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Supplementary Brief of Defendant-Appellant

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

SAMUEL H. SHEPPARD,

Defendant-Appellant.

SUPPLEMENTARY BRIEF OF DEFENDANT-APPELLANT

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State of Ohio, :

Plaintiff-Appellee, :

-vs- : No. _____

Samuel H. Sheppard, :

Defendant-Appellant. :

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SUPPLEMENTARY BRIEF OF
DEFENDANT - APPELLANT

Additional counsel were recently retained in an advisory or consultative capacity in this cause. The main brief by Mr. Corrigan was in the hands of the printer hence it was impractical to make the observations herein set out in said main brief. We trust that the Court will indulge this supplementary brief.

The parties will be referred to as they appeared in the trial Court. Underscoring and other forms of emphases are ours.

I. LEGAL SUFFICIENCY OF THE EVIDENCE

A. FACTS AND CIRCUMSTANCES IN EVIDENCE

This is admittedly a circumstantial evidence case. Therefore, the legal question is: Do the facts in evidence permit legally proper inferences which are sufficient to prove defendant guilty of murder. And while this Court is not required to weigh the evidence in a criminal case, yet it will look to the record to determine whether the rule of proof beyond a reasonable doubt has been disregarded. State v. Petro, 148 Ohio St., 473 (paragraph 11 of syllabus).

In Ohio it is improper to place an inference upon an inference in either a civil or criminal case. Sobolovitz v. Lubric Oil, 107 Ohio St., 204; State v. Petro, supra, page 499. Therefore, each inference must arise directly from a fact, or facts, in evidence before it is proper. Let

us take each fact, or set of facts, that is urged by the State as being incriminatory, and see what may be inferred therefrom. Then let us take the inferences and see if they are legally sufficient to prove guilt. We shall take the facts in the order and in the manner in which they are mentioned in Plaintiff-Appellee's brief in the Court of Appeals, at pages 80-90 under the heading: "The Verdict Was Sustained by Sufficient Evidence".

1. The folded jacket on the couch.

Defendant had a jacket on at 12:30 A. M., while asleep on the couch. At about 8:30 A. M. the same morning it was found neatly folded on the couch. At about 5:50 A. M., the defendant was seen not wearing the jacket.

From the foregoing it could be inferred that the sometime between 12:30 and 5:50 A. M. the defendant removed his jacket.

However, the prosecution seeks to further infer that, since the defendant removed it, he was fully conscious and alert when he did so and that, therefore, he was fully conscious and alert immediately before going up to his wife's bedroom. The latter inferences are the ones that are improper and unsupported by the direct evidence. There is not an iota of direct evidence as to the exact time the jacket was removed or as to defendant's condition at the time, or that defendant folded said jacket and placed it on the couch.

2. The missing T Shirt.

At about 12:30 A. M. the defendant was wearing a T shirt while asleep on the couch. At about 5:50 A. M. he was bare to the waist, and

the T shirt was allegedly never found (although one was found later on in the lake caught on a pier and it had no blood on it -- but let us disregard this for the moment).

From the foregoing it may be inferred that the T shirt was removed from his body some time between 12:30 and 5:50 A. M.

The prosecution then argues that from this it could be further inferred that the defendant himself removed his T shirt. They then seek to further infer from the inference that defendant removed it that he did so after the killing, that the defendant somehow destroyed the T shirt and that the reason he did so was that his wife's blood was upon it, that it got to be there while he was killing her. Even if the first inference is deemed to be justified, certainly the others are not supported by any independent evidence and are legally improper.

3. No struggle in room?

Plaintiff argues (p. 80 of their appellate court brief) that: "Other than the appearance of the victim as she lay on that bed, there was no sign of a struggle having taken place in that room with any intruder."

The uncontradicted evidence is that the victim's pajama tops were pulled up around her shoulders, one of her legs was entirely out of the pajama pants and the top of the pants was pulled down, her body was toward the bottom of the bed and her legs extended out, and she had a wound inside her mouth and her teeth were broken in such a way that the State's witness Adelson testified such was not caused by any blow from the outside but by something getting inside her mouth and doing the damage. (R. 1806). That foreign material was embedded under her finger nails

indicates that she fought and scratched her assailant. There can be no doubt that she struggled strenously with her attacker.

The only fair inference that could arise from the foregoing evidence is that the struggle she put up was confined to the bed. But just how this is supposed to point to her husband rather than to an intruder as the attacker is not clear. It would seem to be more consistent with the picture of her awaking from her sleep to discover an intruder in her room than with being struck during an argument with her husband. It is certainly unusual, to say the least, for a wife to argue from a prone position.

There is one item of evidence, however, that points directly away from the defendant as the attacker. And that evidence concerns the teeth and inside mouth wounds. A fair inference is that she bit her attacker. This, coupled with the admitted fact that the defendant bore no bite wounds, would point directly away from him as the attacker.

4. Victim's rings still on her fingers.

No valid inference can be drawn from this for the reason that there is nothing to show that the attacker even knew that she was wearing any rings, or that he had either the opportunity or the inclination to remove them if he did know. Some types of intruders would be interested, some not. It is even possible that the attacker tried to take them off and was unable to. At page 1745 Dr. Adelson testified that upon arrival of the body at the morgue the attendant there had to manipulate the rings to get them off.

Any attempt to infer anything from the mere presence of the rings upon her fingers leads immediately to guess and conjecture and no-

thing more.

5. No evidence of sexual attack.

From the mere evidence that one small swab of the vagina produced no sperm the prosecution seeks to infer that she was not sexually attacked. The sheet was not even tested.

The only permissible inference here, favorable to the prosecution, is that there was not a sexual attack that was successful to the point of complete culmination. There is no permissible inference that there was no intruder bent upon sexual attack, and certainly no inference that there was no intruder of any kind.

6. Victim's wrist watch.

The prosecution argues that: "The evidence clearly established that the victim's wrist watch had remained on her wrist for some time after the murder because the blood had dried and left an imprint of her wrist watch band (a bracelet band) on her wrist. This was the watch found in the defendant's den in the same location as was the green bag originally."

The bare fact in evidence is that some kind of an imprint, presumably of the watch band, was observed in the blood on her wrist. From this the prosecution seeks to infer: (1) that the watch was removed from her wrist after she was attacked, (2) that it was not done until after the blood had completely dried, and (3) that, therefore, the defendant is the only one who was present long enough to have done that. The latter two inferences are not warranted, and are based upon the first. The second inference, to-wit, that the blood was dry, is not only not supported by any

independent evidence, but is actually repulsed by a well known physical fact, to-wit, that blood will begin to congeal by clottive action within seconds after it is exposed to air, and that an object lifted from partially congealed blood will leave an imprint that will appear the same when the blood later becomes completely dry. Thus, to infer that the watch was removed very soon after the attack would probably be permissible. But by whom? Anything further along that line sufficient to involve the defendant could be reached only by placing inference upon inference.

The only possible direct inference from this evidence is that the watch was removed immediately after the blood started to congeal.

7. Bloody splotch on pillow.

From the outline of the splotch it is inferred that it was caused by a bloody object. From that inference it is inferred that it was the murder weapon.

As to the argument that the object must have lain there for a considerable time, the same things may be said as were said of the wrist watch band under 6. Any blood covered object will certainly leave a bloody outline when placed upon an absorbent surface such as a pillow, even though removed immediately thereafter. Likewise, the blood would begin to congeal almost immediately. All of which means that the object (if it was caused by an object at all) could just as well have been removed within a very short time after the murder, and by an outside intruder.

The only inference arising directly from the bloody splotch is that it "could" have been caused by a bloody object.

8. Blood on defendant's wrist watch.

There is evidence that there was a small amount of blood [illegible] on the crystal and the upper band of the defendant's watch. There is no showing as to whose blood it was, (it was type M, whereas, the victim's blood was type MS - R. 4781), and certainly no evidence as to whether it came from contact with the body of the victim or the killer (who was certainly bloody whether wounded or not), or another. Certainly a doctor dealing with injured patients, as the defendant, could get blood on his watch at any time.

The only permissible inference is that the watch could have gotten blood on it sometime between 12:30 A. M. and when found the next day in the green bag in the yard, and even that is stretching things a bit. Any further inference that the blood got there while it was still being worn by the defendant is wholly groundless and unwarranted.

9. The green bag.

To say the least the examination of the bag for blood was very incomplete and fragmentary. But for purpose of argument only let us assume that there was no blood showing on the inside lining. The prosecution seeks to infer from this that the blood on the watch was dry when the watch was put in the bag.

The only permissible inferences are either that the blood was congealed when placed in the bag so that it did not soak off sufficiently to show, or that the relatively small portions of the watch having blood on them (part of crystal and part of upper band) did not come into direct contact with the bag before the blood congealed. To choose one inference over the other would be to indulge in guess and conjecture. But then neither

one of the permissible inferences lead to the defendant as the perpetrator any more than to an outside intruder.

10. One bloody smudge on defendant's trousers, but no other blood.

Here is another arrow which points directly away from the defendant as the killer. It is inconceivable that the defendant could have stood beside the bed and hit his wife with repeated bloody blows without getting many spray spots of blood on some part or parts of his trousers. No such spots were present.

But what inferences can be drawn from the fact of the single small splotch later found on the knee of the trousers?

The only permissible inference to be drawn from the evidence is that the defendant got blood on the knew of the trousers at some time.

But as to just when, where, and how received, the record is completely silent, and no direct inferences arise. It could have been received from blood on the killer's person, or at the time of checking his wife's body after the crime, or from an injured patient at some time, because blood does not wash out. Any effort to make this evidence incriminating involves placing inference upon inference severalfold.

11. Absence of finger prints.

There is some evidence of a scarcity of finger prints and certain markings which were interpreted as having been made by a rough cloth being wiped over certain surfaces. Although this evidence is vague, fragmentary and disjointed and far from satisfactory, let us assume for purpose of argument that it could be inferred that someone endeavored to

remove fingerprints. Let us further infer (the second inference) from that time it was done by the killer. But that is no direct aid in determining that the defendant was the killer. It is just as logical, if not more so, to reason that a stranger with a criminal record whose fingerprints are on file would be more likely to remove fingerprints than a person whose fingerprints would be expected in the house.

Any line of reasoning leading to the defendant from the simple facts in evidence involves not only repeated inference upon inference, but guess and conjecture at its worst.

12. Bloodstains around the house.

The direct evidence was that there were spots on the floors about the house that "could" have been blood. But they also "could" have been from lead oxide, a common ingredient of paint, as well as other things, according to the same witness. Five such spots were analyzed and found to be blood, but they "could" have been animal blood as well as human. There was absolutely no evidence as to how long the blood had been there, its type, or anything whatsoever to connect said spots (whatever they were) with the murder in point of time.

From the foregoing even an inference that all the spots were, in fact, blood is scarcely justified. But even assuming that it is, to further infer, as the prosecution does, that (1) it was human blood, (2) that it got there following the killing, (3) that it was the victim's blood (as distinguished from a bitten or scratched attacker's blood), (4) and that the person dropping it was the defendant, is guess and conjecture at its vicious worst. Yet that is not new to the prosecution in this case.

The broadest inference possible is that blood got on various floors of the house at some time during the house's long existence -- but was it animal or human, and when and how did it get there?

13. Water under defendant's wrist watch crystal.

From the direct evidence that some small amount of water was found under the crystal the prosecution infers that it came to be there while defendant was wearing it. This inference may be justified. But what kind of water was it -- lake water or tap water -- and when and how did it get there?

Without any further evidence whatsoever on the subject the prosecution seeks to infer from the first inference that it was lake water, further that it got there after the murder and not before, that it got there while he was wearing it, and that it got there when he went into the lake to wash off blood that was never shown to be on him in the first place.

The only justifiable inference might be that some kind of water got under there some time while he was wearing it. But that is all.

14. The dog, Koko, was not heard to bark.

The only direct evidence, of course, is that no one in the neighborhood heard a dog bark during the morning hours of July 4, 1954. Even assuming that the dog was in or near the house and was of the watch dog type and customarily barked when people approached, none of which was supported by any evidence, the only thing that can properly be done with the negative evidence that no one sleeping in adjoining houses heard the dog bark, is to infer that it is possible that the dog, in fact, did not bark, or that he did bark and was not heard by any neighbor.

But as in cases of testimony that a locomotive whistle was not heard to blow, the witness must be shown to have been listening and close enough to hear. There is no such evidence in the instant case, and a dog is under no statutory duty to bark.

15. Burglary picture confused.

The prosecution gratuitously assumes that the burglary was a fake, and then argues from there. But since when does every burglar, especially one in a hurry and with murder on his conscience, act rationally and in any set pattern. Any conclusion that the burglary was a fake must necessarily be reached by inference, and to further infer that it was defendant who did it is to place inference upon inference. Another type of intruder, other than a burglar, could just as well have arranged things to avert suspicion from himself. But the important point is that there is no direct evidence that the burglary was faked, and certainly none that the defendant had anything whatsoever to do with it.

B. SUMMARY

The fair inferences arising directly from the State's own evidence in this case can be no more than the following:

1. The defendant removed his jacket and placed it on the couch some time between 12:30 and 5:50 A. M. (But exactly when and under what circumstances these are not disclosed.)

2. The defendant's T. shirt was removed some time between 12:30 and 5:50 A. M. (But when, by whom, and under what circumstances?)

3. The struggle between Marilyn and the attacker was con-

fined to the bed. (This in no way points to guilt of defendant).

4. The attacker did not remove her rings. (No fair inference is permissible from this.)

5. There was no sexual attack involving penetration and emission.

6. The victim's wrist watch was removed from her wrist immediately after the blood started to congeal. (But exactly when?)

7. Some object lay on the pillow long enough to leave a bloody blotch. (But what was the object, was it the murder weapon, and just how long was it there?)

8. Defendant's wrist watch could have gotten blood on it some time between the time between 12:30 A. M. and the time it was found in the green bag. (But when, where, how, and whose blood was it?)

9. The defendant's watch was in such position, or condition, that it left no blood on the inside of the bag.

10. Defendant got one small splotch of blood on the right knee of his trousers some time. (But when, where, how, and whose blood was it?)

11. Someone endeavored to remove their fingerprints in the house. (But who, when, and why?)

12. Various traces of some kind of blood got on the various floors of the house some time during the years of its occupancy.

13. Water got under defendant's watch crystal while he was wearing it. (But when, where and how -- and what kind of water was it?)

14. It is possible the dog did not bark. (But where was the dog,

and did he bark and wasn't heard?)

Can anyone say that the foregoing inferences, when taken jointly are irreconcilable with the defendant's innocence? Obviously not, for whether considered jointly or severally, they could all be true and the defendant still be innocent. And on that state of the record the State has failed to prove a case as a matter of law.

The law on the subject is clearly stated in 15 Ohio Jurisprudence 2d, pages 630-631, Section 462:

> "However, when circumstantial evidence alone is relied upon for conviction it must be of such a character that it is wholly inconsistent with any other conclusion than that the party charged is guilty of the crime. The circumstances themselves must be clearly proved, and must all point in the same direction, and together must be irreconcilable with any other reasonable hypothesis. All circumstances must be consistent and all, taken together, must point surely and unerringly to the guilt of the defendant, and must be inconsistent with any other rational supposition than that the defendant is guilty of the offense charged. The particular facts and circumstances when taken together must be so convincing as to be irreconcilable with the innocence of the accused or, as said by some authorities, as to admit of no other hypothesis than the guilt of accused. Not every fact and circumstance in a case needs to be proved beyond a reasonable doubt, but every essential link in the chain of circumstances necessary to prove each or any of the charges, as claimed by the state, must be proved beyond a reasonable doubt. The inference which they compel should not be that the defendant might have done the deed, but that he actually did it. If for any reason the facts relied on for conviction in a criminal prosecution are not consistent each with the other, and are not all consistent with the hypothesis of guilt and no other hypothesis, the state must fail."

In the fifth headnote of the case of Locicero v. State, [illegible]

Ohio Law Abs., 109, the holding of the court is accurately stated:

> "In the prosecution of a criminal case there must be either direct or positive proof of guilt or facts established from which deductions may be made which establish guilt, but such deductions cannot rest on probabilities."

At the risk of being facetious let us compare the proof required in a reported civil case and this case. We can surely agree that clearer proof is required in a criminal case than in a civil case. And yet in the famous rat case of Gedra v. Dallmer Co., 153 Ohio St., 258, this Court unanimously held in paragraph 2 of the syllabus:

> "2. In a negligence action, it is not sufficient for plaintiff to prove that the negligence of defendant might have caused an injury to plaintiff but, if the injury complained of might well have resulted from any one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible."

To paraphrase this holding and apply it to a criminal case: "in a criminal case it is not sufficient for the prosecution to prove that the defendant might have been the perpetrator of the crime, but if the crime complained of might well have been done by another, it is incumbent upon the state to produce evidence which will exclude the latter possibility."

It is clear that the State by its evidence did not exclude the possibility that an intruder committed the attack in the instant case.

C. FACTS INCONSISTENT WITH GUILT

It was incumbent upon the State to p[illegible]

would exclude the effectiveness of certain definite facts and circumstances for which the defendant was not responsible and which pointed clearly to his innocence.

The principle of law is stated in the syllabus of the Gedra case, supra, in the latter part of the second paragraph of the syllabus in this language:

> "* * *it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible."

The Gedra case was a civil action -- only dollars were involved. Here a man's life and liberty are at stake. The following are some of the established facts which the State totally and completely failed to explain or to produce any evidence to exclude the effectiveness of these facts and circumstances for which the defendant was legally not responsible and which points almost unerringly to the innocence of the appellant.

(1) The deceased was engaged in a violent struggle immediately preceding her death. Imbedded and buried under her fingernails were foreign articles. One fingernail was practically torn off. The conclusion is inescapable that the decedent was violently scratching her assailant. Appellant was lightly clothed. Whether he had on a T shirt or didn't there would certainly have been scratches about his body. There were no scratches on him.

(2) Blood was splattered over the bed, the floor and the

walls of the room. With the exception of a splotch on the knee of Appellant's trousers there was no blood whatsoever on the trousers, shoes, belt or wearing apparel of the Appellant.

(3) There were wool fibers, of different colors, imbedded under the nails of the deceased, as well as bits of leather. Such fibers were found not to be present in the clothing of the defendant or in any clothing in his home.

(4) Lacerations and abrasions found inside of the deceased's mouth. A tooth was broken off leaving a jagged edge. There were injuries to other teeth. The State's expert testified that the injuries inside the mouth including the broken teeth did not come from any external application of force, but came from some object thrust into the mouth of the deceased. He indicated that it was the finger probably of the assailant. If this be true then the assailant's finger would certainly have been bitten or scratched. There were no scratches, cuts or injuries about the hand or fingers of the defendant, or elsewhere on his body.

(5) A chip of tooth was found under the bed of Mrs. Sheppard. It was not a part of any of her teeth. It was not a part of the tooth of her husband, the defendant. Whose tooth or chip of tooth was it? A piece of leather or leatherette was found in the bedroom. This material was carefully compared by the police to defendant's belt, wallet, shoes and all other leather articles in the house. These bits of leather or leatherette were not the defendant's, nor did they come from any of his wearing apparel or any object in the house. Did they come from a leather jacket of deceased's assailant? That is a proper inference. However,

the defendant did not wear or have a leather jacket.

(6) A cigarette butt was found in the toilet upstairs. It had not been smoked by Mrs. Sheppard the deceased. The defendant did not smoke cigarettes. Whose cigarette was it? It was neither the deceased's or the defendant's. Two reputable citizens Leo Scawitki and Richard Knitter were in the vicinity of defendant's home in the early morning of July 4th. They were strangers to the defendant. They reported to the police that they had seen a bushy haired person very similar to the person described by the defendant, in the vicinity of the murder premises. These two men volunteered their information to the police before ever seeing or hearing or knowing about Sam Sheppard, the defendant. That testimony was undisputed in the slightest. The man they saw may well have been the man who committed the murder. He was there, at or near the premises in the early morning and Mrs. Sheppard was murdered that morning sometime between 12:30 A. M. and 5:30 A. M.

The direct evidence of the two witnesses above mentioned was produced by the defendant. The circumstances above set out were elicited from the witnesses for the State. Neither the direct evidence, nor the circumstances above outlined were denied, refuted, explained or in any other way attacked or even questioned by the State. Such facts and such circumstances so established present a situation where as a matter of law the conclusion must be that the State failed to present or adduce evidence to convict beyond a reasonable doubt. Here are facts and circumstances, unquestioned by the State, that are thoroughly consistent with innocence. 15 Ohio Jurisprudence 2d, page 631, Section 462, lays down

this principle:

> "All circumstances must be consistent and all, taken together, must point surely and unerringly to the guilt of the defendant, and must be inconsistent with any other rational supposition than that the defendant is guilty of the offense charged."

The evidence does not meet this test in the instant case; therefore, it is legally insufficient under the laws of Ohio.

D. PROOF OF SECOND DEGREE -- LEGALLY INSUFFICIENT.

The defendant was charged with first degree murder, was found guilty of second degree murder, and the trial court also charged upon first degree manslaughter. Therefore, under the court's charge and the law the jury had to find beyond a reasonable doubt not only that Sam Sheppard killed his wife, but that he had the intent to kill her as distinguished from killing her in hot blood. It must be remembered that the state's theory and argument was that he got into an argument with his wife, lost his temper, and killed her. Certainly the beating the victim received is just as consistent, and probably more consistent, with hot blood than with cold intent. Where then, is the evidence from which the jury could have found beyond a reasonable doubt that the defendant had the required legal intent to kill?

The law on the subject is clearly expressed in 15 Ohio Jurisprudence 2d, 641, Section 470:

> "The state, in criminal cases, is held to a

strict degree of proof. To warrant a conviction the state must not only establish its case beyond a reasonable doubt, but also each element of the offense beyond a reasonable doubt."

It is one thing to say that a jury may infer intent to kill in cold blood from the facts and circumstances in evidence in the case, but what are those facts and circumstances in the instant case? Surely, if they exist, they are capable of expression. And yet, what are they?

If the husband was the killer, which we emphatically deny, the evidence, to say the least is equally consistent with hot blood as with cold blood. And any effort to choose the greater over the lesser can involve nothing better than guess and conjecture. Evidence which leaves the proof in equipoise is clearly not sufficient; even proof making the greater more probable than the lesser is not sufficient in a criminal case. The proof of intent to kill in cold blood must be beyond a reasonable doubt, and this involves proof to a moral certainty. Such proof against this defendant does not exist.

For these reasons the evidence is legally insufficient to prove beyond a reasonable doubt an intent to kill in cold blood, and for that reason is legally insufficient to support the verdict of the jury and sentence of the Court.

II. ERRORS IN CHARGE OF COURT

A. Charge on Motive.

Following is the court's entire charge on the subject of motive:

> "The law does not require the State to prove motive in this case. The presence or absence of motive shown by the evidence may be considered by you in determining intent, or its presence or absence in the mind of the defendant Sam H. Sheppard, so that if you find beyond a reasonable doubt that the defendant is guilty of any offense under these instructions, then you should find him guilty whether or not a motive has been established."

The jury was charged that motive was to be considered for one purpose only, to-wit, to determine the issue of "intent" to kill or lack thereof. And this was to be done by the jury only after they had determined the guilt of the accused. The necessary effect of this charge was to inform the jury that the existence of a motive, or absence thereof, was of no importance in their determination of the issue of whether or not the accused was guilty.

In this admittedly circumstantial evidence case this was error and it no doubt prejudiced the defendant. It meant that the jury was free to discuss and decide the all important question of the accused's guilt or innocence of the killing without once considering the matter of motive.

The law of Ohio is that: "the presence or absence of motive is a circumstance which should be weighed by the jury in deliberating upon the guilt of the accused". 15 Ohio Jurisprudence 2d, 268, Sec. 30 - Motive. Manifestly there is a broad difference between determining "the guilt of the accused" and determining the degree of that guilt.

The charge of the Gourt did not permit the jury to do its duty [illegible] all important phase of the case, and permitted the jury to find de-

fendant guilty of the killing without first considering and weighing the presence or absence of motive. This was an error of commission of grossest proportions.

B. Charge on General Conduct and Reputation Evidence.

Evidence both favorable and unfavorable to the accused was introduced on this subject. The State introduced such evidence as part of their case in chief. No former acts of violence were shown. It will be noted that in its charge the trial court treated such evidence generally and without regard to where in the trial it was presented or for what limited purpose it was presented.

The Court charged the jury as follows, as shown at pages 7006-7007 of the record:

> "Some evidence has been given in this case concerning the claimed general conduct and reputation of the defendant and it is proper to present such evidence for your consideration. It is not admitted because it furnishes proof of guilt or innocence but because it is a matter of common knowledge that people of good character and reputation do not generally commit serious or major crimes. Such evidence, if believed, may be of some help to you in your consideration of the total evidence and the situation as a whole. The court wishes to caution you, however, that good character and a good reputation will not avail any person charged with a crime against proof of guilt beyond a reasonable doubt."

The accused specifically excepted to the foregoing and requested the following charge which the court refused (R 7014):

"The defendant takes exception to that part of the charge, and requests the Court to charge that
'If evidence of reputation and character shall be considered by the jury in connection with all the other evidence in the case, and if the evidence of good reputation and character, taken in consideration with the other evidence, raises a reasonable doubt of guilt, the defendant may not be found guilty.'

The Court overrules that."

1. Too Broad and One-Sided.

The probable effect of the court's charge as given and its refusal to charge further, was to inform the jury that evidence of the accused's general conduct and reputation could be used against him, but not in his favor. This is not the law.

It may also be said that the court instructed the jury to consider the evidence of character and reputation without telling them what use they were to make of it.

Another reason the court erred in charging so generally on the subject and without limitation, is that the so-called general conduct evidence introduced during the state's case in chief showed absolutely no propensity toward any act of violence. In all the cases cited on the subject in 15 Ohio Jurisprudence 2d, page 772, Section 6, "Evidence of Character or Reputation", the type of unfavorable evidence admitted in the State's case in chief was the kind tending to prove propensity, to-wit, other violent acts in cases of assault and battery, and prior dishonest acts in fraud and deceit crimes.

But in the case at bar previous acts of philandering and falsi-

fication were used by the State to help prove a case of murder, and the jury was charged that: "it is a matter of common knowledge that people of good character and reputation do not generally commit serious or major crimes". This leaves the unmistakable inference and innuendo that people of less than good character and reputation generally do commit serious and major crimes -- otherwise why mention it. This was prejudicial to the accused.

2. Jury Denied Permission to Consider Evidence of Good Character in Determining Guilt or Innocence.

The glaring error of commission is the following part of the charge:

> "It (evidence and general conduct and reputation) is not admitted because it furnishes proof of guilt or innocence".

The Court entirely divorced good character and reputation from proof of guilt, and instructed the jury to do likewise. They must not be divorced, for the former must be considered in reaching a conclusion upon the latter. The defense's request to charge contains a correct statement of the law, and the court committed prejudicial error in refusing to give it.

The law of Ohio is perhaps best expressed in the case of State v. Hare, 87 Ohio St., 204. In that case the reporting judge, after citing with approval the cases of Harrington v. State, 19 Ohio St., 264, and Stewart v. State, 22 Ohio St., 477, said at page 213:

> "The author has given the matter full consi-

deration, and emphatically declares that evidence of good character must always be considered not alone, but in connection with all the evidence bearing upon the guilt or innocence of the accused."

The following statement of the law on the subject is found in 15 Ohio Jurisprudence 2d, Section 462, at pages 628 and 629:

> "Good character does not alone establish innocence. It is merely a fact or circumstance bearing upon the defendant's guilt, or the grade of the offense, where the crime, consists of various grades. The weight which is to be given to such evidence is a question for the jury under all the circumstances involved. * * * Sometimes evidence of good character is of great weight and importance in repelling a criminal charge. * * * Its weight is not confined to doubtful cases, however; it may of itself create a doubt.
>
> "* * *But if, after considering all the evidence, including that of good character, the jury entertain a reasonable doubt as to the defendant's guilt, they must give him the benefit of the doubt and return a verdict of not guilty."

The Court's charge in the instant case had the effect of telling the jury to consider such evidence in the abstract only and unrelated to the other evidence; the requested charge stating the correct and full rule of law on the subject was refused.

3. Charge Grossly Deficient.

The gross deficiency in the court's general charge, on this subject, as distinguished from the foregoing error of commission, and the absolute necessity of giving the additional charge which was refused, is

best shown by the statements made in the case of Watha v. State, 14 O. C. C. (N. S.) 145, wherein the court said, at pages 150-151:

> "The testimony shows that testimony of this character was submitted to the jury. On page 1104 of the record, the court, in instructing the jury on this subject, said:
>
> " ' The defendant introduced evidence tending to show his good character for peace and quietness. If, in the present case, the good character of the defendant for peace and quietness is proven to your satisfaction, then such fact should be kept in view by you in all your deliberations, and it is to be considered by you in connection with all the other facts in the case; and if, after the consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt, it is your duty to acquit him. But if the evidence convinces you, beyond a reasonable doubt, of defendant's guilt, you must so find, notwithstanding his good character.'
>
> * * * * * * *
>
> "And while we think that this instruction to the jury, if standing alone and not qualified by any other instruction given to the jury upon this subject, either before or after it was so given, would perhaps be erroneous, an examination of the record shows that the following special charge was given by the court to the jury at the request of the plaintiff in error, before argument:
>
> "Request No. 20. 'If the evidence of good reputation, taken in connection with the other evidence, raises in your minds a reasonable doubt of Watha's guilt of the murder charge made in the indictment, you can not find him guilty of such murder charge.' "

The court's charge in the instant case, and its refusal to charge as requested, falls far short of the legal requirements on the subject as expressed in the foregoing authorities. It constituted prejudicial

error and requires reversal.

C. Charge on Circumstantial Evidence.

1. In General.

The meat of the Court's charge on this subject is found at pages 7005-7006 of the record, and is as follows:

> "It is necessary that you keep in mind, and you are so instructed, that where circumstantial evidence is adduced it, together with all other evidence, must convince you on the issue involved beyond a reasonable doubt and that where circumstantial evidence alone is relied upon in the proof of any element essential to a finding of guilt such evidence, together with any and all other evidence in the case, and with all the facts and circumstances of the case as found by you must be such as to convince you beyond a reasonable doubt and be consistent only with the theory of guilt and inconsistent with any theory of innocence. If evidence is equally consistent with the theory of innocence as it is with the theory of guilt it is to be resolved in favor of the theory of innocence."

The court's charge is neither clear nor complete.

It is not clear for the reason that, when speaking of the requisites of proof by circumstantial evidence, the court tells the jury, in effect, that they can buttress and support the circumstantial evidence by "other facts and circumstances of the case as found by you" without defining or limiting how such other facts and circumstances are first to be found. The charge does not prohibit the finding of facts and circumstances by inference and conjecture and then using them

to support, and thereby make sufficient, the circumstantial evidence. The court says, in part: "where Circumstantial evidence alone is relied upon in the proof of any element essential to a finding of guilt such evidence, together with any and all other evidence in the case, and with all the facts and circumstances of the case as found by you must be such as to convince you beyond a reasonable doubt and consistent only with the theory of guilt and inconsistent with any theory of innocence".

Then, after the foregoing, the court commits a most grievous error by laying down a preponderance test:

> "If evidence is equally consistent with the theory of innocence as it is with the theory of guilt it is to be resolved in favor of the theory of innocence."

The necessary effect of what the court says is that if the evidence is in equipoise as to guilt or innocence, the jury must find him innocent. This is the civil rule of preponderance.

The correct criminal rule is not that the evidence must be equally consistent with innocence as with guilt, to find innocence, but rather that if it is possible to reconcile the facts in evidence with innocence, he must be found innocent. 15 Ohio Jurisprudence 2d, pp. 766-768, Sec.599--Circumstantial Evidence; State v. Butler, 57 Abs. 385, 386-387; Fess, Ohio Instructions to Juries, 8.15, 86.23, 87.16.

The charge of the court was specifically excepted to, and the accused asked for the following additional instruction which was refused (R. 7015):

> "'Where reliance for conviction is placed on circumstantial evidence, the jury is instructed that the facts and circumstances upon which the theory of guilt is based should be shown beyond a reasonable doubt, and when taken together must be so convincing as to be irreconcilable with innocence and admit of no other hypothesis than guilt.'
>
> "THE COURT: Exceptions overruled, and exceptions noted to the defendant."

This instruction is taken almost verbatim from the rule laid down in the case of Carter v. State, 4 Ohio App., 193, 196, and is supported by the decisions of State v. Knapp, 50 Bull. 28, and State v. Mueller, 54 Bull. 94, and recognized with approval in 15 Ohio Jurisprudence 2d, p.767, Sec. 599.

In the case of City of Columbus v. Treadwell, 46 Ohio Law Abs., 367, Judge Hornbeck, speaking for the Court of Appeals which reversed the conviction, said at page 374:

> "The same rule as to the quantum of proof upon circumstantial evidence attends in Ohio. First syllabus of Carter v. State, 4 Oh Ap 193:
>
> > " 'Where reliance for conviction is placed on circumstantial evidence, the jury should be instructed that the facts and circumstances upon which the theory of guilt is based should be shown beyond a reasonable doubt, and when taken together must be so convincing as to be irreconcilable with the claim of innocence and admit of no other hypothesis than the guilt of the accused.' "

Not only was the requested charge a proper one, but it was necessary to clarify and make complete the general charge on the same

general subject. The refusal to give it constituted prejudicial error.

Even if the first part of the court's charge on this subject of quantum of evidence should be considered proper, yet that part thereof erroneously incorporating the equipoise doctrine requires reversal. As was held in the syllabus of State v. Hauser, 101 Ohio St., 404:

> "2. Where two rules as to the quantum of evidence required of the accused are given to the jury, the one correct and the other erroneous, the court will not presume that the jury followed the correct rule to the exclusion of the incorrect rule."

Refusal to give a proper charge is prejudicial error, and failure to charge further after attention is called by even a technically erroneous request, has been held reversible error. In 15 Ohio Jurisprudence 2d, at pages 744-746, the following statement of the subject is found:

> "578. Refusal to Give Requested Instructions; Request for Incorrect or Inapplicable Instructions. -- It is prejudicial error in a criminal case to refuse to give a requested charge which is pertinent to the case, states the law correctly, and is not covered by the general charge * * * This is true though the request is made at the close of the general charge.
>
> * * * * * * * * * * *
>
> "It (the trial court) is not bound to ignore a requested instruction because it is not, strictly speaking, an accurate statement of the law involved. The court may properly treat it as a suggestion for a proper charge on the theory which counsel for defense entertains. In fact, it has been said not to be sufficient in all cases for the court merely to refuse the charge because it does not correctly

> state the law. In a case of magnitude and difficulty, some instruction on the point should be given."

Thus even if the requested charge on the subject should be considered technically inaccurate, which we do not believe it is, yet it called the trial court's attention to the insufficiency of his general charge on the point and the court should have charged further in order to clarify and complete the general charge as given.

2. The "George Washington" Example.

To say the least the court in its charge gave the jury a most unfortunate choice of an example of circumstantial evidence. The example used bore too close a relation to some of the facts of this case, and could easily have misled the jury by oversimplifying the necessities of proof in their minds. At pages 7004-7005 of the record the court charged the jury as follows:

> "Illustrating now what would be direct evidence, let us assume that I had on a certain day a very fine cherry tree in my yard. The family happens to be away on that day and when I return about 5 o'clock in the evening I find my cherry tree chopped down. I proceed to investigate and first make inquiry of my next door neighbor Mr. Smith. I ask him if he saw any stranger doing anything in my yard on that day. He replies: 'Yes, I saw George Washington chop it down with an ax.' That would constitute direct evidence because Mr. Smith is relying on his own sense of sight and states what he himself saw with his own eyes. For that reason he is able to give direct evidence that George Washington chopped down that cherry tree.

> "Let us now consider a case of Circumstantial Evidence in the same connection. Assume that on inquiry of Mr. Smith, my neighbor, he, in answer to my question, says that he did not see anyone chopping down my tree. I then ask him: 'Did you see anyone about my place today?' He replies: 'Yes, I saw George Washington walk along your driveway from the yard to the street with an ax on his shoulder.' Here is evidence of a fact which does not directly prove who chopped down my cherry tree but which permits a natural and fair inference that George Washington was in my yard with an ax combined with the fact that my tree was chopped down would constitute very definitely a piece of circumstantial evidence to be weighed in the consideration of a charge against George involving the act of chopping down that tree."

Regardless of the latter generalized part of the charge, which would mean little to a layman at best, the example given, to-wit, proof of guilt by mere presence near the scene and possession of the means of commission, could well have deceived the jury. The example used is deceptive because of its oversimplified similarity to the state's theory in the instant case, to-wit, proof of guilt from the mere circumstances of Sam Sheppard's presence in the house at the time of killing and that the murder weapon "could" have been a surgical instrument. The same basic issue was involved in the example as in the case being tried, to-wit, the identity of the person performing the criminal act. The jury was told, in effect, that George Washington could be found guilty solely because he was nearby and possessed a means of commission.

The types of approved examples customarily given are those involving the conclusion of snowfall or rainfall from the circumstantial evidence of going to bed with the ground clear or dry and waking up in the

morning with the ground being covered with snow or being wet. Such examples are approved because they are accurate and yet innocuous, because they bear no similarity to the facts or issues in the case being tried. However, that is not true in the instant case. And it is safe to say that a snow or rain example would be deceptive and not properly given where the issue of snow or rain was the principal part of the state's circumstantial evidence case.

The example used, when added to the court's confused and incomplete charge on the whole general subject, constitutes prejudicial error.

III. DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS

The defendant was denied his constitutional rights guaranteed by Article I, Section 10 of the Constitution of the state of Ohio and the due process amendment to the Constitution of the United States, the Fourteenth Amendment.

The Section of the Ohio Constitution above referred to provides in part as follows:

> "* * * in any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; * * *"

Volume XII of the Bill of Exceptions bottom of page 7023-24 discloses the following:

> "(Thereupon, on this same evening, the following was dictated into the record by the Court:)

> of any kind from the jury, nor having any evidence that their deliberations were not progressing satisfactorily, he, nevertheless, at the suggestion of counsel for the defense, called all counsel together in the early evening, and after discussion of the situation, indicated that he would, unless some report came by 10:00 or 10:30 p. m., have the Bailiff carry to the jury an inquiry from the Court. At about 10:00 p. m. this was done. The inquiry that would be made had been made known to all counsel. The inquiry to the jurors was verbal and was as follows:
>
> " 'Have you arrived at a verdict? If not, is there a probability that you can arrive at one if you deliberate a while longer either this evening or tomorrow? If so, which would you prefer?'
>
> "The Bailiff knocked at the door and propounded the questions to the juror who responded. The juror closed the door and in a few moments returned and stated that the jury had not arrived at a verdict, but that the jury was very close to agreement and would prefer to retire for the night and return the next morning for deliberation. This was communicated to all counsel in chambers and preparations made to have the jury retire for the night."

It might be observed that rather than being close to agreement the jury reconvened the next morning and continued to deliberate until 4:33 P. M. of the next day, December 21, 1954. It should be further noted that something had occurred, or proceedings had in the trial were not in the presence of the defendant, or the Court Reporter, but that the Court itself dictated from its own recollections what had occurred.

At any rate matters of vital importance to the defendant were discussed in his absence. He may have been available in the Court room or he may have been in Jail. The Court did not state in its dictated recollection where the defendant was, but from what the Court did dictate

he was not in chambers with counsel and the Court when certain proceedings were had and certain communications to the jury were discussed. The public likewise was not permitted to know what went on during this phase of the case.

It certainly was of vital importance to the defendant that he know what the Court proposed to do relative to the jury and what communications he proposed to send to the jury by his bailiff. This whole procedure should have occurred in open Court in the presence of the defendant and in the presence of the public. Whatever communication that is said was given to the bailiff and what communication the bailiff gave to the jury is unknown, but had the jury been brought into its box then a record would have been made. The important point is that by the Court's own words certain communications were prepared to be sent to the jury while Court and counsel were in chambers and in the absence of the defendant.

In an early case being that of Kirk v. State of Ohio, 14 Ohio Reports, 511, the syllabus states the law of the case in this language:

> "A Court or Judge has no right to communicate with the Jury respecting the charge of the Court, after the Jury has retired, except publicly, and in the presence of the accused. To do so is good cause for a new trial."

Though the matter discussed in the absence of the defendant in the Kirk case had to do with a part of the charge or instructions, yet the principle of the law is the same. The Court should not have any communications with the jury or discuss any phase of the case in the absence

of the defendant or the public. The Court at page 513 states the broad general principle in this language:

> "The Court charged with his trial, have no right to hold any communication with the Jury touching his case, except in the presence of the prisoner, and before the public."

At page 512 of the Opinion after stating the constitutional provision relative to the rights of an accused in a trial the Court says:

> "It is his right to have a public trial, that he shall meet the witnesses face to face, before the public; and that all that can be said or preferred against him, and all that can be said or urged in his favor, shall be in the hearing and presence of the public."

The constitutional provision emphasizes two basic features of a criminal trial. One the right of the accused and the other the rights of the public. The public is interested in the trial of causes. If courts infringe without sound reason upon the rights of the public to know what transpires in a trial we are then denied a basic principle of peoples government, that is that the public shall know what transpires in the court room. The rights of the accused are of course sacred.

In the instance at bar the Court denied to the public information to which it was entitled to have and denied to the defendant his right under the Constitution to be present and in person when phases of the trial are being discussed. What transpired between the bailiff and the jury nobody knows excepting the bailiff and one juror. The Court obviously did not hear the conversation between the bailiff and the juror. Had the

defendant been present and in open Court he may well have urged that since the jury was close to an agreement that it continue to deliberate at least another half or three-quarters of an hour. The jury may have reached a verdict that night far different than it did after hours and hours of further discussion the next day. This, of course, is speculation. However, under the Constitutional provision all matters of speculation should be reduced to a minimum by a Presiding Judge at a trial.

State of Ohio v. Delzoppo, 86 Ohio App., 381, states the law in the syllabus as follows:

> "1. The defendant in a criminal action has a constitutional right to a public trial and to be present at every phase of it.
>
> "2. The right of one accused of crime to a public trial and to be present at it can not be waived by his counsel.
>
> "3. In a criminal trial, the accused being in the court room awaiting the deliberations of the jury on its verdict, it is prejudicial error for the court and both counsel in an adjacent room and in the absence of the accused to discuss and prepare in writing and send to the jury an answer to a question of law submitted by it to the court."

The Court's own dictation in the record of what occurred discloses that there was a discussion of some phase of the case in chambers between the Court and counsel and the defendant was not present. Where he was the record does not disclose, but I assume that he was in the court room and readily available. If he was in Jail then the error becomes more pronounced as he was forcibly deprived of a constitutional

right that was his.

At page 384 of the Delzoppo case is the following from the Opinion:

> "This being a violation of the accused's positive constitutional right to a public trial and to be present at it, his counsel could not waive it, and the fact that his counsel were in the presence of the court and participated in what was done did not cure the error--so said the court in both the Jones and Grisafulli cases."

Jones v. The State of Ohio, 26 Ohio St., 208, was decided per curiam in this language, pages 209 and 210:

> "We are unanimously of opinion, that on the trial of a felony it is error to proceed, at any stage of the trial, during the enforced absence of the accused, save only in the matter of the secret deliberations of the jury, and perhaps in the hearing of motions after verdict and before judgment.
>
> "It was the right of the plaintiff in error to be present at each and every instruction given to the jury as to the law of the case. This right was denied to him by reason of his imprisonment under the order of the court; and without inquiry as to the correctness of the instruction so given in his absence, it will be presumed that he was prejudiced thereby.
>
> "Nor was the irregularity cured by the presence of his counsel at the time the additional instruction was given, and his failure to make objections. The right of the accused to be present on the trial of such case can not be waived by counsel."

As late as the case of State v. Grisafulli, 135 Ohio St., 87, the court in its Opinion at page 91 approves Rose v. State, 20 Ohio, 31, 33,

by quoting with approval from that case as follows:

> "We conceive it to be the right of an accused person to be present during the trial of his case, and at the return of the verdict, and we think that when deprived of these privileges by being imprisoned in a jail, or in any other improper manner, the verdict returned against him should not be followed by judgment or sentence of the court, but a new trial should be ordered if requested."

The right of the accused to be present at all times and during all phases of the case, is also required by common law as well as by the Constitution. A concise statement of the law on the subject is contained in 14 American Jurisprudence, 898-900:

> "A principle that pervades the entire law of criminal procedure is that after an indictment is found, nothing shall be done except in the presence of the prisoner or his counsel, except in certain cases of misdemeanors. At common law and under the decisions of many courts it is the right of the prisoner in a criminal case to be present throughout the entire trial from the commencement of the selection of the jury until the verdict is rendered and jury discharged. Constitution or secured by statutes, and a denial thereof is good cause for reversing a judgment against a defendant.
>
> * * * * * * *
>
> "To be present, it is not sufficient that the defendant be within the walls of the courthouse; he should be present where the trial is conducted, so that he may see and be seen, hear and be heard. * * *
>
> "The right to be present extends to every part of the trial proper. The defendant should be present on arraignment in felony cases, when

> evidence is given, when the jury is charged, when the court communicates with the jury in answering questions by them, when the jury receives further instructions," etc.

In Ohio it has been held that the accused must be present when the jury is called out to report its progress. Bennett v. State, 10 C. C. 84, 4 C. D. 129. The Court there based its ruling upon the Constitution and the cases of Jones v. State, supra, and Cantwell v. State, 18 Ohio St., 477. The relevant headnotes in the Bennett case are:

> "2. On the trial of a felony the accused has the right to be present in court, when any proceeding, of whatever nature, except the secret deliberations of the jury, are taken in his case.
>
> "3. The accused is entitled to have the deliberations of the jury continue undisturbed and uninterfered with, and it is error for the judge, during the enforced absence of the accused, to hold a conversation with the jury which might influence their verdict, and prevent the defendant from having a fair trial in the case.
>
> "4. The presumption of law is that where error has intervened in a criminal case, it is prejudicial to the defendant."

As is shown previously, the error of the trial court in the instant case was twofold: (1) it communicated with the jury privately through the bailiff, and (2) it had the jury report its progress in the absence of the accused.

IV. CONCLUSION

Constitutional questions, under both the Ohio and United States Constitution, exist in this case which require the attention of this Court and reversal of the judgment.

The rule requiring proof of each and every issue beyond a reasonable doubt has been disregarded, and this Court is duty bound to look to the record on that subject and take the necessary corrective action.

Errors prejudicial to the rights of the accused have intervened, and the accused has not had a fair and impartial trial.

Respectfully submitted,

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