth on pages 8 through 16 of appellant's brief are evidently intended to serve as a foundation for point two of appellant's argument, it must be recognized and admitted that at no time, either at the pretrial stages or at the trial stage itself, did appellant move for a change of venue, a contin-

uance, or any other procedural method available to an accused to insure a fair trial.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY ALLOWING THE WASHINGTON COUNTY SHERIFF TO BE SWORN AS BAILIFF AND TAKE CUSTODY OF THE JURY DURING THE DELIBERATIONS OF THE JURY AFTER THE SHERIFF HAD TESTIFIED AS A WITNESS FOR THE PROSECUTION.

After both the prosecution and defense had given their closing arguments, the trial court called forth Evan G. Whitehead, Sheriff, Washington County, Utah, and the sheriff was then sworn by the clerk of the court as bailiff (T.765, 766). The jury then in the custody of Sheriff Whitehead, retired to deliberate their verdict. Although no objection was made at the time Sheriff Whitehead was sworn as bailiff and custodian of the jury, appelland now argues that such action constituted prejudicial error requiring reversal of his conviction.

Prior to **Turner v. Louisiana,** 379 U.S. 466 (1965), it was clear that in the absence of an actual showing of prejudice, an officer such as a sheriff could also act as bailiff notwithstanding the fact that the officer had been produced as a witness for the prosecution and had given testimony in that regard. 53 Am. Jur.**Trial** § 858, at 625 (1941); 5 Wharton, Criminal and Procedure § 2109, at 290 n.2 (1957). In **Odell**

v. Hudspeth, 189 F.2d 300 (10th Cir. 1951), it was alleged to constitute prejudicial error for a sheriff, a prosecuting witness, to also act as bailiff. The court, in holding the contention to be without merit, stated at 189 F.2d 303, ". . . There is no evidence that the sheriff did anything irregular in performing this function." See also**Newby v. State,** 188 Pac. 124 (Okla. 1920); **Watson v. State,** 197 S.W.2d 1018 (Tex. 1946).

Appellant relies strongly on **Turner v. Louisiana,** supra, for the proposition that an accused need not show actual prejudice resulting from the situation whereby a prosecution witness acts as bailiff, but that such a relationship is so inherently prejudicial as to constitute a denial of due process. Because of this strong reliance on **Turner v. Louisiana,** supra, is it necessary to completely understand the circumstances that existed in that case. Turner was charged with murder committed during the course of a robbery (379 U.S. 466). During the course of the trial, two deputy sheriffs, considered "principle witnesses for the prosecution," (379 U.S. 467), were called to testify. One of the deputy sheriffs testified as to:

> . . . [C]ertain damaging admissions which he said had been made by Turner at the time of his apprehension. In addition, Simmons [the deputy] described the circumstances under which he said he had later prevailed upon Turner to make a written confession. This confession was introduced in evidence. (379 U.S. 467).

The issue as to whether the defendant had voluntarily given the confession was raised, and on

the strength of the testimony of the two deputy sheriffs, was resolved against the defendant.

The necessity and credibility of the deputies testimony was obviously a vital cog in the prosecution's proof of Turner's guilt. As stated by the Court at 379 U.S. 473:

> It is to be emphasized that the testimony of [the deputies] was not confined to some uncontroverted or merely formal aspect of the case for the prosecution. On the contrary, the credibility which the jury attached to the testimony of these two key witnesses must inevitably have determined whether Wayne Turner was to be sentenced to his death.

The nature of the association between the deputies and the jury was described by the Court at 379 U.S. 468:

> The deputies drove the jurors to a restaurant for each meal, and to their lodgings each night. The deputies ate with them, conversed with them, and did errands for them.

The Court further stated at 379 U.S. 473:

> We deal here not with a brief encounter, but with a continuous and intimate association throughout a three-day trial— an association which gave these witnesses an opportunity, as Simmons put it, to renew old friendships and make new acquaintances among the member of the jury.

Under these circumstances, the Court concluded at 379 U.S. 473:

> . . . it would be blinking reality not to recognize the extreme prejudice inherent in this contin-

ual association throughout the trial between the jurors and these two key witnesses for the prosecution.

A brief examination of the testimony given by Sheriff Whitehead in the instant case reveals that the sheriff's testimony was not of such a nature as to bring the case within the confines of **Turner v. Louisiana**, supra. Briefly, the sheriff testified that he arrived at the scene of the crime at approximately 2:00 p.m., on November 9, 1965 (T. 374, 375). The house of the deceased and its location were described (T. 359-379) and the sheriff then related how he conducted a short investigative search of the premises (T. 380). During the course of his testimony, the sheriff also identified plaintiff's exhibits, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 (T. 380 - 391), which are pictures of the deceased's house, the interior of the house, and the interior of the room wherein the deceased was discovered. The sheriff also testified that he subsequently came into contact with one Vern Phillips, who brought two guns, one a twenty-two caliber rifle which was alleged to be the murder weapon, to the sheriff at his office (T. 397, 398). A brief narrative was then given as to the sheriff taking the appellant into custody in Las Vegas, Nevada, on November 3, 1965, and returning appellant to St. George, Washington County, Utah (T. 401, 402). The sheriff did not testify as to any conversation that may have occurred between the appellant and the sheriff during the time the appellant was being transported back to St. George, Utah. As a matter of fact, at no time did the sheriff testify

as to any conversation transpiring between himself and the appellant.

It is obvious from a brief review of the testimony of Sheriff Whitehead that the sheriff's testimony was not a necessary element in the prosecution's case as in **Turner v. Louisiana, supra.** The sheriff's testimony was confined to uncontroverted and merely formal aspects of the prosecution's case. Therefore, on this basis alone, **Turner v. Louisiana, supra,** would not be applicable.

Several cases since **Turner v. Louisiana, supra,** have considered the point now pursued by appellant and have concluded that **Turner v. Louisiana, supra,** did not apply. **Ex parte Bertsch,** 395 S.W.2d 620 (Tex. 1965). In **Bryant v. State,** 397 S.W.2d 445, cert. denied, 385 U.S. 858 (Tex. 1965), the sheriff acted in capacity of bailiff and the defendant relied on **Turner v. Louisiana, supra.**

The court recognized the fact that the defendant made no objection at the time the sheriff took custody of the jury, but at the hearing, because of the claim denial of due process, stated at 397 S.W.2d 452, ". . . we have examined the record and find no merit in such contention." Also, in **Jackson v. State,** 403 S.W.2d 145, cert. denied, 385 U.S. 938 (Tex. 1966), the court stated at 403 S.W.2d 148:

> The nature and extent of the association of the Sheriff with the jury and his testimony pertaining to the case, did not reveal such association or communication with the jury as would call for a reversal under Turner.

See also **Whisman v. State,** 221 Ga. 460, 145 S.E.2d 499 (1965).

The case of **Bowles v. State,** 366 F.2d 734 (5th Cir. 1966), also involved a murder conviction. As to the relationship between the prosecution witnesses and the jury, the court stated at 366 F.2d 736:

> Except when they were in the courtroom or deliberating, the sheriff or his deputies were in attendance upon the jury at all times. . . . As a necessary consequence, the sheriff came into contact with the jury on several occasions during the long trial. It was inevitable that he do so.

The court further stated at 366 F.2d 736 n. 3:

> Although we are mindful of the Supreme Court's admonition in **Turner v. State of Louisiana** . . . that such contact ought not be condoned, we feel that in the circumstances of this case we are not 'blinking [at] reality' in finding the contact non-prejudicial.

It was considered to be the merest pedantry to insist on strict procedural regularity when the lapse therefrom did not result in any harm or prejudice to the accused. In recognizing the impossibility of such strict procedural regularity, the court stated at 366 F.2d 738:

> In rural areas, almost necessarily, this same officer [the sheriff] will come into contact with the jury in the normal course of a trial. It is often his duty to escort the jury to meals and to stand guard during their deliberations. To assert that Turner requires the invalidation of all convictions in which formal testimony was used is too narrow a construction of its teachings and rationale. The dual

> role which the sheriff's duties sometimes require of him presents an ever-present and inherent danger of running afoul of the strictures of Turner and should be avoided when possible. However, the mere existence of contact between the sheriff and the jurors resulting from the performance of prefunctory duties required by law and the orderly conduct of court is not sufficient in and of itself to invalidate the conviction. We find that the performance by the sheriff of his judicial administrative functions required by state law in the circumstances and under the facts presented in this case does not require the invalidation of the conviction.

Appellant overlooks the impropriety and effect of the statements made by the bailiff to certain jurors in **Parker v. Gladden,** 87 Sup.Ct. 468 (1966). These statements were, "Oh, that wicked fellow [petitioner], he is guilty," (87 Sup.Ct. 470), and statements to the effect that the state supreme court would correct any error if the jury should find the defendant guilty (87 Sup.Ct. 470). Also, the fact that the jury deliberated for twenty-six hours, showing disagreement, and the fact that one juror testified that she had been prejudiced by the statements of the bailiff, contributed in no small part to the decision of the United States Supreme Court.

The Utah cases cited by appellant are clearly distinguishable. For example, in **State v. Anderson,** 65 Utah 415, 237 Pac. 941 (1925), a prosecuting witness had given a substantial favor to a juror thereby creating an indebtedness from the juror to the witness and the prosecution. This activity also occurred on more than one occasion. In **State v. Crank,** 105 Utah 332, 152 P.d 178 (1943), the court granted a new

trial on other grounds and was not required to determine whether the conduct such as the conversation between the juror and the witness immediately prior to submission of the case to the jury alone constituted grounds for reversal.

Respondent submits that the proper Utah position is stated in **State v. Hines,** 6 Utah 2d 126, 307 P.2d 887 (1957), wherein this court stated at 307 P.2d 889:

> It is further to be observed that the reporter is an officer of the court, fully acquainted with court procedures and the proper conduct of jurors. Requesting her to accompany the lady jurors was done as a precaution by the judge that the privacy of the jury be assured. **In the absence of any indication of impropriety,** to assume that some irregularity occurred which prevented the defendants from having a fair trial, would require us to indulge in conjecture. This is neither warranted under the circumstances, nor within our prerogative should we desire to do so. [Emphasis added.]

Also, this court stated in **State v. Rivenburgh,** 11 Utah 2d 95, 355 P.2d 680, cert. denied, 368 U.S. 922 (1960), at 11 Utah 2d 112:

> Where separation of [the] jury is for [the] purpose of necessity, under surveillance of bailiff, and there is no communication within a juror, prejudice will not be presumed and the burden is on the defendant to establish that he is prejudiced by the alleged separation.

The court further stated at 11 Utah 2d 112:

> In the instant case . . . no evidence was adduced that anyone conversed with the juror during the

> deliberation. **No prejudice being shown by the defendant,** the contention of separation of the jury is not well taken. [Emphasis added].

Respondent submits that the facts and testimony of Sheriff Whitehead in the instant case preclude the applicability of the inherently prejudice rule set forth in **Turner v. Louisiana, supra.** Subsequent cases that not strictly apply the rationale of that case must be considered together with the failure of appellant to voice any objection at the time Sheriff Whitehead was sworn in as bailiff. Therefore, appellant's contention in this regard is without merit.

POINT II

APPELLANT WAS NOT DENIED A FAIR TRIAL AS A RESULT OF THE COMMUNITY PATTERN OF THOUGHT AS EXPRESSED BY POTENTIAL JURORS AND AS A RESULT OF THE PROXIMITY OF RELATIONSHIPS WHICH EXISTED BETWEEN MEMBERS OF THE JURY AND WITNESSES FOR THE PROSECUTION, THE VICTIM, THE PROSECUTORS, AND THE DEFENDANT.

Appellant, for the first time, now seeks to invalidate his conviction on the grounds that he was denied a fair trial because of a pattern of community thought that existed against him. This argument is analogous in reasoning and application of precedent to a claimed denial of a fair trial due to adverse pretrial publicity. In support of this position, appellant relies on **Irvin v. Dowd,** 366 U.S. 717 (1961). However, appellant fails to fully recognize that **Irvin v. Dowd** did not require complete isolation of a prospective juror from life and the accompanying media

of communication. As stated by the United States Supreme Court at 366 U.S. 722:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebuke the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

One important preliminary consideration to be given the issue now raised by appellant is that a wide degree of discretion is vested in a trial court in determining whether an impartial jury may be obtained. This determination should not be overruled unless it may clearly be shown that the trial court abused its discretion. Annot., Pretrial Publicity in Criminal Case as Affecting Defendant's Right to Fair Trial-Federal Cases, 10 L.Ed.2d 1243, § 6 (a), at 1266 (1964).

Appellant does not single out or rely on any one occurrence to justify a conclusion that the trial court abused its discretion in determining the reliability of the responses of the prospective jurors. Rather, appellant attempts to point to various simi-

larities allegedly existing between the instant case and **Irvin v. Dowd, supra.** However, the only similarity between the two cases is that both trials were held in small communities.

The record clearly indicates that appellant failed to utilize several methods devised to insure him a fair and impartial trial. For example, where adverse pretrial publicity or a communal pattern of thought exists so as to deprive a defendant of a fair trial, several methods, including a motion for a change of venue, a continuance, a dismissal, a change of venire or a challenge for cause, either singly or collectively applied to the jury panel, may be invoked by the defendant. In the instant case, the record is devoid of any such motions on the part of appellant and clearly indicates that the jury panel was passed for cause by the defendant (R. 275).

In light of the appellant's failure to invoke the above enumerated methods of insuring a fair and impartial trial, appellant may not now raise the issue on appeal. **Latham v. Crouse,** 320 F.2d 120 (10th Cir. 1963), wherein the court stated at 320 F.2d 123:

> **In the case before us the record discloses that prior to the exercise of any peremptory challenges, defense counsel passed all jurors for cause. Be that as it may, the claim of jury prejudice because of the telecast was not presented to the trial court and hence is not before us for review.**

In **Hopt v. Utah,** 120 U.S. 430 (1887), the United States Supreme Court held that the trial court did not err in refusing to excuse a juror who had read

a newspaper report of the case, but who stated that he was not conscious of any bias or prejudice so as to prevent him from being fair and impartial and that he could try the case on the evidence adduced in court.

The same situation exists in the instant case. The trial court, believing the assertions of the prospective jurors that the defendant could receive a fair and impartial trial, did not abuse its discretion. Every prospective juror was fully questioned regarding any preconceived bias or prejudice that would prevent him from being fair and impartial. Defense counsel had the opportunity to voir dire. In light of the record, including appellant's passing of the jury panel for cause, no error exists which would give merit to appellant's claim.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING CERTAIN COLORED SLIDES OF THE AUTOPSY OF THE DECEASED TO BE INTRODUCED INTO EVIDENCE.

It must be conceded that the admissibility of photographs is a matter of judicial discretion and the finding of the trial court will not be disturbed unless it is clearly shown that the discretion has been abused. **Potts v. People,** 114 Colo. 253, 158 P.2d 739 (1945); **Martinez v. People,** 124 Colo. 170, 235 P.2d 810 (1951); 17 Okla. L. Rev. 33 (1964); 40 Texas L. Rev. 284 (1961).

The standard generally applied to the admissibility of photographs was set forth by the Supreme Court of Colorado in **Potts v. People, supra,** wherein the court stated at 158 P.2d 740:

> **They are not inadmissible merely because they bring vividly to the jurors the details of a shocking crime or tend to arouse passion or prejudice. . . . It is only when photographs do not illustrate or make clear some issue of the case, and when they are of such a character as to prejudice the jury, that they are not admissible.**

Appellant alleges that the photographs admitted into evidence in the instant case were not necessary because there was no question as to the death of the deceased or as to the cause of the death. (Appellant's brief, p.40). However, appellant neglects to recognize that the entire entry of a plea of not guilty puts in issue every material allegation of the information or indictment. Utah Code Ann. § 77-24-4 (1953). Therefore, to establish appellant's guilt of the crime of murder in the first degree, the prosecution was required to prove all of the elements of murder in the first degree including the fact of death and the fact that the death was caused by and through the willful, deliberate, malicious and premeditated act or acts of the accused.

The autopsy slides corroborated the testimony of Dr. LeCheminant who testified that at the autopsy, he recovered metal fragments from the skull of the deceased (T. 437, 438), traced the paths of the two wounds received by the deceased (T. 440), and con-

cluded that the sole cause of death of the deceased was due to gunshot wounds to the head (T. 441).

The metal fragments recovered by Dr. LeCheminant were later identified by a firearms expert from the Federal Bureau of Investigation as being fired from the twenty-two caliber rifle, exhibit P-28, alleged by the prosecution to be the murder weapon (T. 493). The doctor's testimony also verified the sole cause of death and the fact that the death was precipitated by and through a criminal act. Also, by tracing the paths of the death-dealing bullets, the testimony verified the fact that the deceased was lying down when he was shot, thus establishing the malicious intent and premeditation of the perpetrator of the crime. The essence of the recovery of the bullet fragments and subsequent linkage to the alleged murder weapon is obvious.

In **Potts v. People, supra,** the court stated at 158 P.2d 740:

> Photographs are the pictured expression of data observed by a witness. They are often more accurate than any description by words, and give a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses. Ordinarily photographs are competent evidence of anything which it is competent for a witness to describe in words.

In **State v. Johnson,** 57 N.M. 716, 263 P.2d 282 (1953), the Supreme Court of New Mexico considered a first degree murder conviction wherein the issue as to the admissibility of autopsy photographs was raised. The court stated at 263 P.2d 284, 285:

> It is argued that the court erred in the admission of certain photographs. The photographs show the scalp had been removed from the skull of the deceased, exposing fractures of the skull and certain fleshy part of the head and shoulders of the deceased. The objection made is that the pictures are so gruesome and inflammatory, the minds of the jurors were prejudiced thereby. We do not so appraise them. While the doctor testified in terms descriptive of the wounds, the photographs gave the jury a visual explanation of his testimony. It must be remembered that appellant was standing on his plea of not guilty when the photographs were admitted. The state was put to the task of proving the essential elements of the crime. Whether the deceased was fatally injured was an issue to be determined by the jury. The extent and nature of the wound and the atrocity of the crime also were material questions. Clearly, the photographs, though cumulative, served to corroborate the doctor's testimony and were admissible for that purpose.

The court concluded that the trial court did not abuse its discretion in allowing the introduction of the autopsy photographs.

Appellant's argument also fails to recognize the procedure employed by the trial court in determining the admissibility of the autopsy photographs. The records clearly disclose that the trial court admonished and excused the jury and then proceeded to view the photographs in the presence of the prosecution and appellant and his counsel before proceeding (T. 422-427). Appellant objected on the grounds that the body depicted in the photographs was not properly identified as the body of the deceased. No objection to the admissibility of the photographs was made on the grounds that they

were gruesome and would tend to arouse the passion and prejudice of the jury against appellant.

Also, appellant's inference that auotpsy photographs are inadmissible merely because of the admittedly distasteful event which they reproduce is clearly erroneous. **Potts v. People, supra; Martinez v. People, supra; State v. Johnson, supra.**

Appellant's reference to **State v. Russell,** 106 Utah 116, 145 P.2d 1003 (1944), does not support appellant's position. This court stated at 145 P.2d 1010:

> There is no merit in the other errors assigned. The pictures of the deceased, taken after her death and showing her wounds, were clearly admissible. Even though the defendant did admit the killing, he did not admit the intent to kill and the nature of the wounds may be material on that point. The pictures showed the nature of the wounds more clearly than the testimony of witnesses.

Respondent submits that the autopsy photographs admitted into evidence in the instant case clearly met the established standards governing such admissibility, and appellant has failed to show a clear abuse of discretion on the part of the trial court in allowing the introduction of the photographs. This court should not disturb the decision of the trial court.

POINT IV

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADVISING THE JURY AS TO THE CONTACT THE TRIAL COURT HAD WITH A WITNESS FOR THE PROSE-

CUTION PRIOR TO THE WITNESS' TESTIFYING IN THE INSTANT CASE.

Respondent accepts appellant's general statement that all issues of fact are to be submitted to the jury and that the trial court should, neither expressly nor by implication, indicate its opinion as to the facts or the weight to be given the evidence. **State v. Harris,** 1 Utah 2d 264 P.2d 284 (1953). Respondent submits, however, that the comments made to the jury by the trial court regarding Delton Ray Nance, a witness for the prosecution, were not comments bearing on the credibility of Mr. Nance or the weight to be given Mr. Nance's testimony. Rather, the comments merely clarified an inference raised by defense counsel which was incorrect and improper. To adequately understand the trial court's comments as they occurred, it is necessary to quote at length from the transcript, pages 725-726:

Q. After this conversation that you said you had with Mr. Poe, where you placed on probation?

A. Yes sir.

Q. By whom?

A. By the court.

Q. Which court?

A. The court here.

THE COURT: I placed him on probation, Mr. Morris.

Q. When was that done?

A. I was placed on probation in December.

After the above questions were propounded to the witness by counsel for appellant, the court summoned both the prosecution and counsel for appellant to the bench where an off the record discussion took place. The court then stated:

> Gentlemen of the jury, before commenting to you on this matter very briefly, I have discussed the matter with counsel up here at the bench. When Mr. Nance was questioned by counsel with regard to his being in the cell with Mr. Poe or conversations he had with Mr. Poe, this was the first I had ever heard of the matter. I am the judge who placed Mr. Nance on probation and I placed him on probation I don't remember when but some months ago under the supervision and direction of the Adult Probation and Parole Department of the State of Utah. Mr. Alan Keller is the agent of that office who works out of Provo and has general supervision over Mr. Nance and other probationers in the Fifth District. I know Mr. Keller requires probationers to report to the sheriff's office each month and have them cosign their monthly reports each month; and I assume while Mr. Nance was in Washington County that he reported to the sheriff's office here for that purpose. Mr. Nance, it is true, is it not, that Mr. Keller is your probation officer?
>
> THE WITNESS: Yes, sir, he is my probation officer.
>
> THE COURT: I want it clear that I have never heard about any connection with Mr. Nance and the Poe case until this afternoon when you were on the stand. Mr. Burns, I understand that you are through with this witness, then?

It is obvious by the trial court's comments to the jury that the trial court was merely rectifying the

incorrect inference drawn by counsel for the defendant that the witness received probation because of his statement relating to the instant case. The court, based on its own knowledge of the witness and the witness' case and subsequent probation, knew this inference to be incorrect. The trial court, as the court that placed the witness on probation, was justified in advising the jury that the probation given the witness was independent of any connection the witness had to the instant case. This is so because the trial court knew, by his own knowledge, that this was the case.

A witness testifying on behalf of an accused is entitled to a proper reflection of his character and credibility before the jury. If the prosecution raises an inference detrimental to this image which is improper and incorrect and one which the trial court, based on its own knowledge and familiarity with the witness, knows to be incorrect, the witness and the accused are entitled to the trial court's correction of the adverse implication. For the trial court not to speak out and correct the record would be tantamount to suppression of evidence favorable to the accused. The prosecution and its witnesses are no less entitled to this protection.

Also, it must be acknowledged that the explanatory comments by the trial court to the jury followed an off the record discussion of the matter between the trial court, the prosecution and defense counsel. At the time the comments were made to the jury by the trial court, no objection was interposed by defense counsel.

A comparison of the facts of the instant case and the comments made by the trial court in **State v. Harris,** supra, reveals the inapplicability of **State v. Harris,** supra. In the instant case, the trial court did not comment on the testimony of Mr. Nance nor did the trial court indicate his belief as to the credibility of Mr. Nance. Rather, the trial court merely corrected the adverse inference made by defense counsel that the witness' probation resulted from the willingness of the witness to testify in the instant case. In **State v. Harris,** supra, the trial court limited the jury's deliberations to whether a record of a prior conviction was authentic and then proceeded to comment on the authenticity of the record. The court indicated that the authenticity of the record could be doubted only if the jury concluded that a witness for the prosecution had committed perjury. The facts are clearly distinguishable.

In the instant case, the trial court, in instruction No. 28, instructed the jury:

> In determining the facts or any fact in this case you should not consider nor be influenced by any statement made or act done by the court which you may interpret as indicating its views thereon. You are the sole and final judges of all questions of fact submitted to you, and you must determine such questions for yourselves from the evidence and without regard to what you believe the court thinks thereon. The court had not intended to express, or intimidate, or be understood as giving any opinion on what the proof shows or does not show, or what are or what are not the facts in the case. And it is immaterial what the court thinks thereon. You as jurors must follow your own views and not be

> influenced by the views of the court. If any act or expression of mine has seemed to indicate an opinion relating to any of these matters, you are instructed to disregard it entirely.

Therefore, the corrective instruction given to the jury by the trial court as set forth above eradicates any prejudice which the appellant may now claim.

POINT V

THERE IS NO CUMULATIVE EFFECT OF ERRORS JUSTIFYING A REVERSAL IN THE INSTANT CASE.

The doctrine announced in **State v. St. Clair,** 3 Utah 2d 230, 282 P.2d 323 (1955), that in some instances errors, which when standing alone would not justify reversal, may have such a cumulative effect so as to deprive the accused of a fair trial, is not disputed by respondent. However, respondent submits that the instant case does not meet the degree of error and criteria set forth in **State v. St. Clair,** supra. The duty of the appellate court is set forth in 3 Utah 2d 244:

> On the basis of such appraisal, if the court can say with assurance that the evidence of the defendant's guilt was so clear and convicing that no reasonable jury could be expected to return a different verdict, even in the absence of the irregularities, then the errors would be harmless and the verdict should be permitted to stand. On the other hand, if there is a **reasonable liklihood that in the absence of the**

errors a different verdict might have been rendered, a new trial should be granted. [emphasis added].

In the instant case, there is no cumulation of errors so as to justify a conclusion that a different verdict would have been reached by the jury in the absence of such errors. In **State v. St. Clair,** supra, the cumulation of errors supported this court's finding that it was reasonably likely the verdict of the jury would have been different but for the errors. However, the alleged errors in the instant case do not justify such a conclusion. There is no indication that the appellant did not receive a fair trial because he was tried in St. George, Washington County, Utah. Appellant now submits that the failure of the jury to recommend leniency is evidence of a prejudicial impact on the jurors as argued in appellant's brief. (Appellant's brief p. 48). This argument totally ignores the senseless manner by which the deceased, while asleep, was shot in the face twice by a twenty-two caliber single action rifle at close range. The failure of the jury to recommend leniency cannot be traced to any prejudicial error as alleged by appellant, but rather, is directly traceable to the bestial manner by which the deceased was murdered. It was not a community pattern of thought that resulted in appellant's conviction. The conviction resulted from a commendable presentation of the state's evidence by the prosecution from which only one conclusion could be drawn, namely, that the appellant with the requisite intent, did in fact murder another human being. To now say that

the appellant was convicted because he committed his crime in a community where he was a stranger is to ignore the basic principles on which a jury system is predicated.

To conclude that a cumulation of errors has precluded appellant from having a fair trial first necessitates a conclusion that errors were committed. Respondent submits that this is not the case and that **State v. St. Clair,** supra, is clearly distinguishable.

Respondent submits that this court should follow **State v. Sinclair,** 15 Utah 2d 163, 389 P.2d 469 (1964), wherein it is stated at 15 Utah 2d 170:

> Under our statute [Utah Code Ann. § 77-42-1 (1953)], which requires that errors which do not affect the essential rights of the parties be disregarded, we cannot properly interfere with the jury's verdict, **unless upon a review of the whole case it should appear that there was error of sufficient gravity that the defendant's rights were prejudiced in some substantial way.** We have found nothing of any such consequence here. [Emphasis added].

Respondent submits that a review of the whole record requires a conclusion that the appellant received a fair trial and that no error was committed that prejudiced appellant in a substantial way.

CONCLUSION

It is obvious that the jury was clearly convinced from the evidence adduced at the trial of appellant's guilt beyond reasonable doubt. The record substan-

tiates and necessitates a conclusion that no error was committed that resulted in a substantial prejudice to appellant. Therefore, respondent submits that appellant's contentions are wholly without merit and that the conviction be affirmed.

Respectfully submitted,

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