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10-15-1955

Appendix to Brief of Appellant: Motions for Leave to Appeal, Opinions and Journal Entries of the Court of Appeals

William J. Corrigan
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Louis Hoffner was wrongfully convicted in the Supreme Court of New York on January 16, 1941, of first degree murder and sentenced to prison for life. On November 21, 1952, he was exonerated and released. The New York State Legislature passed an enabling Act to permit him to sue for false imprisonment. On June 17, 1955, the State Court of Claims awarded him $112,291.00. Judge Fred A. Young, in announcing the award, said in part:

> "How can a man be repaid who has been branded a murderer and whose one hope is an early death to release him from the sentence erroneously passed on him? For this any award is bound to be a mere token."

There are so many cases throughout the civilized world where innocent men have been convicted that it would require volumes to adequately cover them. We have selected the foregoing outstanding works and cases to show that innocent men are convicted and that a reviewing court has the obligation to examine the evidence impartially, especially in a case of circumstantial evidence, and not seek, as the court did in this case, to find some evidence that could be the basis for a jury verdict and because a verdict was returned by the jury, to dismiss the appeal.

Respectfully submitted,

WILLIAM J. CORRIGAN,
ARTHUR E. PETERSILGE,
FRED W. GARMONE,
Attorneys for Appellant.

FILED

...the Supreme Court of Ohio

APPEALS FROM
...THE COURT OF APPEALS OF CUYAHOGA COUNTY

...OF OHIO,
Plaintiff-Appellee,
vs.
...UEL H. SHEPPARD,
Defendant-Appellant.

No. 34615
(C. A. 23,400.)

...OF OHIO,
Plaintiff-Appellee,
vs.
...UEL H. SHEPPARD,
Defendant-Appellant.

No. 34616
(C. A. 23,551.)

APPENDIX TO BRIEF OF APPELLANT
Motions for Leave to Appeal, Opinions and Journal Entries of the Court of Appeals.

FILED
OCT 15 1955
SUPREME COURT OF OHIO
ELLIOT E. WELCH, Clerk

WILLIAM J. CORRIGAN,
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ARTHUR E. PETERSILGE,
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Attorneys for Defendant-Appellant.

(Opposing Counsel on Inside Cover.)

...THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN ...847

FRANK T. CULLITAN,
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TABLE OF CONTENTS.

A. Motion for Leave to Appeal from Judgment of the Court of Appeals Affirming Judgment on Verdict 1a
Notice 2a
Acknowledgment of Service 2a
B. Motion for Leave to Appeal from Judgment of the Court of Appeals Affirming Order Denying New Trial on the Ground of Newly Discovered Evidence 3a
Notice 4a
Acknowledgment of Service 4a
C. Opinion of the Court of Appeals on Appeal from Judgment on Verdict 5a
D. Opinion of the Court of Appeals on Appeal from Order Denying New Trial on the Ground of Newly Discovered Evidence 76a
E. Judgment of Court of Appeals Affirming Judgment on Verdict 110a
F. Judgment of Court of Appeals Affirming Order Denying New Trial on the Ground of Newly Discovered Evidence 111a

APPENDIX A.

Motion for Leave to Appeal from Judgment of the Court of Appeals Affirming Judgment on Verdict.

No.__________

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS OF CUYAHOGA COUNTY.

STATE OF OHIO,
Plaintiff-Appellee,

vs.

SAMUEL H. SHEPPARD,
Defendant-Appellant.

MOTION FOR LEAVE TO APPEAL IN A FELONY CASE.

Appellant respectfully moves this Honorable Court for leave to appeal to this Court from a judgment of the Court of Appeals of Cuyahoga County rendered on July 20, 1955, wherein a judgment of the Court of Common Pleas convicting Appellant of a felony was affirmed.

Said Court of Appeals and Court of Common Pleas committed error prejudicial to this Appellant in the respects set forth in the Assignments of Error and Brief to be filed in this case.

Questions of public and great general interest are also involved.

Appellant has also filed appeal herein on constitutional grounds.

Corrigan, McMahon & Corrigan,
by William J. Corrigan,
Of Counsel,

Arthur E. Petersilge,
Fred W. Garmone,
Attorneys for Defendant-Appellant.

Notice.

To the Prosecuting Attorney of Cuyahoga County:

The Prosecuting Attorney of Cuyahoga County is hereby notified that this Motion will be filed in the Supreme Court on Monday, August 8, 1955, and at the same time the Appellant will request an extension of time for the filing of the Assignments of Error and the Brief in this case.

William J. Corrigan,
Of Counsel for Defendant-Appellant.

Acknowledgment of Service.

The Prosecuting Attorney for Cuyahoga County hereby acknowledges service of the foregoing Notice this 5th day of August, 1955.

Frank T. Cullitan,
Prosecuting Attorney—Cuyahoga County.

APPENDIX B.

Motion for Leave to Appeal from Judgment of the Court of Appeals Affirming Order Denying New Trial on the Ground of Newly Discovered Evidence.

No. ....

IN THE SUPREME COURT OF OHIO

Appeal From
The Court of Appeals of Cuyahoga County.

STATE OF OHIO,
Plaintiff-Appellee,

vs.

SAMUEL H. SHEPPARD,
Defendant-Appellant.

MOTION FOR LEAVE TO APPEAL IN A FELONY CASE.

Appellant respectfully moves this Honorable Court for leave to appeal in this case from a judgment of the Court of Appeals of Cuyahoga County rendered on July 25, 1955, wherein a judgment of the Common Pleas Court overruling Appellant's Motion for a new trial on the ground of newly discovered evidence was affirmed.

Said Court of Appeals and Court of Common Pleas committed error prejudicial to this Appellant in the respects set forth in the Assignments of Error and Brief to be filed in this case.

Questions of public and great general interest are also involved.

Appellant has also filed appeal herein on constitutional grounds.

CORRIGAN, MCMAHON & CORRIGAN,
BY WILLIAM J. CORRIGAN,
Of Counsel,
ARTHUR E. PETERSILGE,
FRED W. GARMONE,
Attorneys for Defendant-Appellant.

Notice.

To the Prosecuting Attorney of Cuyahoga County:

The Prosecuting Attorney of Cuyahoga County is hereby notified that this Motion will be filed in the Supreme Court on Monday, August 8, 1955, and at the same time the Appellant will request an extension of time for the filing of the Assignments of Error and the Brief in this case.

WILLIAM J. CORRIGAN,
Of Counsel for Defendant-Appellant.

Acknowledgment of Service.

The Prosecuting Attorney for Cuyahoga County hereby acknowledges service of the foregoing Notice this 5th day of August, 1955.

FRANK T. CULLITAN,
Prosecuting Attorney—Cuyahoga County.

APPENDIX C.

Opinion of the Court of Appeals on Appeal from Judgment on Verdict.

No. 23,400.

IN THE COURT OF APPEALS OF OHIO
CUYAHOGA COUNTY, EIGHTH DISTRICT.

STATE OF OHIO,
Plaintiff-Appellee,

vs.

SAMUEL H. SHEPPARD,
Defendant-Appellant.

OPINION.

July 13, 1955.

SKEEL, *J.*:

This appeal comes to this Court on questions of law, from a judgment of the Common Pleas Court of Cuyahoga County, entered on a verdict of a jury finding the defendant guilty of murder in the second degree.

The defendant was indicted by the Grand Jury of Cuyahoga County for the crime of murder in the first degree, it being charged that on the 4th day of July, 1954, he purposely and of deliberate and premeditated malice killed Marilyn Reese Sheppard. Marilyn Reese Sheppard who was the wife of defendant, was found to have been murdered while in bed at her residence at 28924 West Lake Road, Bay Village, Ohio. The report of her death was first made by the defendant in a telephone call to the

Mayor of Bay Village, J. Spencer Houk, a close friend of the defendant and the deceased, shortly before 6 A.M. July 4, 1954. Thereafter the police and firemen of Bay Village, members of the homicide squad of the Police Department of the City of Cleveland, deputy sheriffs from the Sheriff's office of Cuyahoga County and the County Coroner and members of his staff, were called to the defendant's home and an examination of the premises was conducted. The defendant was removed to Bay View Hospital, where he was questioned by the coroner, a deputy sheriff and a police officer, and at some time thereafter made a written statement of the defendant's knowledge and circumstances surrounding the death of defendant's wife.

From the first time notice of the death of Marilyn Sheppard came to the attention of the press, radio and television stations, they immediately began to devote a great amount of space in publicizing every conceivable phase of the case. Every step of the way, the announcement of the death of Marilyn Reese Sheppard by force and violence, the investigation of the crime, the inquest, the indictment and every step of the trial was headlined and on many occasions editorial comment was indulged in.

The trial was protracted over a period from October 18th to December 17, 1954. The jury deliberated on its verdict from Dec. 17th to Dec. 21, 1954, including Dec. 19th which was a Sunday. The jury, consisting of seven men and five women, were quartered in the Carter Hotel of Cleveland, Ohio, under the care of two male bailiffs during their deliberations.

Before the trial began on October 17, 1954, the defend[illegible] filed a motion for a change of venue, which motion

was renewed from time to time before and during the trial. The defendant also moved to continue the case on the ground that there had been so much publicity that a fair trial could not be had. These motions were overruled and the trial had, resulting in a verdict of not guilty of murder in the first degree, but guilty of murder in the second degree. After overruling defendant's motion for new trial, the defendant was sentenced to life imprisonment as provided by law.

The defendant claims the following errors:

"1. The Court erred in denying the defendant-appellant's application for bail.

2. The Court erred in denying the defendant-appellant's motion for a change of venue, which motion was repeated from time to time during the progress of the trial and repeatedly overruled.

3. The Court erred in denying defendant-appellant's application for a continuance, which was repeated during the progress of the trial and repeatedly overruled.

4. The Court erred in compelling the defendant-appellant to exercise peremptory challenges when the Court should have allowed the challenge for cause.

5. The Court erred in denying defendant-appellant's motions for withdrawal of a juror and continuation of the case.

6. The irregularities occurring during the trial and which reoccurred from time to time and to which the defendant-appellant objected and which objections were repeatedly overruled.

7. The Court erred in the dismissal from the jury, after the jury was accepted and sworn, of Juror William Manning, and substituting in his place, over the

objection of the defendant-appellant, Juror Jack Hanson.

8. The Court erred in not permitting the defendant-appellant to exercise a peremptory challenge after such substitution.

9. There was irregularity in the proceedings of the court.

10. There was irregularity in the proceedings of the jury.

II. There was irregularity on the part of the prosecuting attorney.

12. There was irregularity on the part of witnesses for the State of Ohio.

13. There was error in the orders of the court by which the defendant-appellant was denied the benefit afforded him by the Constitution of Ohio and the Constitution of the United States of America, including the amendments thereto.

14. There was abuse of discretion by the Court, by reason of which the defendant-appellant was prevented from having a fair trial.

15. There was misconduct on the part of the prosecuting attorney.

16. There was misconduct on the part of witnesses for the State of Ohio.

17. The verdict is not sustained by sufficient evidence.

18. The verdict is contrary to law.

19. Errors of law occurring at the trial, prejudicial to the defendant-appellant.

20. Evidence prejudicial to the defendant-appellant was admitted over his objection.

21. Evidence excluded from the consideration of the jury which was proffered by the defendant-appel-

lant and which should have been admitted in evidence.

22. There were errors by the court in its charge to the jury which were prejudicial to the defendant-appellant.

23. There were errors by the court in refusing to give special instructions to the jury prior to argument, as requested by the defendant-appellant, and which were afterwards not included in his general charge.

24. There was error by the court in overruling the defendant-appellant's motion for a directed verdict of "not guilty" at the close of the State's evidence in chief.

25. There was error by the Court in overruling the defendant-appellant's motion for a directed verdict of "not guilty" at the close of all the evidence.

26. There was error by the Court in denying the motions made by the defendant-appellant both at the close of the State's case and at the close of the defendant-appellant's case.

27. There was error by the Court in not removing from the consideration of the jury the count of first degree murder.

28. There was error by the Court in not removing from the consideration of the jury the count of second degree murder.

29. There was error by the Court in not removing from the consideration of the jury the count of manslaughter.

30. Other errors apparent on the face of the record to the prejudice of the defendant-appellant, and by reason of which he was prevented from having a fair trial, as affirmatively appears from the record.

31. The indictment by the Grand Jury was the result of pressure exerted on the Grand Jury.

32. The concept of presumption of innocence established in the law was disregarded by the jury who in their deliberations substituted for it a presumption of guilt.

33. That the judge in this case several days before the day of the trial met with newspaper reporters, newspaper photographers, television personnel and radio commentators and arranged the courtroom in such a manner that the representatives of the press, radio and television were given preference to the space in the courtroom. He also caused to be built and erected inside the bar a long table, which extended across the courtroom, and approximately twenty newspaper reporters were assigned seats at this table. One end of the table was within three feet of the jury box. Outside the bar there are four rows of benches which are for the use of the public during trials. Each of these benches will seat about twenty persons. The Court assigned the first three rows to the personnel of the press, radio and television and in advance of the trial caused printed slips to be made with the names of such personnel printed thereon, and said printed slips were pasted at regular intervals along said row of benches so that said personnel referred to would know which place was assigned to him or her. The last row was reserved for members of the defendant's family and members of the family of the deceased Marilyn Sheppard. The Court established a rule that the admission of other persons to the courtroom was to be by card. The Court also assigned to said newspaper, radio and television personnel all the rooms on the courthouse floor, including the Assignment Room, where cases are assigned to other court rooms for trial. In these rooms said radio, television and newspaper personnel had private telephone lines installed and other necessary equip-

ment to carry on their work. Space in the Assignment Room was set over for the Chicago Tribune, Chicago Sun, The New York Herald Tribune, the Akron Beacon Journal, The New York Journal American, The Associated Press, The Pittsburgh Post Dispatch, the New York Post, The New York Daily News, The International News Service and the United Press.

There was also erected in that room special telephone booths and telegraph equipment which was used to forward with dispatch the reports of the trial.

Rooms were also assigned to radio commentators on the third floor of the courthouse. This is the floor on which the jury deliberating rooms are located. One such room located next door to the jury that was impanelled in this case, was used by Radio Station WSRS and broadcasting continued from that room throughout the trial and during the time that the jury was in the room next door and during recess and during the deliberation of the jury.

During the entire time of the trial a great number of photographers, both television and newspaper, stood on the steps of the courthouse, on the stairs that lead from the ground floor of the courthouse to the second floor and along the corridor on the second floor from the top of the stairs to the entrance of the court room. When the members of the jury came to court, when they arrived for lunch or retired at the end of the trial day, they passed along the way above outlined and were photographed and televised many times, all with the knowledge of the Court.

On a number of occasions, it was necessary for counsel to confer privately with the court in chambers on points that were in issue in the trial. On such occasions when said conferences were held behind the closed door of the judge's chamber, there would be a great rush of photographers, reporters, radio and tele-

vision personnel into the room which adjoined the judge's chambers. So great was the number that crowded into the room that it was necessary on such occasions for counsel to push their way out so that they could again regain their place in the courtroom. After counsel had secured their exit, then a great number of such persons as described would crowd into the judge's chamber to inquire as to the purpose of the meeting.

Each morning the defendant-appellant was brought into the courtroom approximately ten minutes before the trial opened, at which time he was surrounded by photographers and television operators and was photographed and televised many times.

Many times during the trial there was constant moving in the part of the courtroom occupied by said reporters, radio and television personnel. They kept going in and out and changing places and relieving one another.

Pictures of the jurors were printed in the newspapers and were shown on television in the evening. Newspaper pictures were taken in the home of one juror by a Cleveland Press photographer and printed in that paper along with an account of how the juror's family fared while the juror was in court. The fact was called to the attention of the court but no action was taken.

The Court permitted photographers to come into the courtroom and take pictures of the jury panel. The court permitted photographers to go into the jury room and take individual pictures of the members of the jury. These pictures were printed in the newspapers.

Television cameras were set up inside the courthouse with the knowledge and consent of the court. During the trial the Court was part of a television

program that took place on the steps of the courthouse in the morning at a time when the jurors were arriving. This program was arranged by a reporter named Fabian, a representative of the Scripps-Howard newspapers. The Court stood across the street and watched until he received a signal and then walked over to the Courthouse steps, mounted the steps and had a conversation with said Fabian while the television cameras operated.

On one day while the jury was leaving the courthouse, a man appeared on the courthouse steps carrying a sign referring to the case of Sam H. Sheppard. Counsel for the defendant-appellant took this man and the sign before the Court and requested that he be charged with contempt. Several days later when counsel was not present, this person was released.

For months prior to the trial, news in the Cleveland newspapers were slanted against the defendant. A front page editorial appeared in the Cleveland Press demanding his arrest and urged he be subjected to the third degree. Day after day the public and jurors were treated to opinion-shaping headlines, such as "*Quit Stalling and Bring Him In*"—"*Sam Declined July 4th Lie Test*"—"*Says Dr. Sam Talked Divorce.*" — "*Testifies Sam Changed Stories*" — "*Charges Sam Faked Injuries*"—"*Says Marilyn Called Sam a Jekyll-Hyde.*"

Statements were made by the Chief of Police, Inspector of Detectives, Head of the Homicide Squad, members of the Prosecuting Attorney's office, which were adverse and condemnatory of the defendant. Affiant says that none of said persons testified in the case.

The defendant in his testimony stated facts bearing upon his questioning by Cleveland detectives. That evening the following headline appeared in the

Cleveland News: *"Kerr Called Dr. Sam a Bare Faced Liar."* The "Kerr" referred to is Captain David Kerr, head of the Cleveland Homicide Squad. Again, affiant says that said Kerr did not testify in this case.

The jurors in their voir dire examination testified they read Cleveland newspapers and most of them had a Cleveland newspaper delivered into their homes.

The jurors received the case at 10:30 A.M. Friday, December 17th and deliberated until 4:30 P.M. Tuesday, December 21st. This included deliberation on Sunday, December 19th, from approximately 10:30 A.M. to 6:00 P.M.

During the deliberations the jury was ordered sequestered and placed in charge of two male officers of the court. During the period of deliberation, the jurors were taken by the officers to their meals and at night were lodged in the Carter Hotel. During the time the jury was allowed to separate and no female officer of the court was appointed to supervise the female members of the jury.

On one occasion the jury was separated and photographs taken of such separated groups. One photograph was taken of the women members of the jury in one group and another photograph showed the male members of the jury in another group. The photographs of the groups as separated were printed in the newspapers, and in order to arrange such groupings, communications were made with the jury. Other photographs were taken of the jury while at their meals, coming to the courthouse and leaving the courthouse.

That during the five days of deliberation and during deliberations the jury was in a room that was one flight of about twenty stairs from the courtroom; that the door from the court room to this flight of stairs was generally open; that during the delibera-

tions the court room and the corridor outside was filled with curious onlookers, reporters, television, radio commentators and photographers. During this time card games were in progress in the courtroom, groups were visiting, a great number of people milled inside and outside of the court room, and the court room and corridors resounded with laughter, loud talk and noises. The floors of the court room and corridor became stained and dirty, and strewn about with papers, cigarette butts, empty paper cups and various litter; that the atmosphere that existed during the trial and during the deliberation of the jury was not conducive to profound and undisturbed deliberations.

34. The court erred in overruling the request of juror Eleanor Borke to put a question to the defendant appellant.

35. The jury consisted of seven men and five women. When the case was submitted to the jury the Court appointed two male bailiffs but no female bailiff, and after the commencement of deliberations the jury separated at night and the female members of the jury were not in charge of a female bailiff and were not supervised by an officer of the court; that at the hotel where the jury was quartered, the members of the jury had free access to telephone and did communicate during such time by telephone to various individuals.

36. The defendant appellant was deprived of his liberty without due process of law and was denied trial by an impartial jury by reason of the widespread publicity and misinformation disseminated thorough the newspapers, radio and television stations, both before and during the trial; that during the trial the jury was subjected to opinion-forming headlines and editorials, with resultant mass hysteria and the crea-

tion of an atmosphere of public opinion which made a fair and impartial trial by jury impossible, all within the knowledge of the court and all contrary to the provisions of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America and contrary to the provisions of Article I, Section 10 of the Constitution of the State of Ohio.

37. There was error by the court in overruling the motion by the defendant appellant for a new trial."

The first claim of error based on the failure of the court to admit the defendant to bail must be overruled. This was a question resting in the exercise of the sound discretion of the trial court. The evidence produced at the hearing of defendant's request for bail has not been brought into the record before us. In any event, such ruling cannot now be raised after trial and conviction.

The second, third, sixth, ninth, tenth, thirtieth, thirty-first, thirty-third and thirty-sixth claims of error are concerned with denying defendant's motion for change of venue and continuance, because of the manner in which the case was publicized. The record shows that the case, from the date of Marilyn Sheppard's death, until after the verdict was returned and the motions for new trial were filed and heard, received unusual coverage by the press, radio and television. No case in this community ever attracted such public interest or received so much attention by news disseminating agencies. Some of such publicity unquestionably was intended to spur on the investigation and was highly critical of the defendant and went so far in some instances as to have been designated by other newspapers as an attempt to try the case in the

public press before he was indicted. All of this is argued by the defendant as establishing that the court committed an abuse of discretion in refusing to continue the case to a later date or to order a change of venue.

The legal questions presented by these assignments of error are not to be decided by a consideration of the publicity and the tendencies it might have in influencing the public mind generally with regard to their judgment of whether the defendant was guilty of the crime charged against him. The legal question is whether or not the defendant would be accorded a fair, constitutional trial by an impartial jury who would decide the issues of fact entirely by considering only the evidence submitted to them in open court, without the slightest outside influence, when considered in the light of the law as given them by the court. The best test as to whether or not a fair and impartial jury can be secured is the examination of jurors summoned as provided by law, on the voir dire examination.

In the case of *Townsend vs. State*, 17 C. C. (N. S.) 380, the court said:

> "The examination of jurors on their voir dire affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles and that the opinions as formed are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue." (affirmed 88 O. S. 584 without opinion).

In the case of *Hawkins v. State*, 27 Oh. App. 297, the indictment was for a violation of the Crabbe Act. The

plaintiff in error had attempted to organize the citizens of Lorain County against certain public officials of the county, calling for a special grand jury to investigate the killing of an insane citizen by a public official. While engaged in such activities, the plaintiff in error was indicted under the Crabbe Act, resulting in a great deal of newspaper comment both for and against him by the newspapers and also some members of the public. During the impanelling of the jury, five veniremen were excused for cause after statements that they had fixed opinions regarding the guilt or innocence of the plaintiff in error that would require evidence to remove. The trial court overruled plaintiff in error's motion for change of venue. The court held:

"1. Unless it be shown that a fair and impartial trial cannot be had in the county where an indictment originates, a criminal trial must be tried there.

2. The accused of crime has a right to fair and impartial trial, and, if impartial jury cannot be impanelled in county in which indictment was found, trial court must grant motion for change of venue.

3. Whether or not an order granting change of venue in a criminal case should be made rests largely within the sound discretion of the trial court.

4. Appellate court should not disturb trial court's ruling on motion for change of venue in criminal case unless it be clearly shown that trial court has abused its discretion.

5. Denying change of venue for local prejudice of trial for transporting liquor in violating of Crabbe Act (Sec. 6212-13 to 6212-20 G. C.) *held* not abuse of discretion, notwithstanding that affidavits filed in support of the motion alleged that the defendant had

been criticized and denounced for activities in circulating petitions calling for the removal of certain county officials from office and upon occasions of previous arrests on various criminal charges."

In the case of *Richards v. State*, 43 Oh. App. 212 the court held:

"2. That trial court denied change of venue without prejudice until it could be determined whether fair and impartial jury could be impanelled, *held* not abuse of discretion. (Sec. 13427-1 G. C.; 113 O. L. 132, Art. I, Sec. 10 Constitution)."

Other Ohio authorities are:

12 *Ohio Juris.* Sec. 97, p. 128;
12 *Ohio Juris.* Sec. 853, p. 844;
State vs. Stemen, 90 Oh. App. 309;
Dorger vs. State, 40 Oh. App. 415;
Johnson vs. State, 6 O. L. Abst. 707;
State vs. Deem, 154 O. S. 576.

From the foregoing authorities, the law of Ohio is clear that the best test of whether a defendant can have a constitutional trial in the county in which the indictment is returned is to be determined upon the impanelling of the jury. Citizens summons for jury service represent a cross section of the community. Their answers to questions directed to them in the process of impanelling a jury, gives a clear cut picture of their state of mind; their answers indicating whether or not they will be guided by the evidence alone in reaching conclusions of fact, must be given great weight in considering the question presented by a motion for change of venue. When the great majority of the prospective jurors called or summons as

provided by law to be impanelled in a criminal case state they are not and will not be subject to outside influence if accepted on the jury, a trial judge who overrules a motion for change of venue under such circumstances is not guilty of an abuse of discretion. The very foundation of the jury system is founded upon the inherent honesty of our citizens in performing courageously such public service without fear or favor.

The law of Ohio on this subject is in complete accord with the great weight of authority as shown by the opinions of a great majority of the courts of last resort.

In the case of *Viereck vs. U. S.*, 130 Fed. 2d. 945, which was a prosecution for violation of the "Propaganda Agency Act" where a change of venue was asked because widespread newspaper stories had aroused the community against the defendant, the court held that the overruling of such motion did not constitute an abuse of discretion where the record revealed that the jury was chosen very carefully and both sides accepted the jury which was eventually sworn.

In the case of *People vs. Broady*, 90 N. Y. S. 2d 864, which was a wire-tapping prosecution, the court held that newspaper comment alone, even though extensive, does not establish that a defendant cannot be afforded a fair trial in the county where the indictment was returned and overruling request for change of venue did not constitute prejudicial error.

Likewise, in the case of *People vs. Sandgren*, 75 N. Y. S. 2d 753, the defendant was charged with second degree manslaughter resulting from the killing of an eleven year old boy by defendant's dogs wherein it was

charged that defendant permitted such dogs to run at large notwithstanding their dangerous propensities of which defendant had full knowledge. In this case there was intensive newspaper coverage including direct declarations of defendant's guilt and that he knowingly kept savage, vicious killer dogs. The court, in overruling a motion for change of venue held that widespread publication of belief or opinion by the press, of defendant's guilt, does not show serious doubt whether defendant will receive a fair trial so as to warrant change of venue since the press is entitled to public news with fair comment.

See also:

People vs. Connors, 251 Mich. 99;
People vs. Swift, 172 Mich. 473;
People vs. Broady, 90 N. Y. S. 2d 864;
State vs. Burns, 84 A. 2d 801 (Rhode Island);
State vs. Cooper, 92 A. 2d 786 (New Jersey);
Jones vs. State, 240 S. W. 2d 771 (Texas);
People vs. Walker, 246 Pac. 2d 1009 (Calif.);
Wininger vs. State, 257 Pac. 2d 526 (Okla.);
Wetzel vs. State, 76 So. 2d 188;
State vs. Loveless, 80 S. E. 2d 442 (W. Va.);
Terrance vs. Commonwealth, 265 S. W. 2d 40 (Ky.);
State vs. Williams, 62 N. W. 2d 742 (Iowa 1954);
State vs. Godwin, 3 S. E. 2d 347 (216 N. C. 49) (N. C. 1950).

In the case of *State vs. Bird*, 198 Pac. 2d 978 (Wash.) the Supreme Court affirmed the overruling of a motion for change of venue in a homicide case where there had been many newspaper accounts, the crime being one of great

brutality and held that a denial of such motion based on claimed local prejudice, was not error in the absence of a showing that a situation had been created which would prevent defendant from receiving a fair trial before an impartial jury. It was likewise held in the case of *Terrance vs. Commonwealth,* 265 S. W. 2d 40 (Ky.) that a defendant in a homicide case was not prejudiced by the denial of a motion for change of venue and it was not an abuse of discretion to overrule such motion despite newspaper and radio publicity in a county of approximately 500,000 people, where there was a large reservoir of qualified jurors. Also, the Supreme Court of Georgia in the case of *Morgan vs. State,* 84 S. E. 2d 365, 211 Ga. 172, in which defendant had been charged with murder, it was shown that newspapers had carried news items and editorial comment to the effect that defendant had confessed the crime for which he had been indicted and also articles had been published about the defendant of an inflammatory nature. It was held that such facts were not sufficient in themselves to establish that a fair and impartial trial could not be had in the county in which such newspapers were published in the absence of further allegations and proof that jurors who had been summoned to try the case had read the articles and publicity and had formed fixed opinions as to the guilt or innocence from such newspaper articles.

As shown by the foregoing authorities, a refusal to continue a case because of adverse publicity, is to be decided by the same rules as are applicable in considering a motion for change of venue. *Snook vs. State,* 34 O. App. 60. Anno. *Delaney vs. U. S.,* 39 A. L. R. 2d 1314 para. 4 page 1321.

The record in this case discloses that a special venire was called for the trial of this defendant as provided by Sec. 2945.18 R. C. Seventy-five names were drawn from the jury box. Of this number eleven were immediately excused for justifiable reasons or were not found, and could not be summoned (three in number) by the sheriff. Of the remaining sixty-four, thirteen were excused because they had formed a firm opinion as to the guilt or innocence of the accused and ten were likewise excused because they were opposed to capital punishment. Sixteen others were excused for cause.

The State used four peremptory challenges and the defendant five. As is provided by Sec. 2945.21 the State in a homicide case where there is but one defendant, is entitled to six such peremptory challenges and the defendant a like number so that when the jury was sworn the defendant left the right to one peremptory challenge unused. From the foregoing analysis of the venire of 75 electors called in this case, four of those called were not needed in empanelling a jury of twelve. Such jury was selected as provided by law and sworn and accepted by the defendant to well and truly try and true deliverance make between the State and the defendant.

The parties agreed to select two alternate jurors as provided by Sec. 2313.37 R. C. The four remaining jurors of the original list, together with an additional venire of 24 summoned as provided by law, were used for this purpose. Of the 24 summoned, eight were called and questioned together with the four from the original venire, in impanelling the two alternate jurors. Of those examined, three were excused for holding a firm opinion of the guilt

or innocence of the accused, four were excused as bei against capital punishment, one was excused on challeng for cause and each side used one peremptory challeng (Each side had the right to excuse two prospective alte nate jurors peremptorily under the provisions of Sec 2313.37 R. C.)

The analysis of the empanelling of the jury in thi case where but sixteen prospective jurors out of 72 ex amined could not sit because they had prejudged the guilt or innocence of the accused, clearly shows that there was no difficulty whatever in impanelling a fair and impartial jury.

The jury having been impanelled as provided by law and sworn to afford the defendant a fair and impartial trial, and to come to its verdict by a consideration of the evidence submitted in open court without any outside influence or consideration, and where there is no claim of misconduct on the part of any member of such jury during the trial, there can be no ground to claim a mistrial because of continued publicity, publicizing the events of the trial, and other related matters.

Claims of error Nos. 2, 3, 6, 9, 10, 13, 14, 31, 33 and 36 are therefore overruled.

The defendant has grouped assignments of error numbers 4, 5, 6, 7, 8, 9, and 14 under the general topic of "Errors in impanelling the Jury."

The first complaint of the defendant has to do with the court sustaining objections of the state to questions propounded to a prospective juror (Verlinger) concerning what effect the defendant's affairs with other women would have on him, that is "would that prejudice you against

im, or create in you a sense of ill-will toward him so that ou would disregard the proof necessary to convict him of irst degree murder?" The evident purpose of this quesion was to find out what effect evidence of extra-marital ctivities of the defendant, if shown, would have on the juror's consideration of other evidence. In the form in which the question was asked, it was objectionable in that it asked the juror what his conclusions would be upon considering such testimony. The question as framed was very difficult to understand. The meaning ascribed to the question by the defendant in argument would have been proper. After the objection was sustained the defendant reframed the question and the court, over the objection of the State, allowed it to be answered. We do not find that the defendant was prejudiced by the court's sustaining the State's objection when considered in the light of the complete examination of all of the jurors by both the State and the defendant on the subject. The question in a modified form was asked of all but three of the jurors (who were sworn and served in the case) and answered without objection. The cases cited by defendant are not directly in point. They deal with the question of prejudice against a defendant himself because of race or other associations or conduct.

As to the juror "Borke" a question much like the one propounded to juror Verlinger considered, was asked and the state's objection thereto sustained. It does not appear that defendant reframed the question and the subject was not pursued further. As to the jurors who were excused peremptorily by the defendant, three were permitted to answer a question on the subject of the same tenor as was

answered by the nine jurors selected to try the case, as prejudice because of marital infidelity of defendant and two were not interrogated on the subject.

After the jury was sworn and the agreement to em- panel the two alternate jurors was had, it came to the atten- tion of the court upon information received from an out- side source, that juror "Manning" had not told the truth in answer to a question as to whether or not he had been a witness in a criminal case. The juror's answer had been "No." The information that then came to the court and parties was that this juror had been arrested on a morals charge and upon conviction had been sentenced to the workhouse, sentence suspended. This took place in 1943.

The court, after knowledge that the state was going to object to juror Manning, although then sworn as a juror, proceeded to empanel the alternate jurors. After the alternate jurors were sworn Juror Manning was then asked if he had testified in the 1943 incident to which he answered, "I believe I did, sir. I don't know, yes, I did." He also stated he had gotten into an emotional state of mind by having this past experience given such publicity. He stated that since the happening of such event he had lived an honorable life and was the father of a family. The defendant entered an objection to juror Manning being dismissed from the jury. After the alternative jurors were sworn juror Manning stated in part in open court:

> "I tried to be absolutely unbiased and unprejudiced in talking to other people, even in speaking outside the jury. But after what has happened, I would not be able to sit in the box with the other jurors, be able to sit in this case and be unbiased, unprejudiced or un- emotional is what I am trying to drive at mostly. If this keeps up, if I am kept on the jury, I think I will be a sub-headlines as long as the trial goes on. I will definitely have a nervous breakdown in a very short time and, in fact, I feel I am just about ready for one right now."

The court excused Juror Manning in the exercise of his sound discretion, under the authority of Sec. 2945.29 R. C. which provides:

> "If before the conclusion of the trial a juror becomes sick, or for other reason is unable to perform his duty, the court may order him discharged. In that case if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged * * *."

The defendant entered his exception to the proce- dure used by the court in discharging juror Manning and demanded the right to exercisė his remaining peremptory challenge when the first alternate juror was seated in the panel after Manning was discharged, which request was refused.

After a jury is sworn and charged with the delivery of the defendant, the trial is commenced and unused peremp- tory challenges cannot thereafter be used and where an alternate juror has been selected and sworn as provided by law, he must be seated in the place of the discharged juror by order of the court.

One other error is claimed in the impanelling of the jury. The court granted the state's challenge for cause as to juror Richter who was called to be impanelled as the second alternate juror. The evidence shows that this prospective juror had met both the defendant and his wife and had played golf with Mrs. Sheppard. Under oath,

however, she stated that her "acquaintance with them was so slight that I don't think—I know it would not interfere with my opinion." After again answering "yes" to the question of whether she could be a fair and impartial juror in the case, keeping in mind that she had known both the defendant and deceased, the court granted the state's motion challenging her for cause. Section 2945.25 R. C. does not include acquaintance as a ground of a challenge for cause and when a prospective juror under oath states that such acquaintance will in no way prejudice her and that she can act fairly and impartially as a juror, it constitutes error to grant a motion to discharge a juror for cause. Such error, however, was not prejudicial to the rights of defendant for two reasons. First, the second alternate juror empanelled after Richter was dismissed, did not become a member of the panel that was finally charged with the deliverance of the defendant at the conclusion of the trial. At the conclusion of the trial the second alternate juror was dismissed and took no part in deliberating upon the verdict. Add second, the state did not use up its peremptory challenges in empanelling the alternate jurors and it is therefore quite probable that it would have excused juror Richter peremptorily had the motion to dismiss her for cause been overruled.

Assignments of error Nos. 4, 5, 6, 7, 8, 9 and 14 are therefore overruled.

Assignments of error Nos. 17, 18, 24, 25, 26, 27, 28 and 29 are treated together in defendant's brief under the heading: "The court erred in denying the motions for directed verdict or for dismissal of the indictment." This heading is divided into three sections:

"1. The state has the burden of proof to establish defendant's guilt beyond a reasonable doubt.

2. In the absence of substantial evidence on all the elements of the crime charged against the defendants, it is the duty of the court to direct a verdict.

3. That there is no substantial evidence of defendant's guilt but rather supports defendant's story and is inconsistent with his guilt."

The elements of the crime of murder in the first degree as here charged against defendant and as defined by Sec. 2901.01 R. C. are that defendant purposely killed Marilyn Sheppard of deliberate and premeditated malice. There is no question but that the venue of the crime charged is in Cuyahoga County, Ohio. Likewise, the death of Marilyn Sheppard is not in question. That she was the victim of a brutal murder is not in dispute. The defendant in his brief on page 267 says:

> "It is true that an intent by *someone* to kill the decedent and that there was malice on the part of whoever did the killing may be inferred from the nature of the wounds and from the brutal and vicious attack that was made."

And on page 12 of his brief defendant says:

> "Marilyn Reese Sheppard, aged 30 years, was murdered in the bedroom of her home some time between midnight and 5:30 A.M. on Sunday July 4th, 1954."

The murder is described in the closing arguments of the state (record p. 6904) "as one of the most brutal and vicious murders in the history of crime." The evidence of the pathologist of the coroner's office and county coroner giving opinion evidence of the cause of death, supported by

pictures, portrays in all of its horrible detail the scene Marilyn Sheppard's bedroom on the morning of July 1954. Lying in a blood soaked bed with 35 separate woun evidently resulting from blows of a blunt instrume about her head and hands, in some instances of sufficie force to cause fractures of the skull, is unquestionably su ficient for the jury to find that the person who inflicted su wounds upon the person of the deceased, acted with a pu pose to kill. The only questions left for consideration b the jury, which fact must be shown beyond reasonabl doubt, that the defendant was the person who committed the acts causing the death, and if established by that de gree of proof then to determine the degree of murder as defined by the statutes.

We go, therefore, directly to an examination of the evidence dealing with this question. It must be remembered that on appeal the court does not retry the issues of fact but is concerned only with whether there is sufficient and ample evidence to require a submission of the case to the jury and where a verdict has been returned, whether there is substantial evidence (without weighing such evidence) to justify the verdict.

It is the claim of the state that the defendant and the defendant alone, caused the death of his wife. It is the contention of the defendant that a third person, or third persons, was or were in defendant's house on the morning of July 4th, who was or were responsible for her death. This, of course, is not by way of establishing a defense because the defendant has no such burden. It is enough if when weighing such evidence when fairly considered with all the other evidence in the case, the jury does not find the existence of the essential facts necessary to establish the

efendant guilty beyond a reasonable doubt. It is the contention of the state that only three people were in the heppard house after midnight of the beginning of July th, that is, the 7 year old son of the parties, the decedent, nd the defendant, and that all the circumstances as shown y the evidence point directly to defendant as the one ho perpetrated the crime. Also, the claim of defendant's ccount of his encounters with the supposed intruder or ntruders and his descriptions of him or them is so unbelievable as to give weight to the state's circumstantial case. On direct examination in his own defense the defendant testified in part as follows:

"A. The first thing that I can recall was hearing Marilyn cry out my name once or twice, which was followed by moans, loud moans and noises of some sort. I was awakened by her cries and in my drowsy recollection, stimulated to go to Marilyn, which I did as soon as I could navigate.

Q. Now, just one question here. Did you have a thought in your mind at that time as to what caused Marilyn to cry out?

A. My subconscious feeling was that Marilyn was experiencing one of the convulsions that she had experienced earlier in her pregnancy and I ascended the stairway. As I went upstairs and into the room I felt that I could visualize a form of some type with a *light top.* As I tried to go to Marilyn I was intercepted or grappled. As I tried to shake loose or strike, I felt that I was struck from behind and my recollection was cut off. The next thing I remember was coming to a very vague sensation in a sitting position right next to Marilyn's bed, facing the hallway, facing south. I recall vaguely recognizing my wallet.

Q. Now, just a moment. At that point have you any way or can you determine—is there any wa

determining the length of time between the time you were knocked out and when you came to this sitting position?

A. No, sir, no way that I know of.

Q. Now, I am handing you state's exhibit 27 and defendant's exhibit T. Is that your wallet?

A. Yes, sir, it is.

Q. When was the last time you had it in your hand before I handed it to you this morning?

A. It must have been that morning.

Q. That morning. Now, you say—what?

A. I may have had it in my hand at the inquest. I'm not sure whether Doctor Danaceau handed it to me or just held it.

Q. I see, but—

A. Mr. Danaceau—excuse me.

* * *

Q. Now, I have come to the point where you had awakened and saw the faint glow of your badge on the floor. Do you remember?

A. Yes, sir.

Q. Was there a light in the house anywhere?

A. Yes, sir, there was.

Q. That you remember?

A. There was a light.

Q. And where was that light?

A. I cannot say for sure, of my own knowledge.

Q. There was some kind of light?

A. Yes, sir.

Q. Now, then, after you awakened or came to consciousness repeat, as best as you can, in your own words, to this jury what you saw and what you did.

A. Well, I realized that I had been hurt and as I came to some sort of consciousness, I looked at my wife.

Q. What did you see?

A. She was in very bad condition. She had been—she had been badly beaten. I felt that she was gone. And I was immediately fearful for Chip. I went into Chip's room and in some way evaluated that he was all right. I don't know how I did it. I, at this time or shortly thereafter, heard a noise downstairs.

Q. And what did you do when you heard the noise downstairs?

A. And I—I can't explain my emotion, but I was stimulated to chase or get whoever or whatever was responsible for what had happened. I went down the stairs, went into the living room, over toward the east portion of the living room and visualized a form.

Q. Now, where was that form when you first visualized him?

A. Between the front door of the house and the yard somewhere.

Q. Now, are you able to tell the jury what your mental condition was when you came out of this—awoke from this attack?

A. I was very confused. It might be called punchy, in language that we use as slang. I was stimulated or driven to try to chase this person, which I did. My—

Q. And when you saw the form, what did you do?

A. Well, I tried to pursue it as well as I could under the circumstances.

Q. And where did you pursue it?

A. Toward the steps to the beach at which time I lost visualization of this form.

Q. Was it dark?

A. Beg pardon?

Q. Was it dark? Dark?

A. Yes, sir, it was dark but there was enough light from somewhere that I could see this form.

Q. Yes, all right.

A. I descended the stairway and to the landing and I visualized the form going down, or as he came on the beach. And it was at this time that I felt that I could visualize a silhouette that was describable. I—

Q. What happened on the beach?

A. I descended as rapidly as I could. I lunged or lurched and grasped this individual from behind. Whether I caught up with him or whether he awaited me, I can't say. I felt as though I had grasped an immovable object of some type. I was conscious thereafter of only a choking or twisting type of sensation, and that is all that I can remember until I came to some sort of very vague sensation in the water, the water's edge.

Q. Were you able to determine anything about that person?

A. Yes, sir.

Q. And what?

A. Well, I felt that it was a large, relatively large form; the clothing was dark from behind; there was evidence of a good sized head with a bushy appearance at the top of the head—hair.

Q. Now, then, when you came to the second time, just where were you?

A. I don't know exactly where I was. I was—

Q. Were you on the beach?

A. I was on the beach with—

Q. Where was your head and where were your feet?

A. My feet were in the water and my head was directed to the sea wall, toward the south, generally. I could have been slightly askew. The waves were breaking over me and even moving my lower part of my body some.

Q. What was the condition of light at that time?

A. Light?

Q. Light, yes.

A. It was light enough to see at that time. I could see Huntington Pier later when I came to enough sensation to see at all.

Q. Day was breaking, is that right?

A. I would say it had broken somewhat.

Q. Day had broken. What was your mental and physical condition as you remember it now, that you were in at the time that you came to consciousness on the beach?

A. My mental condition was that I was extremely confused. I didn't know where I was or how long I had been there, or my own name, for that matter.

Q. Do you know how long you lied on the beach before you got up?

A. No, sir, I don't.

Q. Well, you did get up to your feet?

A. I finally did.

Q. Do you know how you got up the steps? Do you have any recollection of that?

A. I remember, as I finally came to enough sensation to get to my feet, I rather staggered up the stairway and as I was going up, or as I was recognizing that this was my house, I entered the house and came to the realization that I had been hurt and that I had been struck by an intruder and I was then fearful for Marilyn although I can't say that I actually remembered of seeing her.

Q. You remember what?

A. I don't say that at that time I remembered seeing her the previous time upstairs.

Q. How was your mind working? Was there any blocking of your mental processes at that time?

A. The best I can explain is that my mind was

working like a nightmare or a dream, very horrible dream.

Q. And then what did you do when you got in the house?

A. I eventually went up the stairs. I'm not sure just exactly how rapidly I went upstairs but I did finally go upstairs and it was at that time that I re-examined Marilyn.

Q. Was there enough light in her room then to see her?

A. Yes, sir.

Q. What did you see?

A. I saw that she had been terribly beaten.

Q. Did you determine that she was dead?

A. Yes, I thought that I did.

Q. What was your feeling at that particular time, if you had any feeling, that you remember?

A. I was horrified. I was shaken beyond explanation, and I felt that maybe I'd wake up, maybe this was all a terrible nightmare or dream and I walked around, paced, I may have rechecked little Chip. Very likely I did, but I can't say specifically that I did, and I may have gone back in to see Marilyn. As I recall—I could have passed out again, I don't remember but I was staggered. Finally I went down the stairs trying to come to some decision, something to do, where to turn. I must have paced and walked around downstairs trying to shake this thing off or come to a decision and I thought of a number and called it.

Q. What was the number you thought of?

A. I thought that the number was that of Mr. Houk's.

Q. Do you recall what you said to him over the phone?

A. No, I don't.

Q. Where was the telephone?

A. There are two phones downstairs. I'm not positive which one I used.

Q. And do you know how long it was, have you any recollection of the length of time between your telephone call and the appearance of Mr. and Mrs. Houk?

A. It seemed like a long time, but it evidently was a relatively short time.

Q. And do you know where you were or what you were doing between the time that you made the telephone call and the arrival of Mr. and Mrs. Houk?

A. I was walking through the house again and trying to—trying to clear my mind, trying to remember what had happened, trying to remember a description of this individual that I had seen, trying to differentiate whether there two people or one, in fact, almost thinking there were two. I, shortly before the Houks came, stopped in the kitchen and put my head on the table and that is the first time I recall realizing or recognizing that I had a very severe pain in the neck. Up to that time I may have been holding my neck but I don't remember. And at that time I felt that my neck was injured."

On July 4, at 11 A.M. the defendant made the following statement to Officer Schottke of the Cleveland Police Department as shown by the police report created July 7, 1954, which was received into evidence as "State's Exhibit 49":

"Sir:

The following is the list of questions asked Dr. Sam Sheppard on the first time we questioned him on July 4, 1954:

Q. Will you tell us everything that you know about this?

A. He stated that the Aherns were visiting and that he fell asleep on the couch before they left. The thing he remembers is that he heard his wife screaming and he ran up the stairs and as he entered the room he thought he seen a form and at that time he heard someone working over his wife. He then was attacked and hit on the side of the head and knocked unconcious. When he regained consciousness he heard a noise downstairs and he ran downstairs and seen a form going out the door leading to the porch. He ran after this form and chased him down the stairs and when he got to the boathouse landing he doesn't remember if he jumped over the railing or if he ran down to the beach but he half tackled him and he struggled with him and was again knocked unconscious.

When he regained consciousness, he was on his stomach on the beach being wallowed back and forth by the waves. He then went up to the house and wandered around in a daze and went up and went up to his wife's room and attempted to administer to her and felt that she was gone. He then went downstairs and wandered around in a daze and finally a telephone number came to his mind and he called this number and it was Mayor Houk. He said that Houk came to his house and also his brother Richard and he was then taken to the hospital.

Q. Asked him to describe the screams.

A. Stated that they were loud screams.

Q. How long did the screams last?

A. Stated all the while he was running up the stairs.

Q. Asked him if the same person attacked him that he heard working over his wife.

A. Stated no, as he was under the impression that he was attacked by someone else at the time he heard someone working over his wife.

Q. Asked him how many times he was assaulted?

A. Stated two or three times at the most.

Q. With what were you assaulted?

A. He stated with fists.

Q. Asked him if he could describe the person that went out the door, if that person was white or colored?

A. He stated the person must have been white because the dog always barks at colored people. This person was taller than he was, he was about 6'3" and was dressed in dark clothing and was a dark complected white man.

Q. Asked him if he turned on any light at the time he looked at his wife in the bedroom.

A. He stated no.

Q. Asked him if there were any lights on in the house.

A. He stated he does not remember, he does not recall.

Q. Asked him how he could see to administer to his wife if he did not turn on any lights.

A. He stated he was able to determine there was nothing he could do for her and that she was gone.

Q. Asked him as to the condition as to light and darkness at the time he regained consciousness on the beach.

A. He stated it was a little lighter than dark.

Q. Asked him if the doors were kept locked in the house.

A. He stated the doors were never locked.

Q. Asked him if there was a great deal of money kept around the house.

A. Stated no, only about $60 or $70.

Q. Asked if any narcotics were kept in the house.

A. Stated no, but there may be a few samples in my desk.

Q. Asked him about Dr. Hoversten staying at his house and where he was at now.

A. He stated Dr. Hoversten was staying at his house for a few days but that he had left yesterday afternoon to keep a golf date at Kent, Ohio.

Q. Asked him if he had heard rumors to the effect that Dr. Hoversten was infatuated with his wife.

A. He stated that he had heard those rumors but he did not think anything about it and the rumors might be true.

Q. Asked him if he knew of any men that may have stopped at his home while he was at work.

A. He stated that several men have stopped but that his wife was faithful to him.

Q. Asked him if he could name any of them.

A. Stated that he could not think of any names right now.

Q. Asked him if he was running around with any women.

A. He stated no.

Q. Asked him if his wife was running around with any men.

A. Stated no."

Defendant talked with Coroner Gerber at the hospital at about 9 A. M. on July 4th. Dr. Gerber testified as to defendant's statement of the events of the morning of July 4th as follows:

"Q. Did you have a conversation with him?

A. Yes, sir.

Q. Now will you please relate the conversation?

A. I asked him if he could tell me what happened, that is, I asked Dr. Sam Sheppard if he could tell me what happened. He said he would try to and his conversation was as follows:

That he was sleeping on this couch or davenport and that he thought he heard someone call him, 'Sam.' That he immediately jumped off the couch

and rushed upstairs. When he got to the head of the stairs something clobbered him on the back of the neck or head, and that he was rendered unconscious. He doesn't know how long, he stated, he didn't know how long he was unconscious but when he came to he thought he heard a noise in the living room. That he rushed back down the stairs to the living room and that he was—he thought that he saw some form going out of the doors toward the stairs that lead to the back. That he rushed after the form, and that when he got to the foot of the stairs that lead actually to the beach alongside of the boathouse or bath house, he got into a wrestling match or hassle with the form and that he was rendered unconscious again, and he woke up later and went back up to the house and then went into—up the stairs—went into the living room, up the stairs to the second floor and into his wife's bedroom and felt of her pulse at the neck; realized that there was something wrong with her, something seriously wrong with her, that she was probably dead. That he came back downstairs and some time later called Mayor Houk. I asked him if he could see this form as he went up the stairs from the couch. He said, 'No, it was too dark to see.' He couldn't see anything except a form.

I asked him if he could see the form going down the stairs to the beach. He said, 'No, just a form. Just an outline.' I told him I would not ask him any more questions and left. At the time that I was—he was talking to me and I was asking these questions, Dr. Richard Sheppard came in and another doctor of the hospital came in and took—this doctor, other doctor, took Dr. Sam Sheppard's blood pressure."

He also stated: * * *

"That he rushed after this form. He couldn't tell definitely what this form was, couldn't tell wheth

it was a human being or whether it was a man or a woman, whether or not it had a hat on, whether or not he could see any hair, whether or not it had a coat or trousers on."

The foregoing was repeated at the inquest at Normandy School as shown on page 3101 of the record.

On the afternoon of July 4th at about 3 P. M. the defendant was again questioned by Officer Schottke at which time he stated in part as was testified to by Officer Schottke:

"We then told him that there was blood on the band and on the crystal of the wrist watch, asked him if he could tell us how the blood got there. He stated that he remembered that at the time that he regained consciousness in the upstairs bedroom that he had felt his wife's pulse at the neck and felt that she was gone and at that time he must have gotten the blood on the wrist watch and he heard a noise downstairs and ran downstairs."

On July 10th defendant went to the sheriff's office at the request of the authorities where a full written statement was made which was in part as follows (State's exhibit 48):

"* * * I evidently became very drowsy and fell asleep. I recall wearing summer cord trousers, a white T shirt, mocassin type loafers with no shoestrings, I am not sure of the socks. I don't know whether I had removed my brown corduroy coat that I had put on earlier, or whether I did at this time or not. The next thing that I recall very hazily, my wife partially awoke me in some manner and I think she notified me that she was going to bed. I evidently continued to sleep. The next thing I recall was hearing her cry out or

scream. At this time I was on the couch. I think that she cried or screamed my name once or twice, during which time I ran upstairs, thinking that she might be having a reaction similar to convulsions that she had had in the early days of her pregnancy. I charged into our room and saw a form with a light garment I believe. At the same time grappling with someone or something. During this short period I could hear loud moans or groaning sounds and noises. I was struck down. It seems like I was hit from behind somehow and had grappled this individual from in front or generally in front of me. I was apparently knocked out. The next thing I knew I was gathering my senses while coming to a sitting position next to the bed, my feet toward the hallway. In the dim light I began to come to my senses and recognized a slight reflection on a badge that I have on my wallet. I picked up the wallet and while putting it in my pocket came to the realization that I had been struck and something was wrong. I looked at my wife. I believe I took her pulse and felt that she was gone. I believe that I thereafter instinctively or subconsciously ran into my youngster's room next door and somehow determined that he was all right. I am not sure how I determined this. After that, I thought I heard a noise downstairs, seemingly in the front eastern portion of the house. I went downstairs as rapidly as I could coming down the west division of the steps. I rounded the L of the living room and went toward the dining table situated on the east wall of the long front room on the lake side. I then saw a form progressing rapidly somewhere between the front door toward the lake and the screen door. I pursued this form through the front door, over the porch and out the screen door and then on down the steps to the beach, where I lunged or jumped or grasped him in some manner from the back, either body or leg, it was something solid. However, I

not sure. This was beyond the steps an unknown distance but probably about ten feet. I had the feeling of twisting or choking and this terminated my consciousness.

The next thing I know I came to a very groggy recollection of being at the water's edge on my face being wallowed back and forth by the waves. My head was toward the bank, my legs and feet were toward the water. I staggered to my feet and came slowly to some sort of sense. I don't know how long it took, but I staggered up the stairs toward the house and at some time came to the realization that something was wrong and that my wife had been injured. I went back upstairs and looked at my wife and felt her and checked her pulse on her neck and determined or thought that she was gone. I became or thought that I was disoriented and the victim of a bizarre dream and I believed I paced in and out of the room and possibly into one of the other rooms. I may have reexamined her, finally realizing that this was true. I went downstairs. I believe I went through the kitchen into my study, searching for a name, a number or what to do. A number came to me and I called, believing that this number was Mr. Houk's. I don't remember what I said to Mr. Houk. He and his wife arrived there shortly thereafter. During this period I paced back and forth somewhere in the house, relatively disoriented, not knowing what to do or where to turn. I think I was seated at the kitchen table with my head on the table when they arrived but I may have gone into the den. I went into the den as I recall, either before or shortly after they arrived. The injury to my neck is the only severe pain that I can recall. I should say, the discomfort to my neck. I didn't touch the back door on the road side to my recollection. Shortly after the Houks arrived, one of them poured a half glass of whiskey as they knew where we kept a small

supply of liquor, and told me to drink it. I refused, since I was so groggy anyway. I was trying to recover my senses."

The defendant's statement of the facts as above set forth are to be found with some discrepancies, variations or omissions, in the testimony of other witnesses when called to tell what the defendant told them when questioned on the subject. The first declarations of the defendant were made to Mayor Houk who arrived at the Sheppard home shortly before 6:00 A. M. on July 4th in response to the defendant's call. The mayor testified the defendant said:

> "My God, Spence, get over here quick, I think they have killed Marilyn."

He further testified that he went immediately to the Sheppard home and found the defendant in the den, and

> "I immediately went up to him and asked him what happened, words to that effect, and he said, 'I don't know exactly but somebody ought to do something for Marilyn,' and with that my wife immediately went upstairs and I remained with Dr. Sam and I said something to the effect of 'get hold of yourself' or something like that 'can you tell me what happened?' and he said, 'I don't know. I just remember waking up on the couch and I heard Marilyn screaming and I started up the stairs and somebody or something clobbered me and the next thing I remember was coming to down on the beach.' And that he remembered coming upstairs and that he thought he tried to do something for Marilyn and he says 'that's all I remember.' "

Officer Drenkham who received a call from Mayor Houk at 5:58 A. M. and who got to the Sheppard home at 6:02 A. M. stated on direct examination as to what the de-

fendant said as to his actions when awakened by Marilyn's screams:

"A. I asked the defendant what had happened. He said that he heard Marilyn scream that he remembered fighting on the stairs that he was in the water and then he came upstairs."

Mrs. Esther Houk, wife of the mayor of Bay Village, who accompanied her husband to the Sheppard home, after going upstairs and viewing the revolting sight in the Sheppard bedroom, returned to the kitchen and poured out half a glass of whiskey and offered it to the defendant with the statement "this might help you." The record then discloses the following testimony by Mrs. Houk:

"A. He said, 'No, I don't want it. I can't think clear now and I have to think.'

Q. And he did not take the drink?

A. I asked him 'shouldn't this help?' but he is a doctor, he should know and he said, 'no.' So he didn't take it.

Q. I see. Then what occurred from the den?

A. I believe he was talking.

* * * * *

Q. What did he say?

A. He complained of his neck. He said he thought it was broken. He mentioned kidding Steve about locking his house so tight. He said he remembered being hit at the top of the stairs and either he was chasing someone or someone was chasing him down the stairs. I remember that, because I couldn't picture anyone chasing him * * *."

The defendant's brother, Dr. Richard Sheppard arrived shortly after Mr. and Mrs. Houk and Officer Drenkham and after viewing Marilyn, returned to the den. Mayor

Houk then testified that he heard the following conversation:

"Dr. Richard bent over Dr. Sam and I heard him say that 'she is gone, Sam,' or words to that effect, and Sam slumped further down in his chair and said, 'Oh, my God no' or words to that effect. And I then heard Dr. Richard say either 'did you do this?' or 'did you have anything to do with this?' and Sam replied, 'Hell, no.' "

Shortly after the foregoing conversation with defendant by those who first came to his house, Dr. Stephen Sheppard arrived with a doctor from Bay View Hospital (about 6:15 A. M.) and without consulting authorities, took the defendant to Bay View Hospital.

On the following day, Dr. Hoversten testified about a call he made upon the defendant to the hospital, when he heard the following conversation between the defendant and Dr. Stephen Sheppard:

"A. Yes, I remember I was sitting on the left hand side of the bed and Steve sat near the foot of the bed and he advised Dr. Sam to go over in his mind several times a day * * * As I recall Dr. Steve addressed Dr. Sam and said in words to this effect: 'You should review in your mind several times a day the sequence of events as they happened so that you will have your story straight when questioned' and then he gave as an example 'you were upstairs and you went downstairs and from here to here,' and so forth."

An examination of the foregoing evidence shows that as successive inquiries were made of the defendant, his answers changed considerably. His first statement shows that he did not reach the top of the stairs before encountering someone or a form. No mention is made about "Chip"

until the statement was made at the sheriff's office on July 10th. Likewise, the statements do not suggest that defendant examined the decedent on his first responding to her call, until after the green bag containing defendant's watch, ring and keys were found with blood on the crystal and band of the watch and such fact was called to his attention. There could be no possible way under the sequence of events as testified to by the defendant in which blood could have gotten on the watch unless it got there before the defendant had his alleged encounter on the beach.

When the defendant fell asleep on the couch in the living room on the evening of July 3rd he (by his own testimony) was wearing a T shirt, pants, loafers and a corduroy jacket. When the Houks arrived at 5:45 A. M. on July 4th defendant was bare from the waist up and in his statements claims no recollection of what happened to the T shirt. The T shirt has never been found or accounted for. Chief of Police Eaton when he arrived at 6:30 A. M. of July 4th saw the corduroy jacket neatly folded on the couch where defendant had been sleeping and Officer Drenkham had noticed the jacket in the same position upon his arrival at 6:02 A. M. No one of those who arrived at the Sheppard home prior to the Chief of Police, testified as to have moved or touched the jacket. The defendant is not sure but says he has a faint recollection of having removed it while sleeping because he was too warm. Dr. Stephen Sheppard testified having observed the jacket on the floor. This was prior to 6:30 A. M. However, when the photograph was taken at 8 A. M. the jacket was still in the position as observed by Officer Drenkham and Chief Eaton.

The officers who first arrived on the premises made a complete investigation of the house for evidence of any forcible entry, and found all windows and screens locked, untouched and in place, the screens being fastened from the inside and no damage was observed to any of the doors. Defendant testified that the doors of his home were never locked. However Mrs. Ahern testified that before she left at midnight on the morning of July 4th, she locked the door and chained it on the lake side of the house and the maid testified of being locked out on one or more occasions when she came to work in the morning. She also testified that it was the practice to leave the street door unlocked on the mornings she was to report for work, which was on a fixed day each week. This testimony is supported by that of Dr. Hoversten who said that the first day he visited there in July when he came home at about midnight, Marilyn called down to him not to lock the door because the maid was coming in the morning. The record clearly shows the maid was not expected on July 4th.

Officer Drenkham testified that he patrolled Lake Road during the night beginning about 11 P. M. and continuing until 5 A. M. passing the Sheppard home on several occasions, and noticed no one on the highway at or near the Sheppard home. He also examined the beach at the bottom of the steps by the beach house shortly after 6 A. M. and found no foot prints in the sand. Defendant produced two witnesses, one of whom reported that while driving east on West Lake Road at about 2:15 A. M. on July 4th he saw a big man over six feet tall and weighing 190 pounds standing in the Sheppard driveway wearing a light T shirt but was unable to describe the rest of the dress. He

testified that the stranger had a crew hair cut and was a bit tanned and that all this was observed in the dead of night while returning from a fishing party at Sandusky, Ohio. The witness had a boat attached to his automobile and testified he was driving 35 miles per hour when he observed the stranger in the drive near three maple trees. The other witness claims to have been driving west at about 4 A. M. when he observed a stranger near the cemetery which is just west of the Sheppard home. He described the stranger as having a crew haircut, was 5′9″ tall and had bulging eyes and was wearing a white shirt. Neither of these witnesses came forward until a reward was offered publicly six or seven days after July 4th although the story of Marilyn Sheppard's death had received great publicity, including the story that defendant had met with a form with bushy hair in the Sheppard home after he heard his wife scream for help.

Defendant's testimony was given in support of his claim that his home life and that of his wife was loving and harmonious. As opposed to this evidence Dr. Hoversten testified to conversation in which the witness read and discussed with defendant a letter which defendant had written and which he intended to mail to his wife, on the subject of divorce. The same subject was talked over on several occasions and there is some evidence that the defendant discussed this subject with Susan Hayes. There is also evidence that after Chip was born Mrs. Sheppard was not sexually aggressive and that she had consulted with defendant's brother Dr. Stephen Sheppard on the subject and its effect on her relationship with her husband (the defendant). Defendant admitted meeting with one of his lady patients, *at her insistence and request* on several occasions, taking her to Metropolitan Park on at least one occasion where they kissed each other and being involved in an altercation between the lady and her husband about her attentions to defendant in Mrs. Sheppard's presence on a boat trip to Detroit. He called and was in company of another young lady in California while his wife was in Cleveland. His intimate relationship with Susan Hayes for more than a year was admitted by defendant including his cohabiting with her at the home of Dr. Miller in California for about a week although when first questioned he denied any such affair and upon the coroner's inquest under oath he testified untruthfully on the subject by denying such intimacy.

When the officers arrived at the Sheppard home on the morning of July 4th they found a medical bag of defendant open and on its end with some of the contents spilled on the floor. Some of the drawers in the desk in the library were pulled out and piled on the floor and the tools for defendant's outboard motor, which defendant kept in a green cloth bag in the desk, were on the floor in front of the desk, together with a broken statue. There was also a green box containing fishing tackle on the floor near the tools. Marilyn Sheppard's wrist watch with dry blood on the band was lying on the floor near the desk. The contents of one drawer had been spilled out after Dr. Richard Sheppard accidentally kicked it over. The drawers in the desk in the living room were partly pulled out but the contents thereof were undisturbed. The lid or cover of the desk was open and resting on the back of one of the upholstered living room chairs. There were some sales tax stamps and papers scattered about on the floor near the desk.

The Cleveland police department fingerprint expert testified that there were no readable fingerprints on the desks or in other places about the house; that they had been wiped off or smudged, and on some of the furniture surfaces he found long scratches as if the surfaces had been wiped with sandpaper or a rough cloth of some kind. This was equally true of the metal fishing box and drawers piled in the den.

The picture of Mrs. Sheppard's left wrist showed an impression of the wrist band of her watch in dry blood, as if the watch had been pulled from her wrist after the blood had dried about the wrist band. About 1:30 P.M. the afternoon of July 4th, the mayor's son, while searching the bank which extends down to the lake in front of the Sheppard home and which is covered with very heavy brush, found the green cloth bag containing the defendant's wrist watch, which had stopped at 4:15, with dry blood on the band and crystal and also containing his class ring and key chain. The hour at which the watch was stopped was 15 minutes after the latest time fixed by the county coroner as the time Marilyn Sheppard came to her death (between 3 and 4 A.M. on July 4th). There was no blood on the bag and there is no dispute but that the green bag was the one used by defendant to hold his outboard motor tools and that he kept them in his desk in the den.

There was over $200.00 found in various places about the house including defendant's wallet which contained $63.00 and a check for a large sum of money, all of which was easily discovered by the Chief of Police. Defendant testified that he discovered his wallet which had been in

his pocket, on the floor beside him after he came to in the bedroom. Except for the green cloth bag, defendant's watch, ring and key chain, there is no evidence that anything was missing from the Sheppard home.

Defendant in his argument to the jury said:

> "Well, of course, we don't claim there was a burglary. I mean I don't know why the intruder was there. We claim there was a man there but whether he was there for burglary or not I don't know. We never claimed that he was."

The evidence of the somewhat disarranged condition of the first floor of the house would tend to show the presence of an intruder, but if because of the manner in which it was done and the other surrounding circumstances no such conclusion could be reasonably drawn from the evidence, such condition would give strong support to the State's case. The defendant also argues that decedent came to her death at the hands of a sex maniac by whom defendant was "clobbered" in his bedroom or on the stairway to the second floor, and on the beach. It would be difficult to believe that a sex maniac, after discovery, would take time to set up the appearance of a burglary, or that a burglar would throw away the only property found to have been taken from the house, the green cloth bag containing defendant's wrist watch, ring and key chain.

It is also hard to believe that a burglar would not have found and taken defendant's wallet which he says was on the floor beside him after he encountered the form in the bedroom, and after monies that were about the house, or that either a burglar or a sex maniac would take time or go to the trouble of destroying fingerprints after

the defendant was aroused from his sleep, or that such person, armed with a blunt instrument, would go about his intended purpose without molesting the defendant whose presence asleep on the couch could not have been missed.

When the defendant went to sleep on the couch the green bag containing the tools was in the desk and the defendant was wearing his wrist watch, ring and key chain.

By defendant's own testimony, when responding to his wife's screams for help, he did not turn on the lights either on the stairway while on his way to the bedroom, or in the bedroom. Light switches were conveniently placed for that purpose. That it was then in the dead of night is clearly shown because when he was following the form to the beach he said it was dark, with some reflection from Cleveland, and after coming to and starting back to the house, he testified the day was just breaking. The discovery by defendant that his wife had been so badly beaten "that he felt she was gone" particularly when he returned from the beach and made as he claimed, his second examination of her; that he should do so without light, is a fact which the jury had the right to consider, together with all of the other evidence of his conduct and the surrounding physical facts, in determining the credibility to be given his story. Even though day was breaking, the evidence was undisputed that the window shades were drawn in the murder room, except as to one window which was up six inches to let in air. There is evidence in the record by a neighbor that she drove by the Sheppard home at 2:35 A.M. on July 4th and saw two lights burn-

ing, one on the first floor toward the east side of the house, and one on the second floor.

No mention is made by defendant about the family dog, although he testified that the intruder must have been white, because a dog always barks at colored people. The defendant did not hear the dog bark or at least he gave no testimony to that effect.

One significant fact to be considered is the passing of time between the time of Marilyn Sheppard's death and the time defendant summoned help and what all the activities were that engaged the defendant's attention during that period.

The coroner fixed the time of death as between 3 and 4 A.M. on July 4, 1954. The first call by defendant asking for help was made between 5:45 A.M. and 5:50 A.M. of that day. The defendant testified that when he followed the form to the beach, it was in the dark of night with some reflection of light from Cleveland. At the time he came to on the beach, he testified that it was at about the break of day. It is a matter of public information that on July 4, 1954, the sun rose at 4:58 A.M. Eastern Standard time or 5:58 A.M. Eastern Daylight Savings time. The break of day precedes sunrise by about forty minutes. So that either between the time of death fixed by the coroner, at which time defendant testified he was in the bedroom where decedent died, having responded to her call for help, and in his testimony expressed the belief that she was then gone, or from the time defendant started from the beach to the house after encountering the form there (defendant's testimony being the only authority for this fact) from forty minutes to two hours passed.

There is little or no attempt to account for defendant's actions during this period. It is also true that there were neighbors on both sides who were not disturbed. They were much closer in point of distance to the defendant than was Mayor Houk.

The evidence shows also that there was a telephone between the twin beds in the murder room which was not used by defendant to call help after he regained consciousness from his first encounter with the form either on the stairs or in the bedroom. Likewise, when chasing the form to the beach, the defendant did not avail himself of any weapon although there were firearms available in the den and fire tools in the fireplace in the living room which he passed in going out the door to the lake side of the house.

The defendant's injuries were the subject of some conflicting testimony. Doctors testifying for the State described his injuries as injuries to the right cheek of the face, a black eye, some damage to the right side of his forehead, some damage to the membrane of his mouth, and no indication of any injury to the back of the neck. Doctors for defendant not only report the injuries to the right side of his face, eye and mouth but also injuries to the spinous process of the second cervical vertebrae and some swelling on the back of the neck. They do not claim that the skin was broken at this point. Whatever injuries the defendant sustained were caused by a blow or blows of the fist of an assailant. This was defendant's testimony, although he testified that his first encounter was in the bedroom where his wife came to her death as a result of many blows on the head with a blunt instrument. It was

on this occasion and only then, that the defendant claims that there might have been two assailants "one working over his wife" and the other striking defendant from the back with his fist. While he was following the form to the beach there was no suggestion that there was more than one object or form in front of him.

The foregoing is a summary of much of the evidence dealing with many of the physical facts and conditions of the premises as found on July 4th and of declarations and actions of the parties involved as testified to by the public authorities and other witnesses, together with what the defendant said to others and in his testimony upon trial in relation to the events of the morning. The testimony of the defendant, in dealing with the events that took place in his presence or the things that he did, was characterized by the State as vague, indefinite, uncertain or factually highly improbable. During the time he was under cross-examination the defendant gave evasive answers such as "I can't recall" or "I can't remember," approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence material to the issues in the case.

The jury, under the instructions of the court, was presented with but one question or issue of fact and that was, "had the State shown beyond reasonable doubt that the defendant purposely killed Marilyn Sheppard?"

The State's case is based in part on circumstantial evidence. The law of Ohio on this subject requires that the facts and circumstances upon which the theory of guilt is based must be established beyond reasonable doubt and the facts so established must be entirely irreconcilable

with any claim or theory of innocence and admit of no other hypothesis than the guilt of the accused. *Carter vs. State,* 4 Oh. App. 193.

If, therefore, the jury, after careful deliberation, found that there was any possible hypothesis of innocence, after a consideration of all of the evidence, then the defendant would be legally entitled to be discharged, but if the jury found, after full deliberation, there was no possible hypothesis of innocence based on the facts as they found them to be, and that the facts found are such as to be irreconcilable with any other reasonable hypothesis, than the guilt of the accused, then a verdict of guilty was required.

This was a jury question and we hold that there was sufficient evidence to support the verdict of guilty as found by the jury.

Claims of error Nos. 17, 18, 24, 25, 26, 27, 28 and 29 are therefore overruled.

Assignments of error under the heading of "The admission of testimony" in subhead VI of defendant's brief will next be considered. During the trial, pictures in color that had been taken of the wounds of Mrs. Sheppard's head, after the blood had been washed away, were shown. Six black and white pictures were developed from these negatives and received in evidence, which were explained by the deputy county coroner. The colored pictures were then shown to the jury through the use of a projecting machine on a screen six feet by six feet, the pictures being four feet square. It is claimed that such pictures exaggerated the size of the wounds and unfairly emphasized the evidence of the cause of death. Except for the size of

the pictures, there is no claim that they were distorted or inaccurate. They dealt with a subject vital to one of the issues of fact, that is, the cause of death and the severity of the blows.

In the case of *Cincinnati Traction Co. vs. Harrison* (24 C. C. N. S. 1 on page 6) the court said on this subject:

> "As to the photograph, it was an enlarged one, *but was not for that reason inadmissible.*"

The defendant was not prejudiced by the manner of showing these pictures.

It is further claimed that the testimony of Mrs. Ahern with regard to conversations she had had with the decedent about divorce, was improperly received in evidence. She testified that Mrs. Sheppard had told her that the defendant had discussed the possibility of seeking a divorce from her with Dr. Chapman while in California. At the very outset of the trial the defendant stated as a fact that he and his wife were happy and living a harmonious and lovable married life, and on his defense he testified to support of such statement. Aside from the alleged conversation between Mrs. Ahern and the decedent, there is considerable testimony as to conversations the defendant had with others (particularly Dr. Hoversten and Miss Hayes) on the subject of divorce, such conversations being in part admitted by the defendant. He, however, denies ever suggesting seriously a separation with his wife and maintains throughout that they lived happily together. Statements such as were given in evidence or testified to by Mrs. Ahern as a statement made by the decedent, are always admissible to show that the statement was made or to establish the state of mind of the

parties where their relationship is material to the issues in the case.

In the case of *Cassidy vs. Ohio Public Service Co.*, 83 Oh. App. 404 (a negligence case), the court at page 410 quotes with approval from 6 *Wigmore on Evidence,* (3rd Ed.) page 185, Sec. 1770 as follows:

> "Where the utterance of specific words is itself a part of the details of the issue under the substantive law and the pleadings, their utterances may be proved without violation of the hearsay rule, because they are not offered as evidence of the truth of the matter that may be asserted therein."

Also, in paragraph 1730 of the same work, headed "Statement of another (Bias, Fear, Malice, Affection etc.) Wife's or Husband's Declarations."

> "* * *
>
> 2. A special application is found in actions for alienation of affections, criminal conversation, divorce or *wife murder where the state of affections of the wife to her husband or of the husband to the wife* becomes material. Here the declarations of the person as to her or his own state of affections are admissible under the present principle * * *" (Hearsay rule) (emphasis added).

In 31 *C. J. S.* page 988 Title "Evidence," parag. 239, dealing with independent relevant statements, it is said:

> "Where the fact that a particular statement was made is of itself a relevant fact, regardless of the truth or falsity of such statement, the statement is admissible as evidence as an independent relevant fact."

The cases cited by defendant are not in point. *Potter vs. Baker,* 162 O. S. 488, deals with spontaneous state-

ments of third persons at the time of an accident. *Geller vs. Geller,* 115 O. S. 468, was concerned with the letter of an unknown third person and the other cases are likewise far afield from the legal question here being considered.

Even if it be argued that there is no sound legal basis for the inquiry of what the deceased said of statements of defendant to Dr. Chapman about divorce, yet, because of the state of the record on that subject the defendant's admitted relationships with other women which came to the knowledge of the decedent, the watch incident which was a part of the same conversation between the decedent and Mrs. Ahern (the watch given to Susan Hayes having been previously the subject of some slightly animated discussion between defendant and his wife) we do not find that the defendant was prejudicially affected by the admission of this evidence about which he complains.

Defendant complains also about the admission of testimony given by Mrs. Houk that the defendant told her that in an automobile accident where no physical injury is apparent, a head injury could be easily claimed.

In view of the highly controverted state of the record as to whether or not the defendant sustained an injury to the back of his neck and head we find no error in the admission of this testimony.

Defendant also complains about the extensive cross-examination of the defendant about Margaret Kauzor and Mrs. Lossman and calling attention to the defendant's untruthful testimony given under oath at the coroner's inquest about his relations with Susan Hayes. The defendant also claims as error a question directed to the defendant on cross-examination which assumed that de-

fendant killed his wife, to which the defendant answered "That is absolutely untrue and unfair." The question certainly was proper under the circumstances.

The defendant also claims error in permitting Mayor Houk to testify to submitting to a lie detector (polygraph) test. The record shows that Dr. Stephen Sheppard at one point in the investigation, indicated that Mayor Houk was in some way involved. After this was brought out the Mayor was asked "Did you, Mr. Houk, submit to a lie detector test?" to which he answered over defendant's objection, "Yes." The results of the test were npt inquired about, and the simple fact that a test was made by agreement of the witness under the circumstances could not prejudice the defendant's case.

We likewise overrule the claims of error because of the claimed "unfair and biased testimony of the coroner." If the coroner, in his testimony, was not testifying within the orbit of his personal knowledge, cross-examination is the weapon within the use of the defendant to demonstrate that fact before the jury, to the damage of the State's case.

The foregoing claims of error are therefore overruled.

Errors concerned with the exclusion of testimony are grouped by the defendant under the title "The Court erred in exclusion of testimony."

The first claim of error under this heading is the refusal of the court to require the coroner to produce certain records on the claim that they were public in character.

The records referred to were the work sheets of the technicians of the coroner's office. These papers are not of the character of "public records," and no error was committed by refusing to direct their production in court.

The failure to order the coroner to produce a police report that had been given to him by the police department is not error. This report is the same one that was later received in evidence and while the court's ruling holding that the coroner need not produce a police department record was correct, its later introduction would cure any possible error.

The defendant claims that he was restricted in his cross-examination of Dr. Hexter on the subject of shock and as to the cross-examination of Officer Schottke on whether or not the defendant cooperated in the police investigation of the cause of his wife's death. Neither of these claims are well founded. After an objection to a question put to Dr. Hexter was sustained because of its form, the defendant conducted a searching cross-examination of the doctor on the subject of shock. Whatever restriction the defendant suffered by the court's sustaining the objection claimed as error was fully corrected by subsequent questions which were fully answered. The questions to Officer Schottke asked for conclusions of fact and the State's objections were properly sustained.

The next claim of error under this heading is the court's refusal to permit evidence on what the defendant calls similar offenses or other acts of burglary committed or attempted in Bay Village. It is the claim of the defendant that homes of two citizens of Bay Village were entered by intruders, one in September and the other on July 7, 1954. We know of no theory of law that would make such testimony competent in this case. The court was not in error in ruling against the introduction of this evidence.

The remaining claims of error under this heading a concerned with the court's failure to permit a juror question the defendant while he was testifying in his d fense, refusing to allow Don Ahern to give opinion ev dence as to whether or not the defendant was a "de sleeper" and also in sustaining objection to questions t Dr. Adelson, the pathologist of the coroner's office, as t his opinion of the cause of the wounds on the hands o Mrs. Sheppard.

The right of a juror to ask questions of a witness dur ing trial is clearly within the sound discretion of the trial court. *Utah vs. Anderson* (Sup. Ct. of Utah) 159 A. L. R. 340. The practice is not encouraged because:

> "generally jurors are not familiar with the rules governing the admission of evidence and in the very nature of such a situation, counsel quite naturally will hesitate to object to a question propounded by a juror, even though it may be competent, and this practice is so dangerous to the rights of the litigants that we cannot encourage the practice."
>
> *White vs. Little,* 131 Okla., 132, 268, p. 221.

For further authorities see annotation following the case of *Utah vs. Anderson,* 159 A. L. R. 347.

This claim of error is therefore overruled.

The other two claims of error just above listed are likewise overruled, the questions involved not being material to the issues in the case.

Assignments of error listed in paragraph 6 of defendant's brief entitled "Errors in conduct of trial" will now be considered.

During the trial of the case (which lasted about five week the bill of exceptions being bound in twelve vol-

mes, totaling 7,102 pages together with a supplemental ill of exceptions containing the opening statements, of 06 pages) the court suggested on a few occasions that he proceeding was not going forward with sufficient dispatch and on one occasion the court said that it should not take over a day to determine the cause of death. There are other complaints of the defendant because of remarks of the trial judge of which the following is typical:

> "The Court: Well, Mr. Corrigan, we can't go on with this witness forever. We will have to somehow or other get through with the witness.
>
> Mr. Corrigan: Well, he has not got his pictures here.
>
> The Court: Well, in any event, we are making too much of a ritual of every bit of movement, and I don't think we ought to take the time. It is not fair to these jurors nor fair to anybody.
>
> * * *
>
> Mr. Corrigan: Now, Your Honor, I am here to defend a man for murder.
>
> The Court: I know, but we try other murder cases too. We have to try other people as well."

There was also some discussion before the jury about the defendant demanding the return of the keys to his house, which he claims was necessary for him to have in making out his defense. This claim is countered with proof that defendant or his representative was at liberty to go to his house at any time on request, when in the company of a police officer.

It is likewise claimed that there was disorder during the trial and defendant in his brief lists eleven places in the record when order was called for because of noise in or out of the courtroom.

It is also claimed that the court arranged the courtroom to accommodate a great many representatives of the press, radio and television and other news disseminating agencies, thus restricting accommodations available for others. The record shows that the defendant's family was provided for and that the defendant's brother, Dr. Stephen Sheppard, although a witness, was permitted by order of the court to remain in the courtroom throughout the trial. The court in this case was presented with a very difficult matter because of the unusual amount of coverage attempted by the press, radio and television agencies. The arrangements made by the court were within its sound discretion. Certainly the defendant was afforded a public trial, and from a reading of the record, we cannot say that the court in seeking to maintain an orderly proceeding abused its discretion in directing the courtroom arrangements.

Pierpont vs. State, 49 Oh. App. 77;
Makley vs. State, 49 Oh. App. 359.

It is also claimed that the jury was not properly admonished upon separation during the trial.

A careful examination of the record as to each of the foregoing claims of error shows that the proceedings were regular in every respect and the claims of error are therefore overruled.

It is likewise claimed in this section that the court should have charged on the included offenses of "Assault and battery and assault" and that in holding the jury together for five days after submission of the case, coerced them into agreeing on a verdict.

The claim that assault and battery and assault should have been charged must be overruled. There is no question but that decedent was killed as a proximate result of the unlawful wounds inflicted upon her person. Death, without question of doubt, resulted from the unlawful acts of the killer, and the only factual issue in the case being whether or not the defendant committed the various assaults on her person. The case cited by defendant of *Bandy vs. State*, 102 O. S. 384, 131 N. E. 499, is direct authority against this claim of error. Paragraph 2 of the syllabus provides:

> "2. If the indictment charges murder in the first degree in the perpetration of a robbery under Sec. 12400 G. C. and there is no evidence tending to support a charge of murder in the second degree, or manslaughter, as distinguished from murder in the first degree, then the defendant, upon the failure of proof as to murder in the first degree, is entitled to an acquittal, and in such case it is not error for the court to refuse to charge either murder in the second degree or manslaughter."

See also *State vs. Muskus*, 158 O. S. 276, 109 N. E. 2d, 15.

The case was submitted to the jury on the morning of Friday, December 17th. At the noon hour the jury was put under the care of two bailiffs who were sworn and instructed as to their duties. The deliberations of the jury continued through Saturday and Sunday, the defendant objecting to the Sunday session. On Monday evening, no communication having been received from the jury as to their progress the court instructed the parties that at 10 P. M. the bailiff should inquire 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 jury's reply was that they were close to a verdict and desired to retire at that time and resume deliberations in the morning. The jury returned its verdict on Tuesday, December 21, 1954 at 4:33 P. M.

At no time during their deliberations did the jury or any member of the panel, suggest that there was no hope of a verdict or that they did not desire to continue their deliberations. The jury was called into open court three times a day during deliberations so that there were many opportunities for them to express their feelings if they desired to do so. With the great number of exhibits and 7,102 pages of evidence the jury was unquestionably painstaking in its approach to the serious question presented to them and their willingness to take whatever time that was reasonably necessary under the circumstances, to do justice between the State of Ohio and the defendant, cannot be grounds for criticism. We do not find that there is any basis for the claim that the jury was coerced into a verdict.

The claims of error under the heading "Errors in conduct of trial" are therefore overruled.

The defendant groups assignments of errors Nos. 14, 22 and 23 under the title "The court erred in its charge to the jury."

The defendant requested the court to reduce its charge to writing as provided by Sec. 2945.10 R. C. which provides:

"The court, after the argument is concluded and before proceeding with any other business shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge or other charges or instructions provided for by this section when so written and given shall not be orally qualified or modified or explained, by the court." * * *

Before the trial was concluded, the court had written its charge and a copy given to counsel for the State and for the defendant before argument. The trial came to an end after counsel for the State concluded its final argument to the jury at about 4:15 P. M. of Thursday, December 16, 1954. The court then addressed the jury as follows:

"The Court: Ladies and gentlemen of the jury we will now be adjourned until, shall we say, nine o'clock tomorrow morning. I would like to get a fairly early start, but if we are not all here at nine o'clock we will not, of course, until we are all here, but as soon as possible after nine o'clock I would like to have the court convene. In the meantime, will you be very careful—now we are in the closing stages—not to discuss this case or reach any point whatever where you are seeking or securing any information or notions or statements from anybody about it. The law of this State provides that when a jury is charged with the final word in the case, and a jury proceeds in the secrecy of its jury room to deliberate and to determine the issues that are to be determined, that from that point on, and continuing until such time as they and the Court together, if that should have to come to pass, are not able to agree—or rather, they and the Court are agreed that the jury cannot agree upon a verdict, or a verdict is rendered, the jurors must be

kept together. This case is important. It may take you a short time, nobody knows. It may take you some time, nobody knows. But, in any event, I am sure you appreciate that fact that it is a case that does need deliberation and care in its decision, whatever that decision may be, and for that reason, it may go over tomorrow. If it does, it will be necessary for you to remain in the comfort—some people think it is a discomfort—of a downtown hotel. The Court will take care of all of those details, if they are to be taken care of, so I am saying to you now so that you may come tomorrow morning prepared, if necessary, to remain in a downtown hotel tomorrow night under the care and as guests of the Court and its officers.

Mr. Corrigan: I except to the instructions of the Court.

The Court: Sir?

Mr. Corrigan: I except to your instruction.

The Court: What is erroneous about it?

Mr. Corrigan: I say, I except to your instructions.

The Court: Oh, yes, all right. Without any formality at all, we will be adjourned until 9 o'clock tomorrow morning." (Whereupon adjournment had.)

Court was then adjourned until 9 A. M. of Friday, December 17, 1954. At this time in the absence of the jury, the defendant excepted to parts of the written charge on reputation and character evidence and on the law as to circumstantial evidence and presented requested charges in writing which requests were overruled. The court then proceeded to read its written instructions to the jury in open court without deviation from the prepared charge.

The record does not show that any other business of the court was conducted after the close of court on December 16th and the opening of court on December 17, 1954.

From the foregoing recital of the record, it is clear that no part of the court's instructions on the law of the case was given on Dec. 16th and that the entire charge on the law was in writing as requested by defendant. Sec. 2945.10 R. C. was strictly complied with so that claims of error that the court failed to reduce its charge to writing, that part was given one day and part the next, and that the court failed to give its charge immediately after concluding arguments, must all be overruled.

The duty to proceed to charge the law of a case as required by Sec. 2945.10 R. C. *supra*, means to proceed within the regular hours of the court day which are provided for by Rule 23-C of the Common Pleas Court of Cuyahoga County.

The defendant assigns as error under this division of the brief (error No. 23) that the court refused to give written instructions on points of law before argument. This error is claimed but there is no argument in support of it in the brief.

Sec. 2945.10-E R. C. provides:

> "When the evidence is concluded, either party may request instructions to the jury on points of law which instructions shall be reduced to writing if either party requests it."

This section empowers, but does not require, the court to give such instructions. The following cases support the court's denial of such request and there is no claim that the substance of such requests were not included in the general charge of the court.

State vs. Petro, 148 O. S. 473, 76 N. E. 2d 355;
Grossweiler vs. State, 113 O. S. 46, 148 N. E. 89;
Wertenberger vs. State, 99 O. S. 353, 124 N. E. 243;
State vs. Williams, 85 O. App. 236, 88 N. E. 2d, 420;
State vs. Cheatwood, 84 O. App. 125, 82 N. E. 2d 770.

There remains to consider the court's charge on the subject of the use of character evidence and the rule to be followed when the State's case depends entirely or in substantial part on circumstantial evidence.

On the first question, the court charged the jury as follows:

> "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 good reputation will not avail any person charged with a crime against proof of guilt beyond a reasonable doubt."

This charge is fully supported by the holding of this court in the case of *State vs. Neal,* 97 Oh. App. 339, 118 N. E. 2d 424 (Motion to certify overruled). We hold that the law was correctly stated by the court.

Harrington vs. State, 19 O. S. 264;
Stewart vs. State, 22 O. S. 477.

Paragraph 4 of the syllabus of *Stewart vs. State, supra,* provides:

> "In a criminal case it is error to instruct the jury that evidence of the defendant's good character is not to be considered by the jury or made available to the defendant except in doubtful cases; *the true and proper rule being to leave the weight and bearing of such evidence to the jury.* Harrington vs. State, 19 O. S. 264 approved p. 268." (Emphasis added.)

The charge on circumstantial evidence was as follows:

> "* * * Where circumstantial evidence is adduced, it together with all the other evidence must convince you on the issues 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 guilty, such evidence, together with any and all other evidence in the case, and with all the other 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 request of the defendant is in substance the same as the charge as given, and as given is fully supported by the case of *Carter vs. State,* 4 Oh. App. 193. The defendant's claims of error Nos. 14, 22 and 23 are overruled.

Finally, paragraph 8 of defendant's brief claims "Errors in overruling the motion for new trial."

There is some claim that the jurors were allowed to separate and to communicate with outsiders by telephone

during their deliberations. A photograph was taken of the jury in the dining room of the Carter Hotel. Their separation was only sufficiently far apart to enable a separate picture of the men and women to be taken. The jurors remained in their respective immediate presence except for sleeping purposes. All telephone communications were to members of the family of the jury, and there is no evidence that these telephone calls, made in the presence of a bailiff, were anything but proper.

We have given full consideration to the question of the sufficiency of the evidence as supporting the verdict in this case in another part of this opinion dealing with the motion to direct a verdict, and it seems unnecessary to restate what was said there. For the reasons stated in that part of this opinion, we hold that the court was fully justified in overruling the motion for new trial.

The record in this case was most extensive and the briefs presented by counsel, although likewise extensive, have been of great assistance to this Court in the work of resolving the legal questions presented, it being remembered that a reviewing court is not called upon to determine questions of fact relating to the guilt or innocence of the defendant, a function which in the first instance is solely within the province of the jury. The court in overruling the many assignments of error is unanimously of the opinion that the defendant in this case has been afforded a fair trial by an impartial jury and in the opinion of this Court substantial justice has been done. Sec. 2945.83 R. C. in part provides:

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of: * * *

> (C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby.
>
> (D) A misdirection of the jury unless the accused was or may have been prejudiced thereby.
>
> (E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

A careful study of the record and the authority of the foregoing section of the Code of Criminal Procedure requires that the judgment be affirmed.

Judgment affirmed. Exceptions noted.

KOVACHY, J., HURD, J., concur.

APPENDIX D.

Opinion of the Court of Appeals on Appeal from Order Denying New Trial on the Ground of Newly Discovered Evidence.

No. 23,551.

IN THE COURT OF APPEALS OF OHIO
CUYAHOGA COUNTY, EIGHTH DISTRICT.

STATE OF OHIO,
Plaintiff-Appellee,

vs.

SAMUEL H. SHEPPARD,
Defendant-Appellant.

OPINION.

July 20, 1955.

KOVACHY, *P. J.*:

Samuel H. Sheppard was convicted of murder in the second degree by a jury in the Common Pleas Court of Cuyahoga County and sentenced to life imprisonment in the Ohio State Penitentiary. He appealed that conviction and judgment to this Court in State of Ohio vs. Samuel H. Sheppard, Case No. 23,400, which judgment has been affirmed and opinion filed dealing with the claimed errors in that appeal.

This is a separate appeal emanating from that cause on the sole ground that there is error in the record and proceedings in the Court of Common Pleas of Cuyahoga County prejudicial to the rights of the defendant in over-

ruling his motion for a new trial on the ground of newly discovered evidence.

The motion reads:

> "Now comes the defendant, and moves for a new trial on the ground of newly discovered evidence material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial, and the defendant further requests that an oral hearing be had on this motion."

The defendant produced at the hearing on this motion, in support thereof, the affidavits of the witnesses by whom such evidence was expected to be given and the prosecuting attorney produced affidavits to impeach the affidavits of such witnesses, all in accordance with sub-paragraph F of Section 2945.79 of the Revised Code of Ohio.

There were filed by the defendants:

Affidavit N. D. E. 1 made by Samuel H. Sheppard. It deposes that he is right handed.

Affidavit N. D. E. 2 made by Arthur E. Petersilge, one of counsel for defendant. It sets forth that, on several occasions during the trial, he sought delivery to the defendant of the keys to the home of the defendant and his murdered wife, and that such request was refused by the office of the County Prosecuting Attorney until December 23, 1954—two days following the rendition of the verdict by the jury.

Affidavit N. D. E. 3 made by Stephen A. Sheppard, brother of defendant. It sets forth that he received the keys to the defendant's home on December 23, 1954; that without using them for any purpose, he turned them over shortly to his brother, Richard N. Sheppard.

Affidavit N. D. E. 4 made by Richard N. Sheppard, brother of defendant. It sets forth that he is Administrator of the Estate of the deceased Marilyn Sheppard; that he received the keys from Stephen A. Sheppard on December 23, 1954 and that on January 23, 1955, he made the premises (scene of the murder) available to Dr. Paul Kirk and that Dr. Kirk examined the premises on January 23rd and 24th. Affiant says that there was no change of any kind made in the interior of the dwelling from the time he received the keys until after completion of investigation and examinations within the dwelling by Dr. Kirk.

Affidavit N. D. E. 5 made by Dr. Virgil E. Haws, an Osteopathic Physician and Pathologist. He states he visited the home (scene of the murder) on February 12th, 1955, accompanied by Dr. Richard Sheppard, Dr. Stephen Sheppard and Reverend Robert G. Scully, Pastor of the Rocky River Methodist Church. He states that the purpose of the visit was to remove two (2) blood spots from the wardrobe or closet door on the east wall of the bedroom which was the scene of the murder. He described in careful detail how that purpose was accomplished and states that the spots were placed in separate bottles and sealed in a mailing tube and handed to Reverend Scully, marked Spot "A" and Spot "B."

Affidavit N. D. E. 6 made by Reverend Robert G. Scully. He corroborates the recital of Dr. Haws as to the removal of the blood spots; states the mailing tubes were then and there sealed and handed to him; that he mailed them to Dr. Paul Kirk, Berkeley, California, on February 14, 1955.

Affidavit N. D. E. 7 made by Dr. Paul Leland Kirk, an authority on Criminalistics, who is at present in charge of

the School of Criminology of the University of California. We shall consider its contents later.

Affidavit N. D. E. 8 made by William J. Corrigan, one of counsel for defendant, in rebuttal to the affidavit made by Dr. Marsters for the State and received by telephone from Dr. Kirk. It is in reply to Dr. Marsters' affidavit. We shall consider its contents later.

There were filed by the State:

Affidavit N. D. E.—A made by Saul S. Danaceau, Assistant County Prosecuting Attorney. He states that in November 1954, there were discussions touching the subject of turning over the keys to the house to Dr. Richard A. Sheppard, father-in-law of Marilyn Sheppard, deceased, and the then Executor of her Estate and that the request was denied. He also states that from the time the Prosecuting Attorney or his assistants entered into the case in July 1954 to the present time (April 1955):

> "he does not know of any instance where the defense was denied a request to inspect the said home or to make any investigation therein."

Affidavit N. D. E.—B made by Dr. Samuel R. Gerber, Coroner of Cuyahoga County. He states that in October 1954, Fred Garmone, of Counsel for the defendant, visited his office and there, in the presence of Thomas Parrino, an Assistant Prosecuting Attorney, inspected a large number of articles which were held for evidence and which came from the house in which the deceased was murdered. The articles are listed in detail under captions: Bedding from bed of victim; Clothing of victim, Marilyn Sheppard; Clothing of Dr. Sam Sheppard, in "Hallmark" box. He also states that counsel was shown a model of the head of

the victim and made notes of his view of said articles and model.

Affidavit N. D. E.—C made by Leona Phalsgraff and Raymond Keefe, Secretary and Property Custodian, respectively, of the Coroner's office. They assert that Dr. Anthony J. Kazlauckas, a former Deputy Coroner of the County, visited the Coroner's office in October 1954 and on behalf of the defendant was permitted to examine all the items which were examined by Mr. Garmone, as set forth in the Coroner's affidavit, and that Dr. Kazlauckas further examined:

> Autopsy protocol, Case 76629 (M. 7280) Marilyn Sheppard Conclusions for Laboratory findings.
>
> X-rays of Marilyn Sheppard, Case 76629 taken at Coroner's office.

Affidavit N. D. E.—D made by Dr. Roger W. Marsters in charge of the Maternity Rh Laboratory at the University Hospitals in Cleveland (a clinical laboratory). We shall consider its contents later.

The bill of exceptions of the trial of the principal cause, totaling 7102 pages, a supplemental bill containing 206 pages and a great number of exhibits in Case No. 23,400 were also filed in this appeal. The facts therein are set forth in the opinion rendered in that case. These two appeals have been considered and decided simultaneously.

The proceedings in the trial court were had under authority of Section 2945.79, Revised Code of Ohio, which reads in part:

> "A new trial after a verdict of conviction may be granted upon the application of the defendant for any of the following causes affecting materially his substantial rights:
>
> A)—
> B)—
> C)—
> D)—
> E)—
> F)—when new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial."

The allowance of the new trial, as set forth in the Statute above, is bottomed on the proposition that the new evidence uncovered could not have been discovered and produced at the trial by the exercise of reasonable diligence. This is a basic and necessary requirement under the law. If it were otherwise, a defendant might well take a languorous attitude toward the trial of his case, be indolent in the marshalling of defensive evidence and decide to take his chances on the state being unable to prove him guilty beyond a reasonable doubt and even be so bold as to hold testimony in his behalf in reserve to be used as grounds for another trial in case he be found guilty.

> "A person indicted for a crime and on trial cannot be allowed to speculate upon the outcome of his trial and to hold back evidence which he may easily procure, with the hope and expectation that, should the proof against him be more convincing than he anticipates, he can put the state to the additional expense of another trial, at which the evidence that he has suppressed can be introduced. The law favors a full discovery of all relevant evidence which has a bearing upon the criminality of the defendant. It will not permit the accused to mask his batteries, and, having

thus drawn all the fire of the prosecution, he c
after having been convicted, take the chances of
trial in which everything would be in his favor

Underhill's Criminal Evidence, Fourth Ed
pages 1507 and 1508.

The Supreme Court in *Domanski vs. Woda,* 132
208, states the law in paragraphs three and four o
syllabus as follows:

"3. Newly discovered evidence is other than
which might have been known before the termin
of a trial had due diligence been used.

"4. Where during the trial of a case a party is
reasonable cause to believe that favorable and
able evidence of a material nature exists, it is his d
in the exercise of due diligence, to ask for a c
tinuance, if necessary, to investigate, and to prod
such evidence, if found. Having finally submitted
case without doing so, and having searched for
found the evidence after verdict, he may not t
successfully claim the right to a new trial on the b
that such evidence is newly discovered."

See *Kroger, Adm. v. Ryan,* 83 O. S. 299, 94 N
428;

State v. Brown, 35 O. L. Abs. 77, 39 N. E. (2)

The newly discovered evidence claimed by the
fendant in this case was presented to the trial court in
affidavit of Dr. Paul Leland Kirk. The defendant, in eff
says that his claimed newly discovered evidence
gathered from the bedroom in which the murder was c
mitted and from exhibits which had been admitted
evidence during the trial and thereafter put in the cust
of the Prosecuting Attorney, where they were exami

Kirk on his visit here in January, 1955, together
xperiments conducted by him in his laboratories at
niversity of California subsequent thereto.

Defendant-appellant argues that he was prevented
making this investigation and performing these
riments in time for the trial because the state, through
Prosecuting Attorney of Cuyahoga County and the
of Police of Bay Village, retained possession and
ol of the premises until December 23, 1954, two days
the rendition of the verdict by the jury, when the
to the home were turned over to the administrator of
urdered wife's estate and that that was the first time
the murder that he was afforded access to the place.

The facts with respect to this phase of the case are
Marilyn Sheppard was murdered in the bedroom
r home in the early hours of July 4, 1954. The Chief
olice of Bay Village, John F. Eaton, took immediate
ession and control of the house and held the keys to
ntil late in August when he turned them over to a
esentative of the County Coroner. The Coroner in
gave them to the County Prosecuting Attorney. The
ndant and members of his family were excluded from
ome. On a few occasions, however, they were allowed
nter, with a police officer in attendance, to remove
articles of clothing and other personal possessions.
public authorities completed their examination of
house on August 12, 1954. On August 23, the defend-
made a written request of the Chief of Police for return
keys to his house. This request was refused. Vari-
urther attempts to obtain possession and control of
house were later made by counsel for the defendant

and the executor of the estate of Marilyn Sheppard—all to no avail. Around November 3, 1954, the keys were returned to Chief Eaton by the Prosecuting Attorney. During the trial the defendant subpoenaed the keys into court through Chief Eaton and demanded the right to retain them. The trial judge, however, ruled that they must remain in the possession of the police of Bay Village, which order was carried out until December 23, 1954, when complete possession of the house was given the defendant. There is no evidence that any request to enter the house for the purpose of investigation and inspection was ever made by the defendant nor does the record show any formal application to the court at any time for a like purpose. Dr. A. J. Kazlauckas, a physician and expert who had spent many years as a deputy coroner of Cuyahoga County, was in the employ of the defendant. He examined all the articles of property pertaining to this case in the possession of the County Coroner, together with the autopsy report, conclusions of laboratory findings and X-rays of Marilyn Sheppard and yet made no effort to make any scientific examination of the premises. He was not even presented as a witness during the trial. Assistant Prosecuting Attorney, Saul S. Danaceau, deposes in his affidavit that he informed Arthur E. Petersilge, of counsel for the defendant, and the brother of the defendant, Dr. Stephen Sheppard, in early November, "that the said house was available to the defendant at any and all times to inspect or conduct investigations therein." It seems, however, that it was understood that on all occasions a police officer would have to accompany the defendant or any representative of his when visiting the home.

Chief of Police, John F. Eaton, testified as follows in respect to this matter on pages 6076, 6077 and 6078 of the bill of exceptions:

"CROSS EXAMINATION OF JOHN EATON

By Mr. Mahon:

"Q. Chief, since you have had that key—you got it sometime in November, the key to the house, is that right?

A. Yes, sir.

Q. From that time down to date has the house been accessible to the Sheppard family?

A. Yes, it has.

Q. And have they been in the house during that period of time?

A. Once, on one occasion, at least.

Q. To take care of the heat, and so forth, and water, and all of those things?

A. Yes.

Q. Is that right?

A. Yes.

Q. Have they ever been denied at any time the right to go into that house since you had possession of the keys?

A. They have not.

RE-DIRECT EXAMINATION OF JOHN EATON.

By Mr. Corrigan:

Q. Each time any member of the Sheppard family went in the house they had to get your permission?

A. That's right.

Q. And each time they went in, they were accompanied by a police officer?

A. Yes, sir.

RE-DIRECT EXAMINATION OF JOHN EATON

By Mr. Corrigan:

Q. And the order that Sam Sheppard could not go into his home, where did that come from?

A. * * * There was no order he could not go in his home.

Q. The order that Sam Sheppard could not go into his home except in the custody of a policeman or with a policeman, how did that originate?

A. That was suggested, I believe, by the prosecutor's office."

The burden of proof to show that this requirement of the law has been complied with is on the party moving for a new trial on the ground of newly discovered evidence.

The Supreme Court of Alabama states it thus in *Slaughter v. State*, 237 Ala. 26; 185 So. 373:

> "An accused who moved for new trial on ground of newly discovered evidence has burden of showing due diligence."

The affidavit of Dr. Paul Leland Kirk comprises thirty-three typewritten pages and incorporates by reference sixteen supplemental pages, classified as appendixes A to J, and forty-six photographs, taken and developed by Dr. Kirk.

In its total aspect, it is a most extraordinary and unusual document when related to the purposes to be served by it. The sole purpose of an affidavit offered to support a motion for a new trial on the ground of newly discovered evidence is to inform the trial court of the substance of the evidence claimed to be newly discovered which will be presented at a new trial if one is granted. It is never in-

tended as a method to reconsider the evidence introduced at the trial of the case for the purpose of impugning the soundness of the verdict brought by the jury. If the courts permitted such practices, the inherent certainty of a trial by jury would soon wane and such function in our system of jurisprudence ultimately disintegrate and disappear. Yet a major part of Dr. Kirk's affidavit deals with evidence presented at the trial and ventures his opinion and conclusion with respect to it together with a criticism of the methods of investigation and technical evidence presented by the prosecution. This, of course, was entirely beyond the scope of this instrument and the trial court had the indisputable right to totally disregard every particle of it, which it did. The affiant states in his affidavit that "no instructions or suggestions were made to him as to what to find or what not to find by the attorney representing the defendant." We believe that Dr. Kirk could have spared himself much effort and time had he been told by the attorney for the defendant the narrow scope allowed him under the law for further investigation. Certainly much that is extraneous and redundant might thereby have been left out of this affidavit.

The appendixes describe various experiments carried on by Dr. Kirk to supplement and fortify his theories in connection with many elements of this case. All of them except one deal with "blood."

"A" is labeled *Blood on Watch Band.* In this experiment he daubed an expansible metal watch band liberally with freshly shed blood in two separate experiments—in one, after twenty minutes, the band was dipped in fresh water and moved slowly back and forth and in the second,

the blood was allowed to dry for one and one quarter hours and treated similarly. The time required to dissolve the blood was noted.

"B" is labeled *Time of Drying of Blood.* In this experiment the same watch band illustrated in "A" was daubed liberally with fresh blood from a punctured finger. The time of drying on smooth surfaces and in the recesses of the individual bars was noted. Blood also was smeared over the back of the band and the time for drying noted.

"C" labeled *Blood Trails* and gives his opinion as to the significance of the blood spots found throughout the house, particularly with reference to the steps.

"D" is labeled *Shedding of Blood from Clothing.* Experiments were made with five series of cloths, cotton, wools, rayon, and silk. These were suspended and liquid human blood thrown against them by means of a brush dipped in blood and the time taken when the blood was applied and measured until the last drop fell spontaneously from the garments.

"E" is labeled *Spots from Weapon.* Two series of experiments were performed with a variety of objects which would illustrate effects similar to some common weapons. They were:

1. A large bread knife, with a roughly triangular blade 8″ in length and a breadth at the widest point of 1½″.

2. A large monkey wrench, 15″ in length, with a jaw 1¾″ deep and a maximum opening of 4″.

3. A brass bar, 11¾″ in length, ¾″ wide and ⅛″ thick.

4. A bar of soft wood, 23″ long, 1″ wide and 7/16″ thick.

5. A small ball pein hammer, with a head length of 2½″ and a face ¾″ in diameter.

The first experiments involved dipping these objects in liquid blood, removing them and holding them over paper, recording the time necessary for all blood to drain or drop from the object. This was supplemented by a similar timing while the object was swinging at a moderate rate in the hand.

Then a similar set of experiments was made with objects 1, 2 and 3 above, in which the dripping weapon was carried over long strips of paper at ordinary quick walking speeds, and the distance measured to the last drop that fell.

"F" is labeled *Transport of Blood by Shoes.* This experiment was performed by stepping repeatedly in a region of heavy blood spots on a floor until the shoe soles were thoroughly blood-smeared and then having a person walk normally along a strip of wrapping paper until no more blood was visually apparent on the paper. The last visible trace of blood was then measured.

"G" is labeled *Blood Removal from Shoes.* The experiment consisted of daubing a shoe with leather sole and stitching with about two dozen spots of freshly shed human blood. Most of it was placed along the stitching but various spots were placed at random on the leather of the sole. The shoe stood for thirty-five minutes to allow complete soaking of the blood into the leather and complete drying. It was then immersed in water and forced

back and forth in the water to simulate the wasting acti
of water movement for five minutes. The condition of t
shoe as to blood spots was then noted and any spots st
remaining were rubbed vigorously with paper toweli
until no actual spots could be seen, this to simulate th
action caused by walking. The shoe thereafter was im
mersed in fresh water for five minutes and removed an
allowed to dry. The tenacity with which blood adhere
to such surfaces was thus shown.

"H" is labeled *Amount of Blood Spatter on Clothing*
This appendix discloses the spatter of blood on the
of coveralls worn during the entire series of experimen
It also was determinative of any dripping of blood from t
garment.

"I" is labeled *Nature of Blood Spots from* **Differ**
Origins. In this experiment a wooden block was taken
approximating the hardness of a skull. A layer of spo
rubber 1/8" thick was placed over it, this being about
thickness of the subcutaneous layer of the forehead
scalp. Then a sheet of polyethylene plastic, to simul
the skin, was placed over the sponge rubber. The arran
ment so prepared was placed on a stool on wrapping pa
to collect blood spatter. Around the region was buil
rectangular wall carrying removable paper strips to coll
all flying blood on the sides and in front of the swing
the object used as a weapon. Paper strips to collect blo
flying upwards were placed over the top. Only on t
operator's side was the structure open, the operator c
lecting the blood that traveled backward. The objects u
as weapons included a small ball pein hammer; a me
two ll flashlight with a flared rim; an inch steel bar,

hes long; a brass rod 20 inches long, bent at right an-
s on the end; a brass bar, 3/8 inches in diameter and 2
t long. Blood was puddled on the top of the plastic
ver and heavy blows were dealt that at least with one
ject, the plastic sheet and rubber sponge were cut
rough to the wood. The paper strips were removed from
e walls after each series of blows of a certain type and
ject and photographed. The characteristics of the spat-
ered blood from impact as well as the throw-off blood on
e fore and back strokes were noted from the standpoint
direction and velocity and the size of the drop.

"J" is labeled *Breaking of Teeth.* Experiments were
rried on with seven incisor teeth chosen from some 15 to
incisor teeth obtained from dentists who had extracted
. To anchor the roots of the teeth solidly as in a jaw,
were drilled in a heavy brass bar. A hole was filled
molten "Woods" metal, an antimony alloy that melts
w the boiling point of water, the root was held in the
d metal until the alloy was solid and all teeth so
nted could not be moved until the metal was remelted.
method of breaking the teeth varied but usually con-
d of pulling steadily on them by means of a hooked
h cut in a brass bar. Tests were also made attempting
reak an unmounted tooth with the bare hands. The
nner of fracture was then studied and compared to the
h fragments found in Marilyn Sheppard's bed.

These experiments were devised by Dr. Kirk after an
ection of the Sheppard premises and a view of all the
ibits in the hands of the Prosecuting Attorney. There
reason that we can see that would have prevented
from carrying out the same program before or dur-
the trial of this case in the exercise of due diligence.

The affidavits and the evidence at the trial disclose a disposition on the part of both the Chief of Police of Bay Village and the Prosecuting Attorney of Cuyahoga County to comply with any reasonable request for such inspection of the premises. Moreover it is inconceivable that a formal application to the Presiding Judge in the Criminal Branch of the Common Pleas Court for the exercise of such right would not have been granted. These experiments consequently cannot be considered newly discovered evidence. They could have been prepared for presentation at the trial had due diligence and reasonable foresight been exercised by the defendant and no grounds for the allowance of a new trial exist on this claim.

In *Salinardi v. State,* 124 Conn. 670, 2 A (2) 212, the Supreme Court of Connecticut had the following to say:

> "To entitle a defendant in a criminal prosecution to a new trial for newly discovered evidence, it is indispensable that he should have been diligent in his efforts fully to prepare his cause for trial, and if the new evidence relied upon could have been known with reasonable diligence, a new trial will not be granted."

Aside from the question of due diligence, these experiments, in our opinion, could not have been admitted in evidence in the trial of this murder case. Experiments, to be admissible as evidence, must be performed with identical or substantially similar equipment and under conditions closely approximating those existing at the time of the occurrence being investigated. None of the material used for these experiments was the same as that existing at the time of the murder. The most important, the head of

the victim, was attempted to be simulated by a contraption conjured up by Dr. Kirk without any scientific correlation to the original body whatever. The weapons used were selected on the basis of pure speculation. The teeth were not related to those of the deceased for strength or hardness. Furthermore, the coagulation of blood differs with different persons and is affected by the factors—the temperature and the humidity. The temperature and humidity in the bedroom at the time of the murder are unknown and the coagulation time of Marilyn's blood as well as the blood used in the experiments are unknown. How would it be possible under these unknown factors as to both material and conditions to conduct experiments acceptable in a court of law? It must be said that they are interesting and no doubt would be of value in a textbook on the subject but clearly they would have no probative value in the trial of this cause.

The rule is stated in 17 *Oh. Juris.*, Sec. 479, page 587, as follows:

> "The general rule is that to render experiments or evidence of experiments made out of court, admissible, the conditions need not be identical with those existing at the time of the occurrence in question; it is sufficient if there is substantial similarity. The Ohio courts accord with this general rule. But obviously the probative value of experiments will depend upon the correspondence of the conditions under which they are performed to those of the occurrence being investigated. If there be an exact correspondence of such conditions the experiment will amount to a demonstration and be conclusive upon the issue; dissimilarity of conditions and experiments may affect not merely the weight of the evidence, but its admi-

sibility. * * * If it is utterly impossible to perform an experiment upon facts and under circumstances substantially similar to those in issue, evidence offered of an experiment is inadmissible."

Paragraph seven of the syllabus of *Bickley v. Sears, Roebuck & Co.*, 62 Oh. App. 180, (Motion to Certify overruled by the Supreme Court), states:

> "7. Evidence as to the result of experiments made by a party after an accident, to be admissible, must show the facts surrounding the experiments were substantially the same as they were at the time of the accident."

Paragraph one of the syllabus of *State v. Farrell*, 64 O. L. Abs. 481 (Court of Appeals, Eighth District, Motion to Certify overruled) reads:

> "1. It is not necessary, in order to render experiments or evidence of experiments made out of court admissible, that the conditions be identical with the conditions existing at the time of the occurrence in question; it is sufficient if there be substantial similarity; however, the probative value of such experiments depends upon the correspondence of the conditions under which they are performed to those of the occurrence under investigation."

Dr. Kirk, in his affidavit, under the title *Technical Evidence of the Prosecutor* discusses *Water under defendant's wrist watch Crystal; Loss of T-Shirt; The claimed drying of blood on Mrs. Sheppard's wrist before her watch was* [illegible]*oved; and Drying of blood on defendant's watch* [illegible] *vas inserted in the green bag.*

[illegible] the title *Blood Trails,* he discusses *Clothing;* [illegible]*in of hands* (or face, etc.); and *Shoes* and then

discusses *Green Bag and Contents;* and *Blood on Defendant's Clothing.* His opinion as to each of the indicated subjects is based upon experiments described in Appendixes A, B, C, D, E, F, G, and H. They amount to mere criticism of the manner in which the prosecution's evidence was gathered, doubt as to its evidence having any bearing at all on the guilt or innocence of the defendant and his personal opinion as to its significance. In no sense can this be interpreted as newly discovered evidence.

The next division in the affidavit is entitled, *The Murder Scene,* and the main discussion comes under the heading *Blood Distribution.* He here describes the distribution of blood on the walls, defendant's bed and the radiator. By determining the point of origin, he gives the opinion that the head of the victim was essentially in the same position during all of the blows from which blood was spattered on the defendant's bed; that her head was on the sheet during most, if not all of the beating that led to the blood spots; that probably all of the blood drops on the east wall were thrown there by the back swing of the weapon used; that the blows on the victim's head came from swings of the weapon "which started low in a left hand swing, rising through an arc, and striking the victim a sidewise angular blow rather than one brought downward vertically." He then explains the *Cause of Distribution* and comes to the conclusion based on his experiments as described in Appendix I and his observation of the blood distribution in the bedroom that the blows were struck by a left-handed person. He then proceeds to explain the impact spatter, and the throw-off drops of certain

weapons and decides that the blood spots on the doors of the bedroom were drops made by the back-throw of the lethal weapon, and that a very large spot on the wardrobe door could not have come from the back-throw of the weapon. This spot measured about one inch in diameter. He then expostulates that "this spot could not have come from impact spatter. It is highly improbable that it could have been thrown off a weapon" and that "it almost certainly came from a bleeding hand.—The bleeding hand could only have belonged to the attacker."

We read this portion of Dr. Kirk's affidavit with much interest for it displayed high qualities of originality and imagination, blended with a wide range of knowledge of the subject discussed. However, none of it is newly discovered evidence as contemplated by the law and has no juridical value in this case because:

(1) it includes matter that could have been offered at the trial had due diligence been exercised;

(2) most of the facts involved had been given to the jury at the trial;

(3) the conclusion that the assailant was a left-handed person was argued to the jury at the trial and besides was not a subject for opinion evidence since it was a conclusion for the jury alone to draw in the exercise of its common sense and ordinary knowledge from the facts and circumstances as shown by the evidence;

(4) the opinion that the large spot could not have come from the murder weapon was guesswork since the weapon itself is unknown;

(5) the statement that the large blood spot came from the bleeding hand of the assailant is sheer supposition;

(6) the impossibility of performing experiments to approximate the facts and circumstances of the occurrence involved.

17 *Oh. Juris.*, Sec. 479, p. 588 reads:

"If it is utterly impossible to perform an experiment upon facts and under circumstances substantially similar to those in issue, evidence offered of an experiment is inadmissible."

In paragraph four of the syllabus of *Ohio Power Co. v. Fittro, Admx.*, 36 Oh. App. 186, it is stated:

"4. In action for death by electrocution, demonstrative evidence to show distance voltage would jump from wire held properly excluded, in view of impossibility of performing experiment on facts in issue."

Also 17 *Oh. Juris.*, Sec. 324, page 415 reads:

"Jurors are supposed to be competent in everything pertaining to the ordinary and common knowledge of mankind, and to be peculiarly qualified to determine the connection between cause and effect established by common experience, and to draw the proper conclusions from the facts before them."

The syllabus of *Perkins v. State*, 5 O. C. C. 597 states:

"Upon the trial of a case, where the accused is charged with murder in the second degree, physicians having been called on behalf of the state, who testified that they attended the post mortem examination, giving a full description of the wounds found upon the head of the deceased, their location, and that they were sufficient to produce death, it is error to permit such witnesses to give testimony against the objection of the accused as to the probable relative position of the parties at the time the fatal blow was struck; such

testimony is the mere opinion of the witnesses based upon the facts proven, and from which the jury is as capable of drawing proper inference as the witnesses."

The wounds on Marilyn Sheppard's face and head show a vicious attack with great force directed to vital spots. Because of their character, number and location, the jury may well have concluded that the wielder of the weapon, being impelled by consuming rages and sudden animosity, had a definite purpose to kill and further that a person so motivated would strike from any direction necessary to accomplish his purpose.

In view of these circumstances, the deductions of Dr. Kirk that the pattern of blood spatter, the position and direction of the victim's head and the assumed position of the assailant is only consistent with the hypothesis that the murderer was a left-handed person is, in our opinion, highly speculative and fallacious.

The next division of Dr. Kirk's affidavit is titled *Blood Groups and Individuality.* He states that the grouping of the large spot of blood found on the wardrobe door was performed simultaneously with the same sera and cells and in identical manner as the known blood of Marilyn Sheppard removed from the mattress and the second large spot (½" in diameter) removed from the wardrobe. The latter was used for a control test and dissolved readily in distilled water and gave no sign of delayed agglutination, as was true of the known blood of the victim, but the large spot "was definitely less soluble than that from the smaller spot, or from controls from the mattress" and "in nning the agglutination tests, in every instance and with

tests for both A and B factors, agglutination was much slower and less certain than the controls. The fact that delayed agglutination occurred indicated clearly that this blood was also O group, but its behavior was so different as to be striking. These differences are considered to constitute confirmatory evidence that the blood of the large spot had a different individual origin from most of the blood in the bedroom."

The balance of Dr. Kirk's affidavit deals with *Tooth Fragments, Blood-stained Bedding. The Weapon and Miscellaneous Items* 1) *Victim's Slacks;* 2) *Top sheet of Victim's bed*; 3) *Pillows*; 4) *Nail Polish Fragments* and 5) *Leather Fragment.* All of these matters were covered in detail in the trial of the case and under no circumstances can be called newly discovered evidence. Nevertheless, he undertakes to state his own ideas concerning them and advances his personal theories as to their significance in the case. We know of no rule of law permitting a re-evaluation of a decided case by a person versed in criminalistics with the purpose in mind of laying the groundwork for a new trial.

The final subject of the affidavit is styled—*Reconstruction* with the sub-title—*Defendant's Account.* In this discussion, the affiant gives his own version of the murder from the standpoint of his interpretation of the physical facts and then adroitly fits in the defendant's story to conform to the same. It is inconceivable that such testimony could be given to a jury at a retrial of this cause. It would be usurping the function of the jury.

The Supreme Court in *Fowler v. Delaplain,* 79 O. S. 279, paragraph one of the syllabus, says:

> "A question to a witness which calls for his opinion on the precise issue of fact which the jury is sworn to determine from the evidence, is incompetent."

Also, *Protection Ins. Co. v. Harmer,* 2 O. S. 452, paragraph three of the syllabus:

> "Opinions are only admissible, where the nature of the inquiry involves a question of science or art, or of professional or mechanical skill, and then only from witnesses skilled in the particular business to which the question relates."

Dr. Kirk's opinion as to the large blood spot, discussed above, requires further consideration on our part.

Dr. Roger W. Marsters, a recognized authority on blood, deals entirely with this claim of Dr. Kirk's in his affidavit. He states that "Under ideal conditions * * * variability occurs in the routine performance of blood grouping * * *. These variables are almost always quantitative differences rather than qualitative ones. * * *

Dr. Kirk is postulating different qualities of type O blood characteristic. Even under ideal conditions of fresh blood reactions, sub-groups of type O are unknown. Therefore, to assume the existence of another quality of type O and especially another individual source on the basis of some quantitative difference in reaction and solubility employing an admittedly complex technique cannot be justified."

Dr. Kirk in his rebuttal affidavit questions the qualifications of Dr. Marsters in absorption grouping of dried

blood. He admits "differences in regular blood grouping do occur * * *," and that "much greater differences occur in grouping dried blood because of variation in the conditions under which blood is stored, admixture with foreign substances * * *," but says "these conditions * * * do not apply to the present case." He further says that variations in behavior of different types of blood are due to minor variations in technique or conditions and that these are extremely small when run by experienced persons, that samples of blood of two different persons, even though of the same group * * * will often behave differently; and that any variation in them of a magnitude greater than small experimental variation, when treated identically, must be significant.

He claims that the two spots in this case "were deposited on the same paint, on the same panel of the same door and close together." They appeared normal, were free of contaminating substances and that there was "no indication of any accidental or uncontrolled variation between the two spots that could account for the differences claimed."

He says "No postulate was made by me of different qualities of Type O blood characteristic, nor of any hypothetical 'sub-groups.' Rather the claim concerns different qualities of blood, both of which happen to be of Type O," and cites Lattes "Individuality of the Blood" as authority "that wide differences do occur in Group O bloods."

He further states:

> "7. Solubility differences claimed do not rest on different times necessary to dissolve difference size of

re-dissolved; this is a very delicate process and may readily lead to serious errors."

On page 271 he states:

> "These quantitative differences cannot easily be utilized in forensic cases relating to blood-stains, for the blood in these has invariably undergone changes due to age or other deleterious circumstances, which attenuate the agglutinins."

On page 272 he states:

> "These sub-groups would appear to be fairly constant, though, since we have to deal with quantitative differences (Thomsen), the possibility of differentiating between them for forensic purposes would seem to be likely to remain somewhat uncertain.
>
> The differentiation between individuals belonging to Group O, which Landsteiner and Levine claim to have accomplished by means of human iso-agglutinating sera is still more problematical."

On page 292 he states:

> "Further, in investigations where we have to start from dried blood, particularly in forensic cases, the methods suggested by a number of writers, as we saw on page 268, do not prevent the occurrence of mistakes, and might even be said to favour them."

Dr. Kirk seems to believe that the fact that the large spot dissolved more slowly and that the agglutination tests appeared more slowly is "confirmatory evidence" that this spot originated from a different individual. Such difference in reaction is quantitative only. It, under no circumstances, denotes a qualitative difference. The weight of the expert opinion seems to be that such differences may be attributable to factors of contamination. It must

be remembered that this large blood spot was on the wardrobe door some eight months during changes of temperature, humidity, and in a room that had had many persons milling about, doing various chores, and conducting many tests. Moreover, it was scraped from a door covered with coats of paint. How much of this paint was removed at the time of scraping no one knows. The test is a delicate one involving small quantities of material. A large drop of blood, too, would take longer to dry. What bacterial or chemical contamination befell it is not known. Fingerprint dusting powder, ultra-violet light, dust, detergent deposit, perspiration or body oils of human origin were present in the room. Dr. Kirk himself in his book on "Crime Investigation" says on pages 198 and 199:

> "O blood which contains neither A or B agglutinogen contains both agglutinins, * * *"

and on pages 199 and 200, he says:

> "It is also clear that variations of considerable magnitude in the strength of reaction exists between persons classed in the same group. For this reason, there are various subclassifications such as A_1 and A_2 in use among serologists. The distinction between these rests chiefly on the strength of reaction and can be obtained satisfactorily only when fresh blood is available. With dried blood stains, the form in which most blood appears in evidence, it is not simple to determine the subgroups with certainty."

and on page 201:

> "It should be noted further that, on standing, the agglutinins are slowly lost in many bloods. For this reason, a test which depends only on testing for agglutinin is to be trusted completely only when the

blood is comparatively fresh, or when the results are checked also by methods testing for the presence of agglutinogen as well."

From a careful consideration of the affidavits on this subject, as well as the authorities referred to above, we find:

(1) that Dr. Kirk's contention rests on the difference in time in the appearance of agglutination of the large spot when compared to the same reaction of known blood of Marilyn and the smaller spot used as a control;

(2) that Dr. Kirk believes that this difference confirms the presence of a person at the murder scene other than the victim and the defendant;

(3) that experts contra say that such differences are not unusual even with known samples of the same blood and at most is a quantitative and not a qualitative difference;

(4) that all three blood samples were of the same blood Group, known as O;

(5) that the samples tested, being dried blood exposed for some eight months in a room subjected to much activities by many persons, who examined and tested various parts of the room, were exposed to contamination of many sorts: bacteria, fingerprint dusting powder, hand or body oils and perspiration, dust and other substances;

(6) that in the removal of the stain from the wardrobe door, paint, soap and detergents may have been scraped off;

(7) that experts agree that tests conducted on dried blood are not as reliable as those made on fresh blood;

(8) and that no court, to our knowledge, has accepted such findings as proof of blood from different persons.

We conclude from all the foregoing that the opinion of Dr. Kirk that "These differences are considered to constitute confirming evidence that the blood of the large spot had a different individual origin from most of the blood in the bedroom," even though such blood had the same blood grouping as that of Marilyn Sheppard's, is based on claims so theoretical and speculative in view of Dr. Marsters' affidavit, the statements of authority referred to by Dr. Kirk and his own writings on the subject as to have no probative value in support of defendant's claim of newly discovered evidence.

A motion for a new trial on the ground of newly discovered evidence is directed to the sound discretion of the trial court.

The Supreme Court in *Taylor v. Ross,* 150 O. S. 448, in paragraph two of the syllabus, states:

"2. The granting or refusing of a new trial on the ground of newly discovered evidence rests largely within the sound discretion of the trial court; and when such discretion has not been abused, reviewing courts should not interfere. (Paragraph two of the syllabus in the case of Domanski v. Woda, 132 O. S. 208, approved and followed.)"

See:

26 O. S. 1, *Smith & Wallace v. Bailey;*
96 O. S. 410, *State v. Lopa;*
124 O. S. 29, 32, *Canton Stamping v. Eles;*
132 O. S. 208, *Domanski v. Woda;*
148 O. S. 505, *State v. Petro;*

51 O. L. Abs. 185, *State v. Tarrant;*
13 O. L. Abs. 244, *Pannell v. State;*
28 O. L. Abs. 166, *Cebulek v. Tisone.*

The trial court did not abuse its discretion in this regard.

Paragraph three of the syllabus of *The People v. Fice,* 97 Cal. 459 reads as follows:

"It is not an abuse of discretion for the trial court to deny a motion for a new trial in a criminal prosecution, made upon the ground of newly discovered evidence, where the affidavits offered in support thereof are fully contradicted by counter-affidavits on the part of the prosecution."

It is the law with respect to a motion of this kind that a new trial will not be granted on the ground of newly discovered evidence unless the affidavits in support thereof contain statements which, if it had been offered in evidence at the trial, would have required the jury to return a different verdict.

The Supreme Court in *Cleveland, Columbus, Cincinnati & Indianapolis R. R. Co. v. Long,* 24 O. S. 133, says:

"A new trial should not be granted on the ground of newly discovered evidence, unless the legitimate effect of such evidence, when considered in connection with that produced on the trial, ought to have resulted in a different verdict or finding. The rule of practice, on this subject, was not substantially changed by Section 297 of the Code of Civil Procedure."

See:

7 O. L. Abs. 583, *Cleveland Ry. v. Leanza;*
4 O. L. Abs. 53, *Licate v. State;*

7 O. L. Abs. 711, *DeSantis v. Brumbaugh;*
12 O. L. Abs. 173, *Martin v. State.*

The trial court in its written opinion on this question said:

"It is not reasonable to believe that production of the testimony of Dr. Kirk at the trial, and the counter-testimony of Dr. Marsters, would have made the slightest difference in the total evidence, and certainly not resulted in a different conclusion by the jury."

We believe the trial court was in the best position to determine that question.

Having read the voluminous evidence of the murder trial, studied in detail the affidavits filed in support of and contra to the motion, and the briefs of counsel, and having come to the several conclusions stated above, we unanimously hold that the trial court did not commit prejudicial error nor abuse its discretion in overruling the motion for a new trial on the ground of newly discovered evidence.

Judgment affirmed. Exceptions. Order see journal.

Skeel, J., Hurd, J., concur.

APPENDIX E.

Judgment of Court of Appeals Affirming Judgment on Verdict.

July 20th, 1955:

Appeal by Sam H. Sheppard, Defendant-Appellant (Law).

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts. /s/ Julius M. Kovachy, Presiding Judge.

Received for filing July 20, 1955. Leonard F. Fuerst, Clerk of Courts. By A. M. Harrington, Deputy. (Jr. 20, pg. 201.)

APPENDIX F.

Judgment of Court of Appeals Affirming Order Denying New Trial on the Ground of Newly Discovered Evidence.

July 25, 1955:

Appeal by Samuel H. Sheppard, Defendant-Appellant (Law).

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas of Cuyahoga County, Ohio, overruling the motion of appellant for a new trial on the ground of newly discovered evidence, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellant nor any abuse of discretion, and therefore the judgment of the Court of Common Pleas is affirmed. Appellant excepts. (Jr. 20, page 203.)