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Brief of Plaintiff-Appellee, State of Ohio, State v. Sheppard, Ohio Eighth District Court of Appeals Case No. 23400

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Cuyahoga County

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Plaintiff-Appellee,

vs.

SAM H. SHEPPARD

Defendant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE

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HISTORY OF THE CASE

On August 17, 1954, the defendant-appellant Sam H. Sheppard, hereinafter referred to as the defendant, was indicted by the Grand Jury of Cuyahoga County on a charge of Murder in the First Degree for the killing of his wife, Marilyn Sheppard, on July 4, 1954.

The case was tried to a jury before the Honorable Judge Edward Blythin, commencing on October 18, 1954. The trial lasted nine weeks and on December 21, 1954, the jury returned a verdict against the defendant of guilty of Murder in the Second Degree.

A Motion for New Trial was filed on December 23, 1954, and a supplement thereto was filed on December 24, 1954, and the Trial

Court overruled both motions on January 3, 1955.

A Motion for New Trial on the ground of newly discovered evidence was also filed but was later withdrawn.

The Memorandum of the Trial Court ruling upon the motion for new trial was ordered filed and made a part of the record.

A stay of execution of sentence has been granted pending this appeal.

STATEMENT OF FACTS

Because of the numerous opinions and interpretations of counsel for the defendant that are interspersed with the alleged facts in their brief, and because of certain omissions of pertinent evidence, the State believes that it is necessary to restate such pertinent facts.

The defendant, Dr. Sam H. Sheppard, thirty years of age, resided at 28924 Lake Road, Bay Village, Ohio, with his wife, Marilyn Sheppard, age thirty-one, and their son, Samuel Reese Sheppard, Jr., age seven, known as "Chip." Living at the home also was the family dog named Koko.

The defendant worked at Bay View Hospital, located in Bay Village, Ohio, which, to a great degree, was established through the efforts of Dr. Richard Sheppard, Sr., the father of the defendant. Working at the hospital also were the defendant's brothers, Dr. Stephen Sheppard and Dr. Richard Sheppard, Jr., all osteopathic physicians and surgeons.

The home of the defendant is located on the north side of

Lake Road, which extends in an easterly and westerly direction. A door leads to a screened in porch on the so-called front of the home, which faces Lake Erie on the north. Beyond this porch to the north is a lawn of some 20 or 30 feet, ending in a sharp descent, at the base of which is a beach on Lake Erie. There is a series of 52 steps from the top of the hill leading down to a bath house and in turn to the beach. The area from the top of the hill to the beach is covered with thick, high grass, brush, weeds and stones. North of the house is a small building used as a storage room. To the east of the house is a two-car garage.

A wide lawn extends to Lake Road from the back, or south side, of the home. There are trees on the lawn. There is a door on the south side of the house, leading to a vestibule to the west of which is the kitchen. In the northwest corner of the kitchen there is a door leading to a series of eight steps descending into the basement. To the east of the vestibule is a room that was used as a combination den and doctor's office.

The vestibule then leads into an L-shaped living room in which there is an assortment of furniture and a television set against the north wall. From both the kitchen and the living room, on the south side, three steps lead to a small landing, and from there 12 steps ascend to the second floor. Both on the wall at the point of the small landing leading to the second floor, and at the top of the stairs in the second-floor hallway are electric light switches for lights that illuminate both the stairway and the upper hallway, which extends east and west and is approximately four feet in width.

Directly at the top of the stairs and across this hallway is the room that was occupied by the murdered Marilyn. To the west off this hallway there is a guest bedroom. Chip's room was next to and east of Marilyn's room. Across the hallway and south of Chip's room is a reading room in which was the only light burning at the time of the arrival of the Houks and the police. Another guest bedroom is located to the east of this room, occupied the night before the murder by Dr. Lester Hoversten. Also across from Chip's room is a bathroom.

On Thursday afternoon, July 1, 1954, Dr. Lester Hoversten, a former schoolmate of the defendant, arrived at the defendant's home as a guest. He came there from the Grandview Hospital in Dayton, Ohio, where he had been working. He stayed at the Sheppard home until the morning of July 3, 1954, when he left to visit another friend, Dr. Richard Stevenson, at Kent, Ohio, intending to spend the evening with him and to play golf with him the next day. He left most of his clothing and luggage behind at the Sheppard home.

On Saturday, July 3, 1954, arrangements were made between Marilyn and Nancy Ahern for the Sheppards and the Aherns to spend that evening together. Don and Nancy Ahern reside at 29146 Lake Road, Bay Village, had known the Sheppards for approximately one year prior to July 4, 1954, and were their close personal friends. Mr. and Mrs. Ahern and the defendant and his wife assembled at the Ahern home at about 6:00 p. m. At 7:00 p. m. the defendant left to go to Bay View Hospital, returning to the Ahern home about 7:30 p. m. Cocktails were served at the Ahern home, where they each had approximately two drinks

After a short time they all went over to the defendant's home, following Marilyn, who had gone there shortly before to make preparations for dinner.

Before dinner, the defendant and Don Ahern took the children down to the basement, where the defendant instructed them in the use of a punching bag that was suspended there. At 9:00 p. m. they all commenced eating a substantial dinner, which was completed at about 10:00 p. m. Mr. Ahern then took his children home and returned. Chip was put to bed. At one point Mr. Ahern, who operates a deodorant business, with the defendant went both upstairs and down to the basement of the Sheppard home, part of which had burned some time previously, to see if they could detect any peculiar odors.

They all later watched television. Since the night was quite brisk, the defendant put on a brown corduroy jacket over the white T-shirt he had been wearing. He was reclining on a couch in the L of the living room, lying on his stomach with his head to the north. This couch was located adjacent to the first landing of the stairway leading to the second floor, and it could be seen from the landing and lower part of the stairway.

The Aherns left at approximately 12:15 or 12:30 a. m., before which time Mrs. Ahern had locked the door on the north side of the living room and latched the night chain into the closed position. Marilyn accompanied them to the south door and as they left, the defendant remained asleep on the couch previously described, still wearing the corduroy jacket and T-shirt.

On the morning of July 4, 1954, at approximately 5:50 a. m., J. Spencer Houk, the Mayor of Bay Village, received a phone call from the defendant, in which the defendant said:

> "Sam said, 'My God, Spen, get over here quick. I think they've killed Marilyn.'
>
> "And I said, 'What?'
>
> "And he said, 'Oh, my God, get over here quick.'" (R. 2264) *

The Houks were personal friends of the Sheppards and reside at 29014 Lake Road, Bay Village. Immediately after this call, Mr. and Mrs. Houk went to the Sheppard home, where, at the time of their arrival, there was one light burning upstairs. They entered the Sheppard house from the south, or Lake Road, door, which was closed but not locked. In the vestibule, outside the door to the den, there was a doctor's medical bag lying open on the floor, with some of its contents spilled on the floor (State's Exhibit 11). It was later discovered that the compartments in this bag had remained unopened (R. 2521). The Houks then went into the den and there found the defendant. At that time the defendant was wearing shoes, socks and trousers which were wet, but he was bare from the waist up and had a bruise on his face in the area of the right eye.

Houk testified:

> "Well, we went immediately into the den, which is to the right -- the right door off the hallway, and Dr. Sam was half sitting -- I would say more slumped down in his easy chair, and I immediately went up to him and asked what happened, words to that effect, and he said, 'I don't know exactly, but somebody ought to try to do something for Marilyn,' and with that, my wife immediately went upstairs,

---

* Indicates record pages of typewritten transcript.

> and I remained with Dr. Sam, and I said something to the effect of 'Get ahold 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.'" (R. 2273)

In the den was a desk, the drawers from which had been removed and some of them placed on top of one another in various parts of the room. The record discloses that later when Dr. Stephen Sheppard arrived, he accidentally kicked one of these drawers, spilling its contents onto the floor. On the floor behind this desk, Marilyn's blood-stained wrist watch was found by the police.

The north door in the living room was open at the time the Houks arrived. Mrs. Houk went upstairs and found Marilyn in bed, dead. Chip was asleep in his room.

The next person on the scene after the Houks was Officer Fred Drenkhan of the Bay Village Police Department. Drenkhan received the call at about 5:57 a. m. and arrived at the scene at 6:02 a. m. The Bay Village Police Department, for which the defendant was police surgeon, consists of some seven full time policemen and four part time police officers, most of whom were personally well acquainted with the defendant and other members of the Sheppard family.

Officer Drenkhan testified that he was on duty on the night of the murder, patrolling Lake Road, and that he drove past the Sheppard

home approximately five or six times during the night, and observed no hitchhikers or suspicious persons along the road.

Upon going into the house, Drenkhan first looked into the den and then immediately went upstairs by way of the kitchen. Going upstairs he noticed the couch on which Dr. Sam had been asleep and on it he saw, neatly folded, the defendant's brown corduroy jacket (State's Exhibit 8) (R. 2491-93).

In the bedroom Drenkhan saw Marilyn lying on a four-poster bed, her head about three-fourths the way down on the bed, with both her legs hanging over the north end and under a cross-bar, one leg exposed and the other covered with a white sheet. She was wearing a checkered blouse on the upper part of her body, pulled up so that her breasts remained exposed. Her head was severely beaten and was facing the door to the east. There was a great quantity of blood on the bed and many blood spots on the south and east walls. There were spots of blood in other parts of the room also, and on the furniture (State's Exhibits 9 and 10).

There was a second twin bed in this room, to the west, and these beds were separated by a night stand on which there was a telephone, a clock, and a writing pad. The second bed had not been slept in and the sheets had been partially folded back. There was a chest of drawers against the west wall. There was a chair in the northeast corner of the room, with certain of Marilyn's clothing on it, and near it, on the floor, there were a pair of panties and two pairs of Marilyn's shoes. The distance between the east wall and Marilyn's bed is approximately four feet.

Later on, after the arrival of the Coroner, when the sheet covering part of Marilyn's body was lifted, it was discovered that she was wearing one pajama pant leg but the other leg was completely bare.

Officer Drenkhan testified that there were three windows in this bedroom. One was partially open but the screen on it was locked from the inside. The other two windows were locked from the inside, and none of them showed any marks or signs of forcible entry. An inspection of the entire home disclosed that nowhere on the doors or windows was there any sign of forcible entry, and in her bedroom, except for her appearance and that of the bed on which she was lying, nothing appeared to have been disturbed.

In the living room against the north wall was a drop-front desk with four drawers. The lower three drawers were partially pulled out, the top one being closed (State's Exhibit 13). The contents of these drawers did not appear to have been disturbed. On the floor, in front of this desk, there was found a small quantity of writing paper, tax stamps and other miscellaneous papers, not in great disarray. In the garage, later that morning, Drenkhan saw the defendant's Lincoln Continental, his Jaguar, and a jeep used in Civil Defense work.

Drenkhan was followed to the scene by Fireman Richard Sommers, who had been directed to bring the ambulance, which he did, and by Patrolman Roger Cavanaugh.

At 6:10 a. m. Dr. Richard Sheppard arrived at the scene, and Mayor Houk heard the following conversation between Dr. Richard and

the defendant:

> "Dr. Richard bent over Dr. Sam, and I heard him say that, 'She's gone, Sam,' or words to that effect, and Sam slumped farther 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 it?'
>
> "And Sam replied, 'Hell, no.'" (R. 2279)

Dr. Stephen Sheppard arrived at the defendant's home at approximately 6:15 a. m. With the assistance of Dr. Carver from Bay View Hospital, he half carried and dragged the defendant to his station wagon, according to his testimony, and along with Mrs. Betty Sheppard, Dr. Steve's wife, they took the defendant to Bay View Hospital. All this took place within a very few minutes after Dr. Steve's arrival, and at a time when there was a stretcher in the house and an ambulance in the yard. At or about the same time, Dr. Richard Sheppard removed Chip from the home. All of this was done without asking permission of the police officers.

In daylight, shortly before 6:30 a. m., Officer Drenkhan went down to the lake, and while standing on the platform of the Sheppard bath house, he observed that there was approximately five feet of beach in the area immediately in front of the bath house; that the beach at the foot of the stairs and in the surrounding area was smooth, and that there was no indication of anyone having been on the beach (R. 2536).

Some time between 6:30 and 7:30 a. m., Drenkhan called the Detective Bureau of the Cleveland Police Department and asked for

assistance.

Drenkhan had the following brief conversation with the defendant on the morning of July 4th:

"Q And what did you say to the defendant, and what did the defendant say to you?

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 that he came upstairs.

Q Yes.

A That was all. That was the conversation.

Q Did you have any further conversation with him at any time that morning?

A No, I didn't." (R. 2557)

Drenkhan made no further attempt to question the defendant on July 4th, 5th, 6th or 7th concerning Marilyn's death. It was on July 7th that the defendant left Bay View Hospital to go to Marilyn's funeral.

Chief John Eaton of the Bay Village police stated that he arrived at the scene some time between 6:25 and 6:30 that morning, and while going upstairs to the murder room, he also noticed the defendant's brown corduroy jacket, neatly folded, lying on the couch, as previously described. He stated that a quantity of money was found in the house in various places, including $4 in change in a dressing table in the east bedroom, $100 in a desk drawer in the den, $20 in a bedroom on the second floor, and some $30 in a copper stein in the den.

Deputy Coroner Lester Adelson, a specialist in pathology,

testified on behalf of the State as to the cause of Marilyn's death. She was found to be four months pregnant. There were 35 separate injuries on her head, face and hands. Of these, approximately 15 were to the head, causing many gaping lacerations of the skull and resulting in numerous comminuted fractures in this area. No physical injury in or about the vagina of Mrs. Sheppard was observed. Dr. Adelson took a smear from the vagina to examine microscopically and discovered no spermatazoa present. He testified that she came to her death as the result of the following injuries:

> "Q And will you tell the jury what caused her death?
>
> A Marilyn Sheppard came to her death as a result of multiple impacts to the head and face which resulted in comminuted fractures of the skull and separation of the frontal suture, the seam I described, bilateral subdural hemorrhages, which means collections of blood immediately above the brain, diffuse bilateral subarachnoid hemorrhages, which are hemorrhages immediately on the brain, and contusion of the brain or bruising of the brain." (R. 1720)

Coroner Samuel R. Gerber arrived at the Sheppard home on the morning of July 4th at about 7:50 a. m. Later that morning, around 9:00 a. m., he saw the defendant at Bay View Hospital and had a conversation with him in which the defendant related that he was "clobbered" on the back of the head or neck by some unknown form when he rushed up to the head of the stairs after hearing Marilyn scream (R. 1380-1384).

Dr. Gerber held an inquest, beginning on July 22nd, at Normandy School in Bay Village, where the defendant appeared as a witness. The defendant stated under oath at the inquest that he had never had an affair with Susan Hayes.

Dr. Gerber testified that at the inquest he asked the defendant the following questions and received the following answers relative to the defendant's encounter with his alleged assailant:

"Q Did you see the form on any of the stairways going down?

A I can't say that.

Q You did not catch up with it?

A Not on the way down.

* * *

Q Did you see him on any landings?

A I cannot say specifically that I did.

Q Where is the first time that you saw him?

A Again?

Q Yes.

A It was on my way down from the landing down to the beach.

Q Which landing are you talking about now?

A The landing of the beach house.

Q And where was he at that time?

A I cannot say specifically.

Q Was he on the beach?

A I am not sure.

Q Or was he at the foot of the stairway?

A Doctor, under such circumstances, I just couldn't be sure exactly where it was.

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

A I told you the light was not pitch black. It was --

Q At that time could you see the form, see how it was dressed?

A That is the time as I progressed down the stairway -- that is the time that I thought that I could see the form.

Q Did the form that you saw have trousers on at that time?

A I am not sure what he had on.

Q Did he have a coat on?

A I don't know what he had on.

Q Did he have a hat on?

A As I told you, I couldn't say.

Q Was this a white person or a colored person?

A I can't say for sure. I somehow after encountering him have the feeling that it was not a colored person, that that is merely a feeling. It is not -- it is not a fact that I can say specifically.

Q Did the color of the hair register?

A I can't say that I could see the color of the hair.

Q Did he have any hair?

A I felt that he had a large head, and it seemed to me like there was, as I mentioned earlier, a sort of a bushy appearance.

Q You say you encountered him on the beach?

A Yes.

Q Did he grab you or did you grab him?

A Well, I felt as though I grabbed him.

Q In other words, you caught up to him?

A That was my feeling, but it seemed as though I had caught up with a steam roller.

* * *

Q In other words, you caught up to him?

A That was my feeling, but it seemed as though I had caught up with a steam roller, some immovable object that just turned and made very short work of me.

Q When you grabbed him, what kind of clothes did he have? What did you feel?

A I can't say that I felt anything specific.

Q Did you feel any clothes?

A I can't say for sure.

Q You don't know whether he was naked or not? Did he have any clothes on?

A I felt that I grasped something solid.

Q Was it a human being?

A I felt that it was.

Q Did you have the T-shirt on at this time?

A I don't have any recollection of the T-shirt.

Q Did you have a corduroy jacket on at this time?

A I don't know.

Q After you grappled with him, or he grappled with you, what happened?

A I became -- I was -- I had a twisting, choking sensation, and that was about all I remember.

* * *

Q Where was the twisting, choking sensation? Other than the choking sensation, where was the other sensation? That is the question.

A Other than what I told you, I don't believe I can give you any other specific information.

Q What did you realize next?

A I realized being -- I had a feeling of moving back and forth or being moved back and forth by water.

* * *

I realized -- I had a feeling of moving back and forth or being moved back and forth by water. I felt -- I think that I may have coughed or choked a time or two. I slowly came to some sort of consciousness. I got to my feet and went up the stairs. The time element --

Q Did you swallow any water?

A I don't know. Very likely I did.

Q When you first came to, where was your head and where was your feet? Where were your feet?

A My head was toward the south and my feet were into the lake.

Q How high were the waves at that time?

A The waves were -- well, I didn't notice the waves specifically, but it seemed as though they were moderately high. They were not very high, but it was not extremely calm.

Q Was it daylight then or was it still dark?

A I won't say that it was daylight, but it was much lighter. It was definitely light enough so you might call it daylight, but it was not bright day like it is now."
(R. 3508-3513)

Dr. Gerber described further that when examining Marilyn's body on the morning of July 4th, he observed the impression of the band of her wrist watch in the dried blood on her left wrist at the base of the thumb. He testified in that connection:

"Q Now, Dr. Gerber, when you examined the body of Marilyn Sheppard on July 4th, did you observe anything on her left hand in the vicinity of her wrist?

A Yes, sir.

Q What did you observe?

A I observed some dried blood that had the impressions of the bracelet of a watch on the left wrist.

Q And where on the wrist was that impression?

A Down towards the back of the hand.

Q Will you show on that wrist where that was?

A Right across this way (indicating).

Q I hand you what has been marked State's Exhibit 9, and ask you to point out --

THE COURT: Let's get the record clear on that. Show indicating over the base of the thumb. Is that right?

THE WITNESS: Beginning back at the wrist, at the bone.

THE COURT: Beginning back of the wrist bone and extending over --

THE WITNESS: Coming across the back of the hand.

THE COURT: -- diagonally across the base of the thumb.

Q Handing you what has been marked State's Exhibit 9, and facing the jury, will you point out where you observed this impression?

A This is the left hand, and if you look closely right at the base of the thumb, and extending backward, extending up across and up towards the other side, you can see dried blood and you can see the imprint of the bracelet, of a stretch bracelet, over this particular area.

Q And was that on the left hand, sir?

A Yes, on the left wrist extending down to the hand.

Q I will hand you what has been marked State's Exhibit 45 and ask you whether or not that is a fair representation of what you saw on the hand, the left hand and wrist of

Marilyn Sheppard?

A Yes, sir." (R. 3080-3081)

The pillow found by Dr. Gerber on Marilyn's deathbed was offered as an exhibit. A large, dry blood spot was evident on one side of the pillow, into which there was imprinted the outline of a surgical instrument or something similar to this type of instrument. (State's Exhibits 32 and 34) (R. 3132-33)

Dr. Gerber testified further that on the basis of the contents of Marilyn's stomach, the time when she had eaten her last meal, and the amount of food consumed by her, the appearance of her body at the time he first saw it, and other information available, in his opinion she came to her death between three and four o'clock a. m. on July 4th.

When her body was brought to the morgue she still had three rings on her finger.

Among the personal effects of the defendant turned over to Dr. Gerber at Bay View Hospital by Dr. Richard Sheppard, Sr., on July 4th were the defendant's wallet and three one-dollar bills. In a secret compartment of the wallet $60 was found.

Robert T. Schottke, a member of the Homicide Unit of the Cleveland Police Department, who was assigned to assist the Bay Village police, testified that he and his partner, Patrick Gareau, arrived at the Sheppard home about 9:00 a. m. on July 4th. At about 11 that morning, Schottke went to Bay View Hospital and spoke to the defendant for about 20 minutes, and had the following conversation with him:

"Q Tell us what you said to him and what he said to you.

A We introduced ourselves, told him we were members of the Cleveland Homicide Squad, that we had been requested by the Bay Village Police Department to assist them in this homicide. We asked him to tell us everything that he knew in regard to this matter.

Q And what did he say?

A At that time he told us that the evening before there was company over, the Aherns, and that later in the evening he had fallen asleep on the couch, and while the Aherns were still there, and that while he was sleeping on the couch he heard his wife scream, he ran upstairs --

Q Did he say where this couch was located?

A In the downstairs, in the living room.

Q Yes. Continue.

A He heard his wife scream, and he ran upstairs, and when he got into the room he thought he seen a form. At the same time he heard someone working over his wife. He was then struck on his head -- side of the head and knocked unconscious, and when he woke up he heard a noise downstairs. He ran downstairs and he thought he seen a form going out the front door. He pursued this form down the steps, and when he got to the landing at the boat house, he does not know if he jumped over the railing or if he ran down the steps, but he half-tackled this form on the beach. There was a struggle and he was again knocked out.

When he regained consciousness, he was on the beach on his stomach being wallowed back and forth by the waves.

He then went up the stairs into the home, wandered around in a dazed condition. He went upstairs and looked at his wife, attempted to administer to her. He felt that she was gone.

He then went downstairs again, was wandering around trying to think of a phone number. He called a number and it turned out to be Mayor Houk. Mayor Houk came over.

Later on his brother Richard came over, and he was taken to Bay View Hospital.

Q Do you recall any further conversation?

A We asked him questions after he told us his story.

Q I see. In other words, first he made a recitation to you of what happened, is that correct?

A Yes, sir.

Q And then you and Gareau asked certain questions, is that correct?

A Yes, sir.

Q And did he answer these questions?

A Yes, sir, he did.

Q Now, will you please tell this jury what questions you asked and what answers he made?

A We asked him how the screams sounded to him when he woke up. He said they were loud screams. We asked him how long the screams lasted, and he stated all the while he was running up the steps. We asked him if he was assaulted by the one he heard working over his wife, and he says, no, that he had the impression that he was assaulted by someone else because he was assaulted just about the time he heard someone working over his wife. We asked him how many times he had been assaulted. He said two or three times, at the most. We asked him with what. He said with fists.

Q He said what?

A He said with fists. We then asked him if this was in both assaults, the one in the bedroom and on the beach, and he said yes.

We asked him if he could give us a description of the form that he seen running out the front door, and he stated that he was a big man, and we asked him if the man was white or colored. He said he must have been a white man because the dog always barked at colored people.

We asked him if he knew how tall the man was. He said he was bigger than what he was. He was about six foot three. He was dressed in dark clothing, and he was a dark complected white man.

We asked him if he had turned on any lights in the house. He stated no. We asked him if there were any lights on in the house, and he said he doesn't know, he doesn't recall.

We asked him about the beach, and he said that he was being wallowed back and forth by the waves, when he regained consciousness on the beach, that he was stomach down.

We asked him about Dr. Hoversten. We had heard he was a house guest, and he says, yes, he was staying at the house for a few days, and he said he had left yesterday afternoon to keep a golf engagement in Kent, Ohio.

We then asked him that we had heard rumors to the effect that Dr. Hoversten was infatuated with his wife. He said that he had heard those rumors, that they might be true, but he didn't pay any attention to them because he knew his wife was faithful to him.

We asked him if his wife had any men callers during the day while he was out.

Q Just a moment.

MR. PARRINO: Do you want that read back, Mr. Corrigan?

MR. CORRIGAN: Yes, the noise outside muffles his voice.

MR. PARRINO: Read that back, just the end of it, please.

(Answer read by the reporter as follows:

'We asked him if his wife had any men callers during the day while he was out.')

A He stated that there were several men who called during the day while he was out, but he didn't think anything of it, and we asked him if he knew the names of these men.

He stated that he could not recall them at this time. We asked him if his wife was having any affairs with men, and he stated no.

At that time that was just about the extent of our conversation with him.

Q And how long did that conversation last, approximately?

A Approximately 20 minutes.

Q Would you describe the defendant's appearance during that conversation?

A He was lying there on the bed and he answered all our questions in a normal tone. He did not ask us to repeat any questions. He answered all of the questions and spoke in a loud enough voice that we could hear. We was able to understand him." (R. 3571 - 3577)

The Bay Village police had asked a group of boys to assist them in searching the area north of the home extending to the lake. At approximately 1:30 p. m. on July 4th, Lawrence Houk, the son of Mayor Houk, found a green cloth bag belonging to Dr. Sam in the thick brush slightly to the east of the stairway leading to the beach. He turned this over to Schottke and Gareau, and upon examining it they found a ring, key chain with keys attached, and a watch, all belonging to Dr. Sam (State's Exhibits 26-A, -B, -C), and which defendant admitted he was wearing while he was asleep on the couch. The watch was an automatic, self-winding one, had water and moisture under the crystal, and there was blood on the face of it and on the upper part of the band leading to the face of the watch. The watch was stopped at 4:15.

On July 4th at 3:00 p. m., Schottke and Gareau, in company with Chief John Eaton of the Bay Village Police, had the following further conversation with the defendant at Bay View Hospital (R. 3586-3591):

Q All right. Now, would you tell this jury what you, Gareau and Chief Eaton stated to the defendant at that point and what the defendant stated to you?

A At that time we told Dr. Sheppard that we would like to ask a few more questions. He said all right, and we asked him at that time when he lay down on the couch to go to sleep, what clothing he had on at that time.

He stated that he was dressed in a corduroy jacket, a T-shirt, trousers and loafers.

We asked him if -- what jewelry he had on at that time. He stated his wrist watch, a ring and a key chain with keys on it.

We asked him if he knew where his jewelry was at now. He stated no.

And we then showed him the green bag which we had brought along from the house and asked him if he had ever seen that bag before. He stated it looks just like the bag in which he keeps motorboat tools.

And we asked him where this bag was kept. He stated in the drawer in the desk of his study.

We then showed him the wrist watch and asked him to identify the wrist watch, and he stated that it looks just like his wrist watch, if it is not his wrist watch.

He was then shown the ring and asked if he could identify the ring; he stated that it was his class ring.

We showed him the key chain and the keys and asked him if he could identify them, and he stated that they were his keys and his key chain.

We then asked him how the moisture and the water got into the wrist watch. He stated that a few days before, that he had been playing golf with Otto Graham, that they were caught in a heavy downpour, and at that time the water got into the crystal of the wrist watch, that it was not running properly, his wife was going to take it back to Halle's where she purchased it.

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 on 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, felt that she was gone, and at that time he must have gotten the blood on the wrist watch, and then he heard a noise downstairs and ran downstairs.

We told him that the jewelry had been found in a green bag about halfway down the hill near the lake, asked him if he could account how the jewelry got in this bag that was found on the side of the hill.

He says he didn't know how it got there, but someone must have taken the jewelry from him at the time when he was unconscious.

We then told him that we had examined his billfold and clothing at the Bay Village police station, and that his billfold was still in the hip pocket.

We asked, "If a burglar or someone had taken your jewelry, why didn't they take your billfold?"

He said he remembered at the time when he woke up upstairs he seen the billfold lying on the floor, and that he put it in his pocket and ran downstairs.

We then stated to him that he told us before that he had been on the beach and when he regained consciousness he was being wallowed back and forth by the waves on his stomach, since he was on his stomach, his face would be down, and that he knew as well as we did that an unconscious person can drown in as little as two inches of water.

We asked him how could he account for the fact that he did not drown. He stated that he knew an unconscious person could drown in as little as two inches of water, but that sometimes an unconscious person can help themselves, just like a football player who could play a half a game of football and after the game was over not realize that he was playing football.

We then stated to him that he had told us previously that he had been assaulted two or three times at the most with fists, but that he was wandering around the home in a dazed condition, and if he can account why he was wandering around in a dazed condition.

He said that he was just like a football player that could be injured in a game and play a half a game of football and not know that he was playing the game.

We then asked him when he had taken off his jacket. He stated that some time during the night he very faintly remembers waking up and being too warm and taking the jacket off and either placing it on the floor or placing it on the couch and then going back to sleep.

We told him that the jacket was found on the couch folded neatly, that if he had placed the jacket on the floor, it would still be on the floor, and that if it had been on the couch and he went back to sleep, he would have laid on the jacket and wrinkled it up.

We asked him if he had turned on any lights at any time when he was in the house. He stated no.

We then told him that we had heard that he had been keeping company with a nurse from Bay View Hospital, that this nurse had quit Bay View Hospital, and that she was now in Los Angeles, California, and that while he was in Los Angeles several months ago and while his wife was staying some place else he was seeing this nurse.

He stated, "That is not true."

We told him we heard that he had also given this nurse a wrist watch, and he stated that it was not true.

At that time I said, "The evidence points very strongly towards you and that in my opinion you are the one that killed your wife."

And he said, "Don't be ridiculous."

He says, "I have devoted my life to saving other lives and I love my wife."

He was then asked if he would take a lie detector test and he said yes. He asked how a lie detector worked, and we told him it takes the reaction of the respiratory system --

Q Just a minute, Bob.

MR. CORRIGAN: I can't hear you.

THE COURT: Now go ahead.

A The respiratory system and the blood pressure and the activity of the sweat pores on the palm of the hand, and that's recorded on a graph and the operator interprets the graph.

He said that due to his present condition that he didn't feel as though this would be a fair test and that he would not want to take the test at this particular time.

We told him that he would be able to take the test, if he wanted to, at the time when he felt better.

During this conversation with the defendant, Dr. Stephen Sheppard was in and out of the room several times. In addition to the foregoing, the defendant was asked if there were any narcotics in the house, and he stated, "No, but there may have been a few samples in my desk." Chip was not mentioned by the defendant either in his first or second conversation. On later occasions and in other conversations the defendant said he went to the door of Chip's room and peered into it before going downstairs and onto the beach to struggle with the unknown assailant.

On July 5th Schottke and Gareau and Deputy Sheriff Carl Rossbach went to the hospital again to question the defendant, but they were not permitted to do so. There they saw Mr. William Corrigan, Sr., and Mr. Arthur Petersilge, attorneys for the defendant, as well as members of the Sheppard family.

On July 8th Schottke and Gareau were present at Bay View Hospital to assist in the interrogation of the defendant but were not permitted to question him, although Officer Drenkhan, who was present at the

request of the defendant, together with Deputy Sheriffs Rossbach and Yettra did question him at that time. On July 21, 1954, at the request of the Bay Village authorities, the Cleveland Police Department took over the investigation.

Carl Rossbach, Deputy Sheriff, testified that he began assisting the Bay Village police on July 5th. On July 5th, 6th and 7th he attempted to question the defendant but was not permitted to do so. On July 8th, with Officer Drenkhan and Deputy Sheriff Yettra, he did question the defendant, and the defendant stated that he was attacked by a tall, bushy-haired form (R. 3841-3846).

On the morning of July 4th, Michael S. Grabowski, a member of the Cleveland Police Department, attached to the Scientific Identification Unit, went to the Sheppard home at about 8:30 a. m. for the purpose of assisting the Bay Village police in the taking of photographs and searching for fingerprints. On the drop-front desk in the living room and in other places he discovered peculiar straight lines as though the surfaces had been wiped with some rough cloth. On the drop-front desk he found only a partial palm print, later identified as Chip's. On the doorknob of the door on the north side of the living room he found some smudged marks, none of which were even partially clear as fingerprints. He examined various other places and objects but no other finger or palm prints were found in the living room or in the den.

Henry E. Dombroski testified that he is a chemist and a member of the Department of Scientific Identification of the Cleveland Police Department, and that commencing on July 23rd he together with

other members of his unit made a scientific investigation of the Sheppard home.

Mary E. Cowan also testified on behalf of the State. She stated that she had been employed by the County Coroner's office for 15 years as a medical technologist. Dombroski and Miss Cowan testified that they found numerous spots that were determined scientifically to be blood spots at various places in the Sheppard home, including the upper hallway, the steps leading to the second floor, the living room, the garage, and the room over the garage. In addition to those, additional tests were made as to some of these spots. In several places on the basement steps and the steps leading to the second floor spots of human blood were found. Miss Cowan examined the green bag heretofore described that had contained the defendant's ring, key chain and watch, and stated that there were no blood stains anywhere, either on the inner or the outer surfaces of the bag.

Cyril M. Lipaj, a Bay Village police officer, testified that on July 14th an old, battered and torn T-shirt was found near the pier of the home adjacent to the Sheppard residence, but later testimony showed that this was neither the size or make of other T-shirts found in the Sheppard home.

Mrs. Doris Bender testified that she lived at 294 Ruth Street, Bay Village, Ohio, and that on the morning of July 4th at approximately 2:15 or 2:30 a. m., she along with her husband and child were driving past the defendant's home. She noticed that at that time there was one light on upstairs and one on downstairs on the east side of the house

(R. 4174-77).

Thomas R. Weigle, the record discloses, was Marilyn's cousin. He related that while he was visiting at the defendant's home in March, 1952, Dr. Sam flew into a rage and administered a severe beating to Chip (R. 4821).

Ellnora Helms, who worked from time to time as a maid at the Sheppard home, specified that when she examined the murder bedroom some two weeks after July 4th, she could not find anything missing therefrom (R. 3984). She also testified that after Dr. Sam Sheppard and Marilyn Sheppard returned from their spring visit to California they occupied separate beds in the north room, and that prior to such visit they occupied a double bed in the eastern room. Ellnora Helms also testified that Koko, the dog, would not bark at persons with whom she had become familiar, but would bark at strangers.

Miss Susan Hayes, page 23, appeared as a witness on behalf of the State, and related that for a period of time she was employed at Bay View Hospital as a laboratory technician. She worked with the defendant on many emergency cases. She worked at Bay View from early in 1949 to December 1952, and again from August 1953 to February 3, 1954, after which she went to California. During that time the defendant expressed his love for her and had sexual relations with her, in the defendant's automobile, at her apartment, and at the Fairview Park Clinic operated by the Sheppards. She testified that on a number of occasions the defendant discussed divorcing his wife with her (R. 4853-4856). Before she quit her job at Bay View the defendant gave her a ring as a gift.

Before she left for California she gave the defendant her California address.

In March 1954 the defendant and Marilyn went to California and when they reached Los Angeles Marilyn went on to Monterey, California, to stay at the ranch of Dr. Randall Chapman and remained there with Mrs. Chapman. The Chapmans and the Sheppards had been well acquainted for several years. The Chapman ranch is located some 300 miles north of Los Angeles, where the defendant had remained.

Shortly after Marilyn's departure for Monterey, the defendant called Miss Hayes, who was living in a suburb of Los Angeles, and saw her. That same evening they attended a party together at the home of Dr. Arthur Miller, with whom both the defendant and Marilyn had been acquainted for many years. Attending the party were Dr. Randall Chapman and other doctor friends who knew both Marilyn and the defendant. The defendant and Miss Hayes remained at the Miller home that night, sharing the same bed. The following day the defendant drove Miss Hayes to her residence, where she picked up some clothing and returned with him to the Miller home, where she and the defendant lived together for approximately a week, occupying the same room. They had sexual relations there, on numerous occasions. During that week the defendant, Miss Hayes, the Millers and some others all went to San Diego to attend a wedding. Miss Hayes lost her wrist watch on the trip and the defendant bought her another one.

After staying with Miss Hayes, the defendant drove up to the Monterey ranch with Dr. Randall Chapman, and from there he and

Marilyn returned to Ohio.

The evidence established that Dr. Lester Hoversten visited the defendant at Bay View Hospital on July 5th, at which time Dr. Steve came into the room, was irritated and stated that he had left strict orders that no one was to see Sam unless he, Dr. Steve, was first notified (R. 3803). Dr. Hoversten testified relative to that incident as follows:

> "Q Did Steve leave at any time after he came in?
>
> A Yes. After speaking sharply to me, he turned on his heel and walked quickly out of the room, and then he came back in just a few minutes.
>
> Q And when he came back in, did he say anything?
>
> 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, you went downstairs, and from here to there,' and so forth." (R. 3812-13)

Dr. Hoversten testified further that the defendant had written Marilyn a letter concerning a divorce while he was in California. The defendant had permitted Dr. Hoversten to read this letter, at which Dr. Hoversten advised him against sending it (R. 3771-3777).

Dr. Hoversten further testified that the defendant again discussed divorcing Marilyn with him in the spring of 1953. At this time Dr. Hoversten advised the defendant to speak to his parents about this and to go slowly when considering divorce since "he might be actually

jumping from the frying pan into the fire." (R. 3779-3781)

The defendant is six feet tall, weighs around 180 pounds, and in past years had been active in many sports including football, tennis, track, and up to July had played basketball with some regularity and was an expert water skier.

Shortly after his arrival at Bay View Hospital on July 4th, X-rays of the defendant were taken, in which there was allegedly found to be a chip fracture in the infra-posterior margin of the second cervical vertebral spinous process. Dr. Stephen Sheppard announced that the defendant had a broken neck. Additional X-rays of this area of the spine were taken on July 7th and this supposed fracture did not appear in them. On July 8th the defendant was discharged as a patient from Bay View Hospital, wearing an orthopedic collar, which he continued to wear until after his arrest on July 30th.

Dr. C. W. Elkins, M. D., was called as a witness by the defense. He was personally acquainted with the Sheppards for some time and on July 4th was called in as a consultant specialist. He testified that at no time did he have the opinion or advise that Dr. Sam could not be extensively questioned by the police.

Leo Stawicki and Richard Knitter testified on behalf of the defense. Stawicki testified that he was driving an automobile on Lake Road on the morning of July 4th, around 2:30 a. m. and noticed a man standing in a driveway next to a tree which he described as six feet tall, with a long face and bushy hair. Stawicki's report to the police came after the Sheppard family had offered a $10, 000 reward for the arrest and

conviction of Marilyn's killer. Knitter testified that he saw a stranger on the roadway near the Sheppard home on the morning of July 4th, as he was driving along around 2:50 a. m., but did not report it to the police until July 12th, after the reward had been made.

The defendant took the stand and claimed that on the night in question he was sleeping on the couch downstairs, heard his wife scream and ran upstairs and was knocked out when he entered the bedroom; that he saw a light garment that had the appearance of having someone inside of it (R. 6559) at his wife's bed and that something hit him from behind; that he came to, heard a noise downstairs, went down the stairs and out the door of the house leading to the lake, chasing a dark form down the stairway to the water where again the defendant was rendered unconscious by this form. As to this, the defendant testified:

"Q Well, will you describe it in more detail, then?

A My recollection is that it was a good sized man. I felt that it was a man.

* * *

Q And I mean by that, Doctor, not what you felt but what you actually know.

A It was a form that seemed to me to be relatively good sized, evidence of a large head with a bushy appearance on the top.

Q And when did you determine that it had a head, Doctor?

A At that time, I would say, was the first time I could be absolutely sure that --

Q At what time?

A At the time that I saw the form going from the landing down to the beach." (R. 6581-82)

The defendant testified further on cross examination:

"Q Did you have the feeling that this form was the thing that was responsible for your wife's death?

A Yes, sir, I did.

Q And you don't know whether you struck at it or not?

A I don't know for sure. My feeling was to tackle it or get ahold of it and bring it down, and then do what I could.

Q Well, now, after you came through -- or came to, rather, and you found yourself down on the beach with the water washing up on you, what did you do then?

A Well, I very gradually came to some sort of sensation, staggered to my feet and started to eventually ascend the stairway to the yard and to my home.

Q And when you came to on the beach, did you see anything of this form?

A No, sir, I didn't." (R. 6585)

The defendant further testified that he came up from the beach into the house and went upstairs, turned on no lights in the bedroom, examined his wife and determined that she was gone. He then went downstairs and later called Mayor Houk.

The Sheppard home, the surrounding area, and the lake itself out some distance were searched, on July 4th and at other times, but neither the murder weapon nor the defendant's T-shirt were ever found.

Other pertinent parts of the evidence will be referred to in the argument which follows.

ARGUMENT

I. THERE WAS NO ERROR IN DENYING THE MOTIONS FOR CHANGE OF VENUE AND A CONTINUANCE.

It is contended that the defendant was entitled to a change of venue and a continuance because of the widespread publicity disseminated through the newspapers, radio and television stations, both before and during the trial of this case; that during the trial the jury was subjected to opinion-forming headlines and editorials, with resultant mass hysteria and the creation of an atmosphere of public opinion which made a fair and impartial trial by jury impossible; that the trial judge met with newspaper reporters, newspaper photographers, television personnel and radio commentators, before the trial and arranged the court room in such a manner that the representatives of the press, radio and television were given preference to the space in the court room; for irregularities occurring during the trial; for irregularity in the proceedings of the Court and of the jury; for abuse of discretion by the Trial Court; and that the indictment by the Grand Jury was the result of pressure exerted on the Grand Jury.

The motion for change of venue was made prior to the impaneling of the jury and was renewed from time to time as the trial proceeded. The numerous references in the brief of the defense to newspaper headlines and stories, and the opinions and interpretations of counsel for the defendant as to the meaning of these newspaper stories and articles, are interspersed in their brief with evidence offered in the

trial of this case, in such a manner as to make indistinguishable the evidence received in support of the motion for change of venue and the evidence received in the trial itself.

Omitted from the list of newspaper articles in their brief were those newspaper stories offered by the defendant, the members of his family and the defendant's attorneys, to the newspapers, such as "My Story" by Dr. Sam Sheppard in the Cleveland Press, signed articles by William Corrigan and Fred Garmone and the innumerable posed pictures of the defendant and his counsel which appeared almost daily in the various newspapers.

The Trial Judge, in ruling upon the motion for new trial on the question of denial of change of venue, stated:

> "The request, when made, was based upon the claim that the extraordinary public attention centered upon the case in this county by the various media of news made the securing of a fair and impartial jury in this county impossible.
>
> It is a matter of common knowledge that the case commanded that same attention throughout Ohio and the United States of America. It commanded very much attention throughout the free world. Chief counsel for the defense conceded and asserted this to be a fact and stated fervently that the defendant could not have a fair trial in Ohio, or even in the United States. The only conclusion from that assertion must be that the defendant cannot be tried at all on an indictment for Murder in the First Degree. Such a claim furnishes its own answer.
>
> Seldom indeed has there been a case about which the average citizen was so confused by the published stories, or more uncertain about what the facts actually were. With present-day means of communication, the same precise stories were simultaneously published in every city and county in the state and it certainly will not be denied that Cuyahoga County is the most liberal county in the state, and, as a result,

> the best in which to conduct a trial involving a much publicized charge of crime, whatever its nature.
>
> It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like was involved -- what actually was involved was a mere mystery, a 'whodunit.' The only safe and sure way to determine whether a fair and impartial jury can be secured is to proceed to impanel one. The Court reserved ruling on the motion pending such an effort and became convinced, and is still convinced, that an intelligent, sincere, patriotic and fair jury was impaneled. Upon that being accomplished, the Court overruled the motion and believes such action was not error." (Jr. 85, page 6-7)

Counsel for the defendant applied for a continuance of the trial to "permit the extraordinary publicity to quiet down." The trial started on October 18th and counsel for the defendant had been engaged in the case within hours following the crime. It was not claimed that they were not prepared for trial and, as the Trial Court stated: "nor was any suggestion made as to who was going to quiet down the publicity, nor when, nor how." (Jr. 85, page 7) This application was therefore properly overruled.

There is no question but that there was a great deal of public interest in this case and that there has been a great deal of publicity throughout the country and, for that matter, throughout the world. It should not be necessary to point out that newspapers have a constitutional right to report events in the community and to criticize what appears to them to be laxity on the part of public officials. Defense counsel have seen fit to devote a considerable portion of their brief to criticism of public officials; surely, the newspapers have an equal right. The Trial Court

put it very succinctly when he stated in ruling upon the motion for new trial:

> "It is to be noted that not a single person or agency connected with the investigation of, or prosecution, for the crime involved escapes the anathema of the defense. These include the police, the Coroner, his assistants, the prosecuting attorney and his aides, the State's witnesses, the Grand Jury, its foreman, the trial jury, the public, the bailiffs and the Court. The sense of search for truth and the declaration of justice seems to have vanished from a whole community as if by magic and overnight.
>
> The news agencies of every kind and character are thrown in for good measure. In spite of all the charges made, not a single specific item is cited in support of the claims made. Only broad generalities are indulged in. Reviewing courts will, we hope, have the duty of passing on all the legal questions involved and appearing on the record, and unless it is shown in very clear fashion that some extrinsic forces plowed through the effort to grant the defendant a fair trial, and succeeded in disrupting that effort, it is fair to assume that none did." (Jr. 85, page 14.)

The only question with respect to the motion for change of venue was, could a fair and impartial jury be impaneled in this community, where the offense occurred? The question was answered by the impaneling of the jury. Such a fair and impartial jury was impaneled, even though the defense did not exhaust their peremptory challenges, either as to the first 12 jurors or as to the alternate jurors.

There isn't a scintilla of evidence in the record to support the contention that the jury or any single member thereof, was biased or prejudiced by the newspaper stories or anything else, or that the jury was in any way influenced by the reporting of this case in the newspapers, over the radio and on television. A distorted picture is presented to this Court

as to the conduct of the trial and the arrangements made for the reporters and others. Regardless of what action was taken by the Trial Court, it was certain that all of these newspaper reporters were to be present and that demands would inevitably be made upon the Trial Court by all types of news media. The Trial Judge stated, in ruling upon the motion for new trial:

> "Realizing that the case had caught the public imagination to an extent leading national and, indeed, international news media to decide to fully 'cover' the trial, and having requests for space from many of them, the Court decided to make proper arrangements before trial and to control the situation so as to minimize and, if possible, eliminate confusion during the trial. The court room is small.
>
> The Court assigned specific seats to individual correspondents in the rear of the court room and back of the trial area, and issued orders that there was to be no crowding or congregating at the front end entrances (one on each side of the bench) of the court room; that there was to be no passing back and forth through the trial area and that all entries to and movings out of the court room be via the public doorway in the rear of the court room. Members of the defendant's family were accommodated with seats at all times during the trial. The same was accorded members of the family of the murdered Marilyn. Members of the general public were admitted to the extent of the seating capacity of the court room and a scheme of rotation was established so that many persons attended some sessions of the trial and no favored members of the general public were present at all times, nor permitted to be.
>
> Rules were prescribed for photographers and representatives of radio and television stations. They were cautioned that no cameras were to be permitted in the court room excepting in the morning before the convening of court and at the close of the day after adjournment, and that in no event were pictures of the defendant to be taken

in the court room at any time excepting with his consent or that of his counsel.

The Court's arrangements and orders were carried out with one or two simple insignificant exceptions, due to overenthusiasm. The defendant and his chief counsel were far more gracious to the press, photographers and gallery than was the Court. A very large number of pictures of the defendant, his family, counsel and friends were taken in the court room (outside of court session periods) with their permission and without complaint. Counsel for the defense held press conferences in the court room with cameras clicking; all to the apparent delight of counsel for the defense, and, naturally, without protest.

Julian Wilson, a photographer for the Associated Press, testified on this point at the hearing had on the motion and supplemental motion. His testimony stands wholly unchallenged and it states the procedure followed with perfect clarity.

Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special importance when undertaking a signal public service. Not a single complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or the defendant, but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest.

Some space outside of the court room which could be spared for the moment without interference with the public service was used by publicity agencies for their typewriters and other equipment but it is definitely not true, as stated in the motion herein, that:

'The Assignment Room, where cases are

> assigned for other causes to court-rooms, was assigned by the Court to reporters and telegraphers.'
>
> Some generally unused space in the Assignment Room was so assigned. Neither person, record, nor piece of equipment in the Assignment Room was moved, removed or displaced and the Assignment Room functioned normally throughout the entire period of the trial of this cause. One of the real purposes of assigning that space to the uses mentioned was to remove them entirely from the immediate court room area. They were out of the corridors leading to the court room and permitted free movement of the public and visitors within the building, whether there in connection with this case or otherwise, wholly unaffected by the Assignment Room space activity." (Jr. 84, p. 9-11.)

It should be noted that following the request for separation of witnesses, which the Court granted, the Court allowed Dr. Stephen Sheppard to remain in the court room throughout the trial, even though it was stated he was to appear as a witness for the defense. (R. 1673)

Complaint is made relative to the part taken by the Trial Court in a Fabian television program on the steps of the Court House. The Trial Judge on one morning walked toward the Court House steps, as usual, and there saw Robert Fabian (a retired Superintendent of Scotland Yard) with a very small contraption in his hand. Mr. Fabian said, "Good morning, Judge Blythin, nice morning." The judge said, "Good morning, Mr. Fabian." (Jr. p. 13, Item 38.) There was no conversation of any kind about the case on trial or any other subject.

The right to grant a change of venue lies in the sound discretion of the Trial Court, State v. Richards, 43 O. App. 212; and there is no showing that the Trial Court abused its discretion in overruling the motion for a change of venue and for a continuance.

II. THERE WAS NO ERROR IN DENYING THE MOTIONS FOR A DIRECTED VERDICT OR FOR DISMISSAL OF THE INDICTMENT.

The defense contend that the State did not prove this defendant guilty beyond a reasonable doubt because of the absence of fine drops of blood on his trousers, because he was not bitten, because a tooth chip was found under the bed not shown to be from the defendant or the victim, because a piece of leatherette found on the floor was never identified as coming from anything belonging to the defendant, because of a fleck of fingernail polish found on the floor of the bedroom, because of red and blue fibers under the murdered woman's fingernails, because of a cigarette butt found in the toilet upstairs and because two disinterested persons testified that they saw a bushy-haired man near the premises.

Of course, the defense fail to state in their brief, as the record will disclose, that the small piece of leatherette and the fleck of nail polish were not found until many persons such as Dr. Richard Sheppard, Dr. Steve Sheppard, numerous Bay Village policemen, numerous Cleveland policemen, the Houks, numerous newspaper reporters and photographers and others had been in and out of that room.

As to the tooth chip referred to, it was not found until much later, July 23, after many people had been in and out of that room.

As to the so-called disinterested persons, they did not report what they alleged they saw until after the newspapers had carried an offer of $10,000 reward and had also carried stories of a bushy-haired intruder. They did not even report to the police authorities what they

claimed they saw until about a week after the murder, even though it was well publicized. The evidence shows that Officer Drenkhan had patroled the road in the vicinity of the Sheppard home during that period of time, five or six times, and he testified that he did not see any persons walking or standing along the road in the vicinity of the Sheppard home.

The State agrees that it has the burden to prove the essential elements of the charge against this defendant and by evidence that convinces a jury of his guilt beyond a reasonable doubt. As we will hereafter show, the State did prove the guilt of this defendant of the murder of his wife, beyond a reasonable doubt.

III. THERE WAS NO PREJUDICIAL ERROR IN IMPANELING THE JURY.

A. It is contended that the Trial Court erred in refusing to allow the appellant to question prospective jurors on whether evidence of extra-marital affairs would prejudice them against him.

The record will disclose innumerable questions asked various jurors as to whether extra-marital relations would bias or prejudice them or prevent them from being fair and impartial jurors. The only objections that were sustained were those to questions which were asked in such a form as to call for the reaction of the jurors in advance, the evident purpose of which was to have the jurors indicate in advance what their reaction would be under a certain state of the evidence. Such questions were inadmissible. In State v. Huffman, 86 O. S. 229, it was held:

"1. The examination of persons called to act as jurors is limited to such matters as tend to disclose their qualifications in that regard, under the established provisions and rules of law, and hypothetical questions are not competent when their evident purpose is to have the jurors indicate in advance what their decision will be under a certain state of the evidence or upon a certain state of facts."

B. The claim is made that the challenge for cause should have been sustained in connection with Juror Barrish because it is claimed he said he would give more weight to a police officer's testimony than he would to a layman. The record will show that upon further examination of Juror Barrish, he stated in this connection:

"Q Mr. Barrish, you understand it is the function of the jury to weigh the testimony of all of the witnesses who testify?

A Yes, sir; I do, sir.

Q And in weighing the testimony of any witness, you have a right to believe or disbelieve all or any part of any of the testimony of a witness. You understand that?

A Yes, sir.

Q Now, if a police officer testified or any law-enforcing officer testified, would you weigh and measure his testimony with the same yardstick that you use on the testimony of any lay witness?

A I would --

Q Would you -- go ahead.

A I understand what you mean. I would have to hear the other side. I couldn't give a policeman preference over the layman, but he should -- he would know more information about any information whatsoever in a case like this.

Q Well, if a policeman testified and you felt that you believed him, you would believe him?

A Yes, sir.

Q If you felt that he wasn't telling the truth, you wouldn't believe him?

A That's right, sir.

Q And wouldn't you apply that same test to any layman?

A That's right.

Q So you would apply the same test to the testimony --

A That's right.

Q -- of a policeman as you would to a layman?

A Yes, sir." (R. 93-95)

As to the matter of presumption of innocence, Juror Barrish was also questioned and stated as follows: (This juror was passed for cause by the defense at Record 115.)

"Q You could. One of the rules of law that I am sure his Honor, Judge Blythin, will instruct you on is that at the outset of this trial, right at this moment, that the law provides that this defendant is innocent, and that that presumption of innocence is to carry on through to him throughout the trial until such time, if such time ever comes in the trial of this case, that his guilt is proven beyond a reasonable doubt, that he is guilty.

Now, if the Judge should charge you that that is the law, could you follow that instruction?

A I could, sir.

Q And can you at this time give this defendant the benefit of that presumption of innocence?

A I could, sir. (R. 67.)

Much is said in the brief of the defense about a prospective juror by the name of Solli who was alleged to have stated that he would not vote for the electric chair (App. Br. p. 286) "and the information given to the defense was that he would vote for the electric chair if he got on the jury." Solli was not a juror in this case. He asked to be excused for illness and he was excused with the consent of both sides.

As to Prospective Alternate Juror Mrs. Betty Richter, who was excused for cause, she had acknowledged that she knew Dr. Sam and Marilyn Sheppard, had met them socially, and was a golf companion of Marilyn Sheppard.

Ultimately Lois M. Mancini was seated as such alternate juror in place of Mrs. Richter, but she was excused at the conclusion of the trial and did not participate in the deliberations or the verdict.

As to Juror Manning, after he was seated and sworn as a juror, a young man came to the Criminal Courts Building, talked to counsel for the defendant first and later to the Prosecutor, and informed them that Juror Manning had been arrested and convicted of a morals offense relating to a young man. The matter was also brought to the attention of the Court and counsel for the defense. Manning neglected to make this conviction known when he was asked on the voir dire examination whether or not he had ever appeared as a witness in any case. The matter became known generally and received considerable publicity. A meeting was held in chambers and by common consent the matter was continued to over the weekend. Counsel for the defense thereafter proposed that he would consent to the discharge of Juror Manning if the entire panel was discharged

and we would proceed to re-impanel the jury. This proposal was declined by the State.

After the alternate jurors were impaneled, Juror Manning addressed himself to the Court, in open court, and stated:

> "JUROR MANNING: Right now, I mean from what is going on, when I came down here for jury duty I thought I was doing what a public spirited citizen of this country would do. That's the only idea I had when I came down. It interfered with my work, my earning a living. I didn't give a second thought to that. I came down here, and if I was chosen, I would serve and serve in the way I spoke, absolutely unbiasedly. And I was -- I tried to run myself from the heart and mind together and be absolutely unbiased and unprejudiced in thinking and talking with other people, even speaking outside this jury. But after what has happened, I would not be able to sit in that box with the other jurors, be able to listen to the case and be unbiased, unprejudiced or -- unemotional is what I am trying to drive at mostly; that if this keeps up, if I am kept on the jury, I think I will be a sub-headline 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."
> (R. 1600-1601)

The Trial Court excused Juror Manning on the ground that he was both disabled and disqualified.

Revised Code Section 2945.29 (13443-13) provides:

> "Jurors becoming unable to perform duties. 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 to be 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. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the Court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

Revised Code Section 2313.37 (11419-47) provides in part:

* * *

> "If before the final submission of the case to the jury a juror becomes incapacitated or disqualified, he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge, said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror."

In each instance where the defense asked that a juror be discharged for cause and were overruled, it had developed upon further questioning that the juror was unbiased and unprejudiced and would follow the instructions of the Court, and was a qualified juror. There was, therefore, no basis for discharge for cause.

The prospective jurors were questioned at very great length by both counsel for the State and the defense, and the Court. In fact, there are three volumes of the Bill of Exceptions, totaling hundreds of pages, setting forth such detailed examination. Except for Juror Manning who was discharged, the 13 jurors who sat and heard this case, and the 12 jurors who decided this case, were all competent and qualified jurors, without prejudice or bias, and the record discloses that they gave most careful and adequate consideration to the case.

IV. THERE WAS NO ERROR IN THE ADMISSION OF CERTAIN TESTIMONY.

A. Complaint is made because color slides were used by Deputy Coroner Adelson in connection with his testimony. The color slides which, except for the color, are the same as the black and white

photographs, which are in evidence, by their very nature of presenting the color, gave a better view of the objects portrayed. For example, the color slides would clearly distinguish blood or blood spots, not so readily distinguishable on black and white photographs. On the other hand, they would also show that the liquid under the crystal of the defendant's watch was not blood, but water.

The color slides included not only pictures of the deceased's body but also of various objects such as the defendant's watch, the victim's watch and the trousers of the defendant, as well as the tooth chips found on the bed.

B. It is contended that some hearsay testimony by Nancy Ahern prejudiced the defendant.

This testimony followed the cross examination of Don Ahern by the defense wherein he was questioned as to the attitude of Marilyn and Dr. Sam Sheppard toward one another. There is also an assertion in the opening statement of the defense that their married life was happy. On cross examination of Nancy Ahern the defense proceeded to question her on her testimony on the very same subject matter at the inquest and thus got substantially the same testimony to the jury. Many other witnesses were also questioned by the defense as to the attitude of Marilyn and Dr. Sam Sheppard, one to the other, and the defense introduced into evidence a letter from Marilyn Sheppard to Mrs. Brown, her aunt, and had the letter read to the jury.

There was an abundance of testimony from other witnesses, Dr. Hoversten, Susan Hayes, Dr. Stephen Sheppard, that at various times

there was trouble and talk of divorce, notwithstanding that up to and at the inquest such trouble and divorce talk was denied by the defendant. There was for example the testimony of Dr. Hoversten who dissuaded the defendant from sending to Marilyn, his wife, a letter pertaining to divorce after Dr. Sam Sheppard had shown him the letter and discussed its contents with him.

The substance of the testimony of Mrs. Ahern was merely that Dr. Sam and Dr. Chapman had a conversation and that following the conversation, the defendant had determined to continue his married life. Such a conversation, in view of all of the other evidence on the same subject, could hardly be considered as having prejudiced the defendant.

It did not involve any particular element of the crime itself. At most it would have had some bearing on the possible motive, which is not an essential element of the crime itself.

C. It is claimed that the testimony of Esther Houk relative to the defendant's statement to her sister in her presence that a head injury could be faked, was remote and unrelated. The defendant was claiming rather severe injuries in this case. It was the contention of the State that although the defendant was injured, the extent of his injuries were not nearly as serious as he and his family stated them to be. If he thought no more of faking a head injury for someone else, how much more would he be inclined to fake injuries for himself? This testimony was pertinent.

D. The defense claim that the Court erred in permitting the defendant to be cross examined about Margaret Kauzor and Julie Lossman.

The defendant had mentioned Julie Lossman in his written statement and there was no objection to the introduction of the statement. Cross examination of the defendant on the same subject certainly would be pertinent for him to explain the contents of his written statement.

The idea the defense tried to convey was that the defendant and Marilyn were perfectly happy in California. Cross examination of the defendant relative to his conduct with Kauzor was for the purpose of throwing some light on his true conduct in California.

The defense persistently attempted to portray an exceedingly happy and lovable married life for the defendant to support their contention that under no possible circumstances could the defendant have committed this crime. From the very beginning of his interrogation by police officers, the defendant maintained that he had had no affairs whatever with other women and it is admitted that he denied under oath during his testimony at the inquest that he had any affair with Susan Hayes. The record discloses that his affair with Mrs. Lossman, as well as his affair with Susan Hayes, was known to Marilyn. The affairs themselves, as well as the subsequent knowledge of the wife, are certainly pertinent to show the troubled status of their married life and negatives the lovable and happy picture presented by the defense.

The evidence shows with respect to Margaret Kauzor, like that with Susan Hayes and Lossman, his affairs with other women, all conducive to a troubled rather than a happy married life, and conducive to quarrels and incriminations which are very likely to result in a crime such as charged in this case. The evidence shows by the testimony of Dr. Hoversten that this defendant, while married, had on

an occasion been with Margaret Kauzor in California, when he was a student there, and subsequent to the Kauzor affair, the defendant prepared a letter directed to Marilyn, suggesting a divorce, which he was dissuaded from sending by Dr. Hoversten.

E. The defense claim that the Court erred in permitting unfair cross examination of the appellant concerning Susan Hayes and as to how he sustained his injuries.

At the inquest the defendant was specifically asked whether he had had an affair with Susan Hayes, which he under oath unqualifiedly denied. This, of course, was to sustain the picture they were trying to portray of a lovable, happy, married life. At the trial the defendant admitted intimacies with Susan Hayes. Cross examination along this line was not only not error but the prosecutor would have been lax if he had not questioned the defendant as to his previous testimony under oath, which contradicts his testimony at this trial concerning Susan Hayes.

Incidentally, the claim now made that he deliberately lied because he was a "gentleman" in order to protect the reputation of Susan Hayes was not followed by the same sort of solicitation by the defendant for Mrs. Lossman. In that instance, the defendant was careful to portray Mrs. Lossman as the aggressor. The simple fact of the matter is that, in both instances, the defendant was concerned solely with his own interest and in concealing his affairs with other women in order to continue the pretense of a lovable, happy, married life.

Cross examination of the defendant with the following question was likewise competent:

"Q And that after you had killed her you had rushed down to that lake and either fell on those stairs or jumped off the platform down there and out to the beach, and there obtained your injuries?"

The defense claim this question was unfair and prejudicial. The defendant himself told Officer Schottke in describing the events surrounding the murder that "He pursued this form down the steps, and when he got to the landing at the boat house, he does not know if he jumped over the railing or if he ran down the steps." (R. 3572) The question was, therefore, perfectly proper and it was a reasonable inference to be drawn from the defendant's own account of how he pursued the phantom down the stairway to the beach, that that is how he sustained any injuries that he had.

F. The defense argue that it was error to permit Mayor Houk to testify that he took a lie detector test. Houk was merely a witness in this case, not the defendant, and his willingness to take the lie detector test was simply one item of fact to show both his attitude and conduct. The Trial Court instructed the jury that a person is not compelled to take a lie detector test. His instruction to the jury on the subject of a lie detector test was as follows:

"THE COURT: Mr. Parrino, the Court would like to say a word to the jury now.

Ladies and gentlemen of the jury, you are not to understand by these questions that any person is obligated to take any lie detector test.

A person has his own choice. He is under no obligation whatever to take it." (R. 3852)

When the subject of the lie detector was first presented in the questioning of Officer Schottke and he related the conversation he had

had with the defendant pertaining to the lie detector, no objection was made to the admission of those conversations at that time (R. 3590).

The defendant himself on direct examination in response to questions asked by his counsel, Mr. Corrigan, related his conversations with officers Schottke and Gareau pertaining to the lie detector test (R. 6298 - 6299).

It is argued that the testimony of the Coroner was unfair and biased relative to the defendant's description of the "form" and that the Coroner at one point stated that the defendant didn't know whether it was a human being. The record shows that upon further questioning, the Coroner testified that he asked the defendant, "Was it a human being" and that his answer was, "I felt it was." We invite the Court to examine all of the questions and answers with respect to this "form" (R. 3508-3513).

V. THERE WAS NO ERROR IN THE EXCLUSION OF CERTAIN TESTIMONY.

A. It is contended that the Court erred in withholding a record of the Coroner's office from the appellant. Coroner Gerber testified that during the week of the 4th he had obtained a copy of a partial report of Detective Schottke's police report as to what he had done (R. 3248). Mr. Corrigan requested that Dr. Gerber bring into court all of his records in this case. The judge instructed that the Coroner was only obliged to bring into court public records. This was not a public record. It was a part of the police records. Coroner Gerber brought into court pursuant to the Court's instructions all of the public records relating

to this case. During the course of the work of the technicians in the Coroner's office, certain work sheets were prepared for their own use. These work sheets were not a part of the permanent public records and certainly there would be no obligation to bring them into court.

B. The claim is made that the defense were restricted in their cross examination of Dr. Hexter. The defense were cross examining Dr. Hexter along the lines of "what makes a person tired." The cross examination was so extended as to tire everyone. Also, the record will disclose that Dr. Hexter was cross examined quite extensively by counsel for the defendant on the subject of "shock." Objection was made to the substance of the question set forth on page 318 of the appellant's brief, which was properly sustained by the Court. Thereafter, counsel proceeded to cross examine Dr. Hexter on the subject of "shock" ad infinitum. (R. 4534 et seq.)

C. The claim is made that the defense were restricted in their cross examination of Officer Schottke. Objections were properly sustained to certain questions put to Officer Schottke quoted in the brief of the defense. Counsel was injecting into the questions conclusions and argumentative material. The record will disclose that those questions by counsel which were direct and called for answers which related to the facts were not objected to and were fully answered.

D. It is contended that the Trial Court erred in sustaining objections to certain questions on page 320 of appellant's brief asked of Officer Schottke regarding a police report published in the Cleveland News. Counsel endeavored to examine Schottke about a

newspaper article with which Schottke had no connection and the Court properly sustained objections thereto. Schottke brought into court the report that he had made and it was made available to the defense (State's Exhibit 49, R. 3752). After repeated reference of counsel for the defense to the police report of Detective Schottke, the report was marked as State's Exhibit 49 and turned over to counsel for defense (R. 3759) and without objection was offered and received in evidence (R. 3759). The record shows that Exhibit 49 is the complete report of the conversation Schottke had with the defendant on the first and second occasions on July 4th and that Officer Schottke knows of no other report (R. 3762). Officer Schottke testified that he had no connection whatever with the story in the Cleveland News.

E. The next claim is that the Court erred in refusing to allow evidence of similar acts in Bay Village. As to the testimony of Miles Davis with reference to an encounter with a person in his home on 375 Kenilworth Road, Bay Village, the evening of September 13, 1954, there was no basis whatever upon which such testimony could be received and the particular questions objected to were properly sustained. (R. 5984-5986)

Similarly, with respect to the witness Lawrence Carman, who testified that he resided at 31013 West Lake Road and further stated that his home was burglarized on July 7, 1954. There was no basis upon which the testimony could be received and the particular questions objected to were properly sustained (R. 6083-6085).

F. The defense claim that the Court erred in preventing

a juror during the trial from asking a question of the appellant. The Court was fully justified in declining to permit a question to be put. Had the Court acted otherwise and each juror been permitted to question witnesses, chaos would be the inevitable result and no one would have protested more loudly and longer than counsel for the defense.

G. It is claimed that the Court refused to allow Witness Don Ahern to testify that the appellant was a deep sleeper. This is not true. The Witness Don Ahern had testified that it did not strike him as strange that his host should go to sleep in his presence; that he had seen Sam Sheppard go to sleep on many occasions at the Ahern and Sheppard homes; and that there was nothing strange about that situation or that incident that night (R. 2056-2057).

The only question objected to was the one question counsel inquired as to the reason for the defendant sleeping at various times in the presence of guests. This was the question to which an objection was properly sustained. Thereafter, counsel proceeded to question the witness further and asked, "Was it characteristic of Sam Sheppard to go to sleep in the middle of a party" and without objection, the witness was permitted to answer, "It wasn't unusual." (R. 2057) When counsel for the defense again asked, "Is it not a fact that Sam's going to sleep in the middle of a party was not unusual?" (R. 2061) (App. Br. p 323) the question being repetitious was objected to and the objection properly sustained. Counsel thereupon continued by asking, "But the fact is that his going to sleep on the night of July 4th (July 3rd) caused no question in your mind?" The witness was permitted to answer without objection,

"That's right."

As to the question, "Isn't it a fact he worked hard and slept hard," an objection was properly sustained. When the defense went beyond the questions of fact, beyond the knowledge of this witness and called for his opinion or conclusion, or when the questions were repetitious, the objections were properly sustained.

H. The next complaint is that the Court erred in refusing to permit Dr. Adelson to express an opinion as to how the wounds got on the hands of the victim. It is apparent on its face that the question put to Dr. Adelson (App. Br. p 323) as to whether or not the wounds on her right hand would indicate a struggle, was objectionable.

VI. THERE WAS NO PREJUDICIAL ERROR IN THE CONDUCT OF THE TRIAL.

A. There was no error in the remarks of the Court in the presence of the jury. It is claimed that the Court erred in suggesting that a certain line of examination was being over-extended. Reference is made to the cross examination of Dr. Adelson. The record will disclose, from pages 1727 to 1969, some 240 pages of cross examination of this doctor, and from pages 1985 to 2016, some 30 pages of recross examination, or a total of some 270 pages.

Dr. Adelson, who is a deputy county coroner, appeared as a witness for the State to establish the cause of death. He appeared for direct examination on the afternoon of November 4th. The direct examination was concluded a few minutes after the Friday morning session,

November 5th. (R. 1723-1727) The cross examination of Dr. Adelson then ensued. After a whole day of cross examination, the Court suggested that a whole day of cross examination appeared to him to be enough to determine the cause of death. However, an adjournment was taken to Monday, November 8th, and the cross examination of this witness continued for most of the morning (R. 1893 to 1969). After a short redirect (R. 1969-1985), there was recross examination of this witness for the remainder of the morning session (R. 1985-2015).

The record will disclose that the cross examination and recross examination was extremely repetitious and the widest possible latitude was given to counsel, notwithstanding the excursions of counsel into wholly unrelated fields.

Similarly, as to the testimony of Officer Dombrowski and the comments of the Court complained of (App. Br. p. 326) (R. 4582). This officer had previously produced, at the request of counsel, all of the pictures that were taken and in open court counsel examined them all and selected the pictures they wished to use and returned the remainder to the officer, who returned them to the files of the Police Department. Later, counsel questioned this witness with respect to the pictures he had so returned to the files. He asked him to again look them up and again bring them back into court (R. 4582).

It should be noted that the cross examination of Officer Dombrowski began at page 4291 of the record, on November 26th at 10:15 a. m. and proceeded for the remainder of the day. It was resumed (R. 4545) on Monday, November 29th and proceeded through the entire

morning. It continued during the afternoon and the episode complained of took place late that afternoon (R. 4582). The cross examination of this officer consumes some 322 pages of the record (R. 4291-4613). Delay in requiring the officer to go back and get the photographs previously produced in court and examined by counsel and returned to the officer was caused by counsel and in view of the unnecessary time consumed with repetitious matters and questions, the remark of the Court that "We can't go on with this witness forever. We will have to somehow or other get through with this witness" was not only pertinent, but necessary, if we were to ever conclude with the trial of this case.

Further complaint is made that the Court erred in not ordering the keys to the house in the possession of the police turned over to Mr. Corrigan and as a result the appellant or counsel did not have access to the home to make an examination of the premises and particularly the room where Mrs. Sheppard was murdered.

This episode occurred during the closing days of the trial when a subpoena was issued to Chief Eaton, requesting the Chief to bring with him the keys to the house. As a matter of fact, the defendant, counsel for the defense, and the members of the defendant's family had never been denied an opportunity to enter the premises or any part thereof, or to make an examination or investigation therein. Also, as a matter of fact, the defendant, counsel, and defendant's family had visited the premises and at no time had they been denied access thereto.

The cross examination of Chief Eaton at that time, by Mr. Mahon, was as follows:

"Q Chief, since you have had that key -- you got it some time 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 have had possession of the keys?

A They have not." (R. 6076)

"By Mr. Corrigan:

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

A Pardon me. Will you repeat that?

MR. DANACEAU: We object to that. We know of no such order.

Q Did you make that order?

MR. DANACEAU: Just a minute.

MR. MAHON: Was there such an order?

THE COURT: Let him tell what the situation was.

MR. MAHON: There is no evidence there ever was such an order.

THE COURT: No, there isn't any evidence about an order, but he is the Chief of Police. Let him answer if there was.

Q I didn't understand the question, I'm sorry.

THE COURT: Will you restate your question, Mr. Corrigan? The Chief doesn't understand it. Or let the reporter repeat it.

(Question read by the reporter.)

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."

(R. 6077-6078)

Obviously, the whole episode in the closing days of the trial, and the demand for the keys in the presence of the jury was a grandstand play and show, and nothing else.

As to the query of the Court pertaining to the time or date that the witness Ellnora Helms, the maid in the Sheppard home, referred to in her testimony pertaining to the washing of blood, and the subsequent remark of the Court that the washing of blood during the month of April "had nothing to do with the 4th of July or anywhere near it," (R. 4003) counsel objected to the form of the question, whereupon the Court withdrew it and rephrased the question as follows: "It was not anything that happened near the 4th of July, one way or another?" The witness answered, "No, because I hadn't been there." (R. 4004) There was no objection to this last question.

B. It is claimed that the Trial Court erred in the conduct of the trial because of disorder during the trial. Counsel complains that there were instances of disorder, noise and laughter in the court room. It should be remembered that this trial continued for some nine weeks and that necessarily there are times when people are required, for one reason or another, to leave the court room. A few of these occurrences caused the Court to admonish the spectators to the end that there be no interruption of the trial proceedings. There are, of course, the inevitable traffic noises on East 21st Street which result in short delays or repetition of the questioning.

As to the incident of the laughter to which Mr. Corrigan refers, it resulted from Mr. Corrigan's remark, "Well, I don't care what the conversation was," after he had asked the witness what the substance of a conversation was, and the witness had given his answer.

Counsel complains of the presence and conduct of unnamed persons in and about the court room and corridors during the five days in which the jury was deliberating in their jury room. If the unnamed persons interested in the outcome of the trial, whether they be newspaper men, counsel for the defendant, the defendant's brothers, Dr. Steve Sheppard and Dr. Richard Sheppard, their respective wives and friends or other spectators, milled around during the five days, or if some of them played cards during the long wait, we fail to see how that in any way influenced the jury in its deliberations or had any bearing on the verdict. There is not a scintilla of evidence in the record that the jury was disturbed or influenced by any of the activities in the court room or in the corridors while

they were in their jury room during their deliberations.

C. It is claimed that the Court erred in failing to properly admonish the jury at the time they separated. In support thereof, counsel do not claim that such admonition was not given but objects that the instruction was not sufficiently extended in detail upon every occasion. The Court did instruct and admonish the jury in great detail at the outset and repeated such detailed instructions on many occasions. On other occasions, having given such detailed instructions and admonition, the Court simply reminded them of their duties not to discuss the case, "not even among themselves."

D. There was no coercion of the verdict. Counsel complain of coercion of the verdict but cite no evidence whatever to support this unfounded assertion. The fact that the jury deliberated a period of five days merely shows the carefulness and consideration which they gave the mass of testimony and over 200 exhibits in the case, and the written instruction given by the Court to this jury which they had with them in their jury room.

VII. THERE WAS NO ERROR IN THE CHARGE OF THE COURT.

A, B, C. It is claimed that the Court erred in failing to give the entire charge in writing, in giving part of the charge one day and part the next, and in failing to give the full charge immediately after argument.

The record discloses that at the close of the arguments the Court, after admonishing the jury, adjourned at 4:15 p. m. to 9:00 a. m.

the following morning. The only thing that occurred between the adjournment and the charge was the request of defense counsel in the judge's chambers for special instructions, which the Court refused (R. 6988-6991). Thereupon, the parties proceeded to the court room and the Court immediately gave the written charge, a copy of which counsel for the defendant already had, to the jury verbatim and in its entirey (R. 6992-7012). The charge was given the morning of December 17th without interruption.

D. The claim is made that there was error in the charge on character and reputation (R. 7006) (App. Br. p. 340), in that the Court did not appreciate the weight that is to be given to evidence of character and reputation and the jury was not required to consider this evidence if it followed the Court's instruction.

The Court did not, by this charge, take from the jury the right to consider the character evidence with all of the other evidence in determining the question of defendant's guilt or innocence. In fact, the Court left it to the jury to give full consideration to all of the evidence including character evidence, in coming to their verdict.

In Harrington v. State, 19 O.S. 264, the Court said, at page 269:

> "The true rule is said to be, 'that the testimony (character evidence) is to go to the jury and be considered by them in connection with all the other facts and circumstances, and if they believe the accused to be guilty they must so find, notwithstanding his good character.'"
>
> Stewart v. State, 22 O.S. 477.

The Trial Court correctly instructed the jury further that good character

and good reputation will not avail any person charged with a crime against proof of guilt beyond a reasonable doubt. This is the same as saying, as the Court of Appeals stated in State v. Wayne Neal, "If you have no doubt whatever of the defendant's guilt, after considering all of the evidence, character evidence should not set him free for such criminal conduct clearly established." (97 O.A. 339, 351)

E. Counsel complains about the charge on circumstantial evidence (R. 7004-7006) (App. Br. 342-343) but do not point out wherein it is wrong in any respect. The fact that the Court did not use the language of the charge submitted by counsel on the same subject matter does not make the charge as given, erroneous.

F. The Court did not err in failing to charge on assault and battery and assault. The evidence in this case did not warrant a charge on assault and battery or assault. Whether in an indictment for murder in the first degree, a charge is warranted as to a lesser offense depends, not merely upon whether the lesser offense is included in the formal charge, but upon whether or not there is any evidence tending to support the lesser offense. Bandy v. State, 102 O.S. 384.

VIII. THERE WAS NO ERROR IN OVERRULING THE MOTION FOR NEW TRIAL.

A. The defense claim that the defendant was entitled to a new trial because the Trial Court erred in allowing the jurors to separate and to communicate with outsiders during their deliberations. (App. Br. pp. 344-346).

The Trial Court appropriately stated on the hearing on the motion for new trial:

> "While this Court would not for the world minimize the importance of guarding this jury -- or the jury in any other case -- from annoyance or influence, he must express the thought that human beings, whether serving as jurors or not, cannot be wrapped in cellophane and deposited in a cooler during trial and deliberation.
>
> The jury in the instant case was jealously guarded throughout the entire proceedings and it is worthy of note -- and indeed decisive in this Court's judgment, that not a suggestion of influence upon the jury is forthcoming from any person or agency. Interference or influence must be the test. If we are to convict jurors without a scintilla of evidence of undue influence on them, it is now pertinent to halt and ask ourselves what becomes of our faith in our decent fellow-citizens and of what value is the jury system at all.
>
> It is claimed that the jurors were permitted to separate on one or two occasions within the period of their deliberations and were so photographed. Foreman Bird and Bailiff Francis testified that the so-called separation of jurors was merely their momentary division in the dining room of the hotel for the purpose of photographing the men in one group and the women in the other. It was in the presence of the two bailiffs, was only a few feet in extent and there was no communication of any kind with the jury by the photographer. To term such a petty detail a 'separation' is stretching the imagination to a dangerous point. It certainly is not the separation prohibited by law and is hardly worthy of serious thought or comment.
>
> The Court had complete confidence in the jury in this case; it was protected at all times from any possible approach, and its every movement and conduct would seem to be an eloquent demonstration of the fact that it proved itself worthy of the confidence placed in it to faithfully carry out the admittedly tremendous responsibilities entrusted to it." (Jr. 85, p. 12-13)

It was asserted by the defense in a supplemental motion for new trial that a female bailiff should have been placed in charge of the female jurors, and is commented upon in their brief (App. Br. p. 344). The Trial Court stated in that connection:

> "Again we are left with nothing beyond a definite distrust of jurors. No law is cited in support of the contention made nor is there one word of suggestion that any men or women jurors were approached or communicated with by anyone; nor that any of them misconducted themselves in any manner." (Jr. 85, p. 14)

B. It is urged in the brief of defense that the presence of blood on the green bag is not indicative of the guilt or innocence of any accused person (App. Br. p. 350). It is not the presence but the absence of blood on the green bag that is significant. The absence of bloodstains on the inside of the bag proves that the wrist watch of Dr. Sam Sheppard was put into the green bag after the blood on the watch had dried; otherwise there would have been a bloodstain on the inside cloth.

As to the tear on his trousers there is no satisfactory explanation by the defendant. The tear could have been caused by Marilyn in her struggle with the defendant before she was finally killed.

As to the absence of blood on the trousers, except for the one spot, and on the trouser belt, that may well be accounted for by the direction of the blood spurts from the victim, the covering of the upper portions of the trousers by the T-shirt, or washing in the cold lake water.

There is reference in the brief of the defense to the tooth chips and it is argued that the blow inflicted on Marilyn was struck by a left-handed assailant.

It is asserted that Marilyn bit her assailant and that accounts for the tooth chips. There is no evidence in the record of any such biting. Even if it were conceded for the purposes of this discussion that she bit something, it could just as readily have been the weapon, clothing, or other material.

Chips of teeth are far more likely to result by being hit with an instrument, for the reason that the chips are at the tip of the teeth and not at the root, and Marilyn may have had her mouth open at the time, or the chipping may have resulted from the force of a blow on her finger which may have been placed across her mouth at the moment. Furthermore, the pull of either the part of a hand or of clothing or other material inserted in the mouth and being bit by the victim would have pulled her head with it and such a pull would less likely cause chips on the tip of the teeth. It is also quite natural for someone to expectorate, cough up or throw out broken tooth chips no matter from where the force used on them came.

This defendant, Dr. Sam Sheppard, was physically strong. He had played football. He was a good swimmer and water skier. He drove cars in races. He played basketball and tennis. He practiced boxing and had a punching bag in the basement of his home. Such athletic activities develop skill in both right and left hands and arms. He was also a practicing surgeon and must have been necessarily adept with either hand. A man of his physical strength and attainments could very readily rain blows on the head and face of Marilyn Sheppard with downward strokes, strokes from the right to the left or left to right, and backhand strokes

as well, tennis style.

There were lacerations on both sides of Marilyn's head and on the top of her head. There were blows on her face and on her hands. This defendant was physically able to rain these savage blows on his victim with either the right hand or the left, or from time to time with both hands. The evidence discloses that the defendant did on occasions actually use his left hand. He stated that when he was in the bedroom he took his wife's pulse at the neck with his left hand, and that is his explanation for the blood on his wrist watch.

THE VERDICT WAS SUSTAINED BY SUFFICIENT EVIDENCE

Counsel for the defendant attempt to maintain that the evidence in this case was not sufficient to exclude every other reasonable hypothesis than that of the guilt of this defendant of the murder of his wife, by suggesting that "there is every indication that this murder was the result of a sex attack and a person bent upon a sex attack could assume that there was no one else in the house and could have entered the unlocked back door." (App. Br. pp. 357-358)

If this victim was murdered by an intruder whose only motive was a sex attack, why would such an intruder take the defendant's watch, ring and key chain which he had on his person that night?

The unreasonableness of this hypothesis of the defense is so great that it taxes human credulity to the point of revolt. Under the evidence in this case, this Court is asked to assume by such a claim of the defense that this woman was killed in her home by a sex maniac who entered

that home in the dead of night, while Koko, the dog, was there and did not bark, with a formidable weapon, knowing in advance that the back door was unlocked, passed up the defendant who was lying on a couch adjacent to the stairway and who could be seen by anyone coming in that door and going up the stairway, entered the bedroom of the victim without having turned on any lights on the stairway or in the bedroom, attempted to attack the woman and proceeded to beat her skull and body with some 35 blows of this weapon before the defendant could come to her aid; and when the defendant did come to her aid without having turned on any lights, the intruder felled this 180-pound athlete with only a blow of the fist, did not use the same formidable weapon on the defendant to erase him as an eye-witness to this deed; left him lying in the bedroom and went downstairs in the dark, started to make some noise and waited around downstairs to be chased by the defendant out the lake door of the house, which the evidence shows had been locked by Mrs. Ahern and closed with a night chain; ran down the stairway to the beach, the only place where the intruder could not get away from the defendant other than going into the water, struggled with the defendant on the beach and again did not attempt to eliminate him as an eye-witness to this deed; removed the T-shirt from the defendant's body, removed his wrist watch, key chain and ring from his person, placed the defendant's watch which had blood on it and water under the crystal, the key chain and ring into the green bag which had been in a desk drawer in the defendant's den, took the bag and its contents outside the house and threw it away; set the home up to make it look as though a burglar had entered the place, removed any

fingerprints, and then departed with the weapon and the T-shirt, having thrown the rest of the loot away. And now before this Court of Appeals, defense counsel urges that his only motive, that is, the motive of the intruder, under all of these circumstances, was a sex attack.

That someone murdered Marilyn Sheppard on July 4, 1954, in that home is clear beyond all doubt and the evidence is clear beyond a reasonable doubt that no human being other than the defendant had the exclusive opportunity to do the deed. There was evidence of a burglary set up in that home but even this idea of a burglar, though urged by the defendant's counsel during the trial, was finally abandoned by counsel in their argument to the jury when they 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 a burglary or not, I don't know. We never claimed that he was." (R. 62)

If there wasn't a burglar in that home that night, and the defense finally conceded that they weren't claiming there was a burlgar in there, who put the watch, ring and key chain in that green bag? The defendant had been wearing these items. Someone set it up to make it look as though a burglar entered that home and committed this murder, and who other than the defendant would simulate a burglary; who, other than the defendant would have reason so to do; who, other than the defendant had the time and the exclusive opportunity to set up this evidence of a burglary?

The defendant's watch had stopped at 4:15. (R. 3581) The Coroner testified that Marilyn was killed between 3:00 and 4:00 a.m.

What was the defendant doing in the hour and a half that elapsed between the time his watch stopped, his wife was killed and 5:50 a. m. when he called Mayor Houk, who was the first one he informed as to what happened to Marilyn? For some time prior to 4:15 a. m. and before 5:50 a. m. this defendant had the place all to himself.

Let us see whether the evidence excludes the hypothesis that a burglar did the killing, because if it does, then the only person left in that home to commit this crime was the defendant. There was no evidence of a forcible entry into this home and if a burglar entered the back door which the defense claim was unlocked, the defendant's own statement that he was lying sleeping on the couch until he heard his wife scream makes it absolutely clear that the burglar could have burglarized the place (all of the evidence of the ransacking was downstairs), gotten what he wanted and gone away without having to go upstairs to kill the defendant's wife to accomplish the burglary. The evidence shows that all that the "burglar" got was a green bag with the defendant's wrist watch, key chain and ring in it, and then the "burglar" threw those items away. There was no evidence in this case that it was necessary to go upstairs to murder this woman to secure the defendant's wrist watch, key chain and ring. He had those on his person.

From the evidence in this case, the jury were justified in concluding as a matter of fact that it was too unreasonable to believe that a burglar would have spared this powerful man lying downstairs in full view of anyone who may have entered that door, and go upstairs and kill the wife in order to ransack the downstairs portion of the home. This

strange burglar, contrary to what is the custom of burglars, chose to kill rather than to get away with the defendant's valuables. And a strange way this "burglar" had of ransacking. He pulled out some drawers in a desk and then neatly stacked those drawers aside the desk. He pulled out the drawers of another desk in the living room but did not disturb the contents of those drawers. There was money in the defendant's wallet and money in various places in the house which this burglar did not take. He searched for this green bag which was in a drawer in the defendant's desk in his study in order to carry out of that house three small items, namely, the defendant's watch, key chain and ring, all of which the burglar could have put in his pocket and made a quick getaway, if he really wanted those items. And this peculiar burglar evidently did not want these items because he threw them away. They were found in the weeds on the hill leading to the beach.

Then again, this burglar did another strange thing -- his unnatural doings as a burglar involved in the story the defendant tells -- here is a burglar up in that bedroom bludgeoning this defenseless woman to death, the defendant appears on the scene and appears so late that the burglar has had an opportunity to get in some 35 blows on this woman's skull and body with a deadly weapon. The burglar then becomes highly considerate of the defendant who surprises him in the commission of this crime, and only "clobbers" the defendant -- not with the same deadly weapon -- the blow to the defendant was a fist blow. The supposition that this burglar could not inflict one single mortal or serious wound on this defendant (the defendant was discharged from the hospital four days after

the murder and attended his wife's funeral the day prior to his discharge) while he was able at the same time to inflict mortal wounds on this defenseless woman, is a most exceedingly unreasonable and fallacious story. The jury were justified in finding from that part of the evidence offered by the defendant in his story as to what happened in the bedroom that any wounds the defendant claimed he had were either self-inflicted or inflicted by Marilyn.

Nor is there any explanation offered by the defendant as to how it could be that this burglar or intruder would beat this woman to death with a formidable weapon to secure the defendant's wrist watch, key chain and ring which were on his person that night. Marilyn's rings were still on her fingers when she was found, so this burglar was not murdering her to secure any of her valuables. Marilyn's wrist watch was found in the defendant's study so this burglar did not take that watch. And, obviously, no burglar would have had to murder her in order to take any valuables such as found in the green bag. The evidence conclusively established that they came from the person of the defendant.

Wasn't it reasonable for the jury to conclude that no intruder entered this home that night, and that since there was evidence of a fake burglary, that the defendant set up this fake burglary to divert suspicion from himself as his wife's murderer? There is no other reasonable hypothesis left under all of this evidence, as to who did this deed except that it was done by the defendant. Every other reasonable hypothesis is excluded by the evidence.

Beyond a reasonable doubt, no one but the defendant, her

husband, had the exclusive opportunity and the time to kill this woman in the manner that she was murdered. There could be no motive for fabricating evidence such as the burglary setup other than the defendant's own guilt of the homicide, and no outsider had the opportunity and the time, nor the motive, to fabricate a burglary in that home.

The evidence in this case is undisputed that on the night of July 3rd after the departure of the Aherns from the Sheppard home, there were three living persons remaining there, Marilyn, Chip, and the defendant. At the time of the arrival of Mr. and Mrs. Houk, the first persons to appear on the scene that morning, two of the persons, Chip and the defendant, were still alive, and Marilyn was dead. Chip was sound asleep. It is significant to note that when the Houks arrived, the defendant was offered and refused a drink of whiskey because he "wanted to keep his senses." For what? So that he would not get confused on the story that he had concocted before the Houks arrived as to how he would explain this murder?

Thereafter, upon being asked what had happened, the defendant told a fantastic and wholly incredible story. The jury heard the defendant's story which he told at the inquest, which he told to the police officers, which he told in his written statement and which he told on the trial, and being judges of the facts and of the credibility of the witnesses, and it being their province to weigh all of the evidence, they evidently concluded that it was too unreasonable for belief and justifiably so. We have heretofore quoted portions of his testimony at the inquest, what he told Coroner Gerber and what he told the police officers and his

story in his written statement (State's Exhibit 48) was in substance as follows:

The defendant said he was lying on the couch in the living room watching television and fell asleep; that he heard his wife cry out or scream, at which time he ran upstairs and charged into their bedroom and saw a form with a light garment (R. 3621). At that time he grappled with something or someone and was struck down. He said, "It seems like I was hit from behind somehow but had grappled this individual from in front or generally in front of me." The next thing he knew he was gathering his senses while coming to a sitting position next to the bed and recognized a slight reflection on a badge that he had on his wallet. He picked up the wallet and "came to the realization" that he had been struck.

He said he looked at his wife and believed that he took her pulse and "felt that she was gone"; that he instinctively "ran" into his youngster's room and determined that he was all right. After that, he thought he heard a noise downstairs and went down the stairs as rapidly as he could, rounded the L of the living room and saw a "form" progressing rapidly. He pursued this form through the front door, over the porch, out the screen door and down the steps to the beach house landing and then on down the steps to the beach. The defendant said he then lunged or jumped and grasped this form in some manner from the back, "either body or leg, it was something solid" (R. 3623) and he "had the feeling of twisting or choking and this terminated my consciousness."

The defendant said that the next thing he knew he came to a very groggy recollection of being at the water's edge on his face, being

wallowed back and forth by the waves; that he didn't know how long it took but he staggered up the stairs toward the house and at some time came to the realization that something was wrong and that his wife had been injured. He went back upstairs and looked at his wife, felt her, checked her pulse on her neck and determined that she was gone.

After determining that his wife "was gone," he said he believes he paced in and out of the room and "may have re-examined her"; that he went downstairs, "searching for a name, a number or what to do." He said, "A number came to me and I called, believing that this number was Mr. Houk's." (R. 3624)

He said that the Houks arrived shortly thereafter and during the period between the time that he called them and their arrival, he paced back and forth somewhere in the house. He went into the den either before or shortly after the Houks arrived. At this point in his story, the defendant volunteered: "I didn't touch the back door on the road side to my recollection." Shortly after the Houks arrived, the defendant said one of them poured half a glass of whiskey and told him to drink it and he refused the drink because he was trying to recover his senses. He said then, "I soon lay down on the floor," and Mr. and Mrs. Houk went upstairs.

So glaring in its absurdity, improbability and unreasonableness was that tale of the defendant in view of the evidence in this case, that the jurors' minds must have recoiled when it was offered to them as the truth of what occurred in that home that night. His story defies common sense, and from the evidence, the jury were justified in concluding as a

matter of fact that it was too unreasonable to be worthy of belief.

The evidence established that when the Aherns left that home, the defendant was lying on the couch with a jacket on, a T-shirt, and his wrist watch and the jury were justified in inferring that the defendant, before going up to that bedroom that night, was fully awake and knew what he was doing. His jacket that he had been wearing while lying on that couch was found neatly folded on the couch. He offered no explanation on the trial as to when he removed that jacket, other than a vague recollection (as all of his recollections were vague and misty) that he may have taken it off while sleeping there. The evidence established that he could not have had this jacket on when he started upstairs and later pursued this phantom out of the house and down to the water, because the defendant claims that he lay in the water for an unknown period of time and, as we say, the jacket was found dry and neatly folded on the couch where he had been sleeping, and had no blood on it.

The jury were justified in concluding that there was no one up in that bedroom murdering this woman but the defendant. Other than the appearance of the victim as she lay on that bed, there was no sign of any struggle having taken place in that room with any intruder.

The victim's rings were still on her finger so no burglar had been in that room murdering her for her valuables. There was no evidence that she had been sexually attacked. Further, the evidence established that no one but the defendant had the opportunity and the time to remove the victim's wrist watch from her wrist, and that this watch was not removed from her wrist until some time after the murder. The

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

No one but the defendant had the time and the exclusive opportunity to remove the object from the pillow on the victim's bed which the evidence clearly established had lain there for some time after the murder because the blood on it had dried and left an outline of some kind of instrument on that pillow. The jury were justified in concluding from this evidence that the defendant was the only one in that house who had the time and opportunity to remove that instrument from that pillow.

The defendant's wrist watch was found with blood on it, in a green bag that had no blood on it. The blood was on the crystal and on the upper band of the watch. The jury were justified in concluding that it was the defendant and no burglar who placed that watch in this bag in an attempt to deceive and divert suspicion from himself. The defendant explained the blood on the watch by claiming that he must have gotten it on the watch at the time he took his wife's pulse at the neck. He offered no explanation as to how the watch could have gotten into the green bag other than that it must have been taken off him when he was unconscious.

According to the defendant's own story, before he could touch his wife in that bedroom, he got clobbered. If, after he came to, he touched her and got the blood on the watch then, no burglar could have

taken the watch from him while he was knocked out the first time. The only other opportunity for a burglar to take the watch off his person was when he was down on the beach, knocked out the second time. If a burglar took the watch off the defendant down at the beach, the burglar would have had to go back to the house, search for the green bag, put the watch in the green bag, take it outside and throw it down the hill. No burglar or phantom had that green bag in his possession while he was being pursued down to the beach by the defendant and threw it away at that time, since the watch could not have been in the green bag at that time because the only opportunity the burglar had to remove it from the defendant's person was down on the beach. And why would a burglar throw the bag among the weeds with these valuables in it, after knocking the defendant unconscious on the beach? He had every opportunity at that time to get away with these items.

Further, as stated, there was no blood on the green bag and the blood on the watch would have had to dry in order not to leave a stain on the bag. The jury could reasonably infer, therefore, that the watch of the defendant was placed in that bag some time after the murder, after the blood had dried on the watch, and no one but the defendant had that opportunity.

And strange it was that the defendant took his wife's pulse with his left hand, which necessarily follows as a fact if he got the blood on the watch by taking her pulse. And strange it was that the blood on the watch was on the upper surface of the watch where it could not reasonably be expected to be if gotten on there as a result of taking the victim's

pulse. There was no "form" around, according to the defendant's own story, after he came up from the beach and felt his wife's pulse.

When the defendant was pursuing this phantom down to the water, he told Officer Schottke that when he got to the landing at the boat house he does not know "if he jumped over the railing or if he ran down the steps." Could not his actual injury have resulted from a jump and fall?

And why was the defendant going down to that water with his wife lying brutally murdered, instead of summoning help? The deed was done by that time, he knew that "she was gone" or at least needed help, and he knew he was only chasing a phantom, because according to his own story, he was pursuing only a "form." He went down to that water for some other purpose than to catch this form. There was evidence on his trousers of a bloodstain. His T-shirt that he had been wearing while he was lying on that couch has never been found and the jury were justified in inferring that that T-shirt was splashed with blood and that the defendant had a reason therefore for disposing of it. He offered no explanation as to what may have happened to his T-shirt. He claimed that he had not at any time that night washed his hands, but if he took his wife's pulse and as a result got blood on his watch, some blood would have gotten on his hand also. And if he got the blood on the watch after he came up from the water, no burglar, not even a "form" was around at that time.

There were bloodstains around the house. There was evidence of an attempt to remove fingerprints in that home. Who but the defendant had the opportunity after the murder to accomplish the removal

of fingerprints ?

The evidence shows that the defendant made no effort to summon help while he was up in that bedroom, which he could readily have done because there was a telephone on the night stand in that room. He made no effort to do anything to help his wife at that time. During the entire period of time when the defendant claims he heard his wife scream, to and including the time he returned to the house from the beach and again went upstairs to examine his wife, he turned on no lights in the house, according to his own testimony. Why ? The evidence shows that there was a light switch at the bottom of the stairway as well as at the top of the stairway. If, as he says, he heard Marilyn scream, why did he not immediately turn on the lights by flipping the switch at the bottom of the stairway ? He went into that bedroom again to examine his wife after he returned from the lake, but turned on no light in that room at that time, according to his testimony. Why ? And the defendant, according to his own story, although twice ascertaining that his wife "was gone," told the Houks and his brother, Dr. Richard, that something ought to be done for Marilyn. Why ? He knew that she was dead when these persons arrived.

And who would have waited around that home until after the blood had dried and then removed that instrument from the pillow on the victim's bed, and the watch from her wrist, on which the blood had also dried and left an imprint of the bracelet ? Who could possibly have done that except the defendant ?

With all of this evidence before them, the jury were fully

justified in concluding that this defendant wasn't chasing any phantom down to the water but was being pursued by his own conscience, and ran down to the water for purposes other than to catch his wife's murderer -- to wash the blood off his body and his clothing. And the jury were justified in concluding that this defendant then came back into the house, realized the seriousness of what was confronting him and that is when this fake burglary was set up to deceive anybody who might investigate. The jury could reasonably conclude also that that is when whatever instrument he had used to bludgeon his wife was taken from that house, and the T-shirt that he had been wearing was taken and disposed of.

The defense states that "with two minor exceptions there is no circumstantial evidence of any value whatsoever: (1) the water under appellant's wrist watch crystal; (2) the loss of the shirt." (App. Br. p. 348)

What about the blood on defendant's wrist watch?

What about the blood on Marilyn's wrist watch, the place where it was found (the den), and the fact that it was removed from her wrist after the blood had dried?

How about the impression of an instrument on the pillow and the removal of the instrument after the blood had dried?

What of the fact that there was no bloodstain on the green cloth bag in which the defendant's blood-stained wrist watch was found, indicating that the watch was put in the bag after the blood had dried?

What about the blood on the stairways and in the basement?

And how about his neatly folded corduroy jacket found on

the couch, dry and without bloodstains ?

And why was the defendant whisked away by his brother Stephen without consulting the police or the Mayor, and without using the stretcher and the ambulance available, in the light of the claimed serious injuries ?

And if Marilyn screamed as the defendant claims she did, why was not Chip awakened; and if there was some intruder in the house, why did not the dog Koko bark ?

Consider also the spontaneous utterance of Dr. Richard Sheppard to his brother, the defendant, when he stated, "Did you do this ?" or "Did you have anything to do with it ?"

Consider also the exaggeration of the injuries to the defendant: the claim of a broken neck, the final X-rays showing no fracture whatever, and the activities of the appellant in the pursuit of his practice as a doctor within a few days thereafter.

Consider also the fake burglary:

> The billfold of the defendant not taken.
> Marilyn's rings not taken.
> Marilyn's wrist watch not taken, but found in the den of the defendant, in the very same room in whichthe green bag was kept.
> Compartments in defendant's upturned medical kit undisturbed.
> The drawers of drop-leaf desk in living room pulled out but contents undisturbed.
> The drawers in a desk in the defendant's den neatly stacked beside the desk.
> The absence of fingerprints due to wiping by rough cloth.
> Relatively inconsequential items placed in green bag and bag then thrown away.
> No evidence of a forcible entry.

Consider also the fact that the defendant's watch, when found, was stopped at 4:15 and, according to the Coroner, the time of death was between 3:00 and 4:00 a. m.

And why did the defendant fail to call for help immediately, with a telephone available in that bedroom? Why did he wait until 5:50 a. m. and then call his friend Mayor Houk?

What about his incredible and fantastic story of encounters with "forms"?

Why should this "form" use a deadly weapon to kill defenseless Marilyn and not use the same instrument on the defendant, who could be a witness if there was in fact such a form present?

What of the fact that Mrs. Doris Bender drove past the Sheppard home between 2:15 and 2:30 a. m. and saw the lights on, both up and down stairs?

Consider also that the instrument used to murder Marilyn, as well as the defendant's T-shirt have disappeared and neither have ever been found.

And what of the fact that Ellnora Helms, the maid, found nothing missing in the bedroom, and defense concede in their brief (p. 357) that the weapon was brought into the bedroom?

Nor can the physical attainments of the defendant be ignored -- his various athletic pursuits and his skill as a surgeon. He was physically able to strike the blows that killed Marilyn in the manner described in the evidence, and he could do it with either or both hands.

Consider the fact that the defendant's thumb print was

found on the north side or front side of the backboard of Marilyn's bed, and the complete absence of any other thumb or fingerprints in that bedroom.

Consider also the absence of any footprints or other evidences of a struggle on the beach when Officer Drenkhan went down at 6:30 a. m. and took a look at the beach.

And what about the defendant's affairs with Susan Hayes and other women, affairs that became known to Marilyn Sheppard, the consequent marital troubles -- fertile soil for precisely what happened in this case.

Consider also the behavior and conduct of the defendant since the murder of Marilyn Sheppard, and the protective shield thrown about him.

These evidentiary facts and the many others received in evidence are not to be considered as isolated fragments and separate and apart from each other. Considered together, and in their entirety, they present a mass of evidence which proves the defendant guilty beyond a reasonable doubt of the crime charged.

Under the principles of the law of circumstantial evidence, a case in point and which closely parallels the instant case is Hinshaw v. State, 47 N. E. 157 (Supreme Court of Indiana) (1897), wherein a husband was convicted of second-degree murder of his wife.

Counsel for the defendant in the instant case argue negative evidence and select certain pieces of evidence to show that the defendant was not guilty. In the Hinshaw case, the Court stated (at page 172):

> "* * * Must the jury be directed to take the evidence of the State, piece by piece, and reject every part in which a flaw may be found? It is good military strategy to divide and conquer. It is not a sound or just rule which requires the prosecution in a state case to make a voluntary division of its forces, so that they may be beaten in detail. And so we say it is not the law that the jury in a criminal case must take the evidentiary facts piece by piece, and consider each item separate and apart from the other items or the whole evidence."
>
> * * *
>
> "Evidence is not to be considered in fragmentary parts, and as though each fact or circumstance stood apart from the others, but the entire evidence is to be considered, and the weight of the testimony to be determined from the whole body of the evidence. * * *"

On the subject of the legal force of exclusive opportunity, the defendant in the instant case had to commit this crime as a circumstance tending to prove his guilt, the Court in the Hinshaw case says at page 164:

> "Where the relation between the parties is of a still more intimate character, as between members of the same family, and particularly between husband and wife, opportunities for the commission of crimes of the highest grade become indefinitely multiplied. They are, in fact, of hourly occurrence. There exist in the relation last mentioned all the elements to constitute the most perfect opportunity that can be desired, unlimited access to the person, and complete seclusion during the hours when that person is in its most defenseless state." * * *

In the trial of any criminal cause lasting some nine weeks, either party is bound to claim some error of one sort or another in the conduct of the cause. Revised Code Section 2945.83 (13449-5) 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."

CONCLUSION

For the reasons heretofore set forth, there is no prejudicial error in this cause justifying the granting of a new trial.

Respectfully submitted,

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ACKNOWLEDGMENT

I acknowledge receipt of three copies of the within brief of the Plaintiff-Appellee, this _____ day of _____, 1955.

_____
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