



3-23-2000

## Memorandum Opinion Regarding Admission of Testimony of Robert Bailey, Testimony of Susan Hayes Benitez and Testimony Regarding Extramarital Activities of Samuel Sheppard

Judge Ronald Suster  
*Cuyahoga County Court of Common Pleas*

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3-23-00

STATE OF OHIO )  
 ) SS.  
CUYAHOGA COUNTY )

IN THE COURT COMMON PLEAS  
  
CASE NO. 312322

ALAN DAVIS, et al., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
STATE OF OHIO, )  
 )  
Defendant. )

**MEMORANDUM OPINION  
REGARDING ADMISSION OF  
TESTIMONY OF ROBERT BAILEY,  
TESTIMONY OF SUSAN HAYES  
BENITEZ AND TESTIMONY  
REGARDING EXTRAMARTAL  
ACTIVITY OF SAMUEL SHEPPARD**

Defendant State of Ohio has indicated that it wishes to introduce the testimony of Robert Bailey. Plaintiff objects that the testimony is irrelevant, unfairly prejudicial and improper character evidence.

**Background**

The issue of whether to admit evidence of (1) Samuel Sheppard's extramarital activity, and (2) discussion between Samuel and Marilyn Sheppard regarding divorce or stress in the Sheppard marriage, has been the focus of numerous arguments, both written and oral, between the parties. The Court has admitted some evidence and excluded other evidence in this regard already.

Evidence of this type has probative value. As the Court discussed in its March 5, 2000, Memorandum Opinion, ongoing affairs could have present a motive for Samuel Sheppard to murder Marilyn Sheppard (the Court will refer to this as the "motive theory."). That Memorandum Opinion did not discuss another aspect to this issue -- whether ongoing affairs could also an also present a reason for Samuel Sheppard *and Marilyn Sheppard* to have fought. The Court allowed both parties

the opportunity to brief and, on March 17, 2000, argue this issue.

Defendant's argument in this regard is that a reasonable juror could have concluded that Marilyn Sheppard, enraged by her perceptions of Samuel Sheppard's past conduct, may have actually started a confrontation with Samuel Sheppard that resulted in her death on July 4<sup>th</sup>. In essence, Defendant's argument is that a reasonable juror could conclude that this confrontation between husband and wife resulted death by either manslaughter or by a non-premeditated murder. On this basis, Defendant urges this Court to allow evidence of any past extramarital conduct because it constitutes a continuous escalation of events which culminated in a confrontation on July 4, 1954. The Court will refer to that argument herein as the "marital discord" theory.

Noting that this "manslaughter theory" was a dramatic change in position by the State, Plaintiff nonetheless urges the Court to reject the argument on the basis that it continues to put before the jury irrelevant and prejudicial information, in violation of Evid. R. 401-403, as well as improper character evidence in violation of Evid. R. 404. Plaintiff also urges that, to the extent this theory is being used to provide for the admissibility of the Susan Hayes affair or the testimony of Robert Bailey, it constitutes a reversal of this Court's March 5<sup>th</sup> Memorandum Opinion (which, in this regard and without waiver of other objections thereto, Plaintiff maintains was correctly concluded).

#### **The State's "Marital Discord" Theory**

The State's theory has merit, if there is evidence to support it. A spouse aware of her husband's extramarital activity might be inclined to complain about it, thus causing an argument or even a physical confrontation. The key to Defendant's argument is that Marilyn Sheppard must have perceived any evidence of Samuel Sheppard's flirtatious or amorous activity. Obviously, she could

only react to the extent that she knew something amiss was going on.

For similar reasons, the Court has admitted evidence that Samuel and Marilyn Sheppard were outwardly loving and affectionate during the period before July 4, 1954. This would be evidence of lack of marital discord which would be probative of Plaintiff's position in this regard.

At the same time, there is an obvious potential for unfair prejudice - the jury should not be left to think that because Samuel Sheppard engaged in extramarital activity (if he did), that he could not have been wrongfully convicted or that he is less deserving of the protections of the law. It may well be easy for a juror to hold against Plaintiff the fact that Samuel Sheppard, the Plaintiff's predecessor in interest, was an adulterer (if, in fact, he was). The "wrongful" nature of imprisonment could easily be confused or de-emphasized by a jury who finds his conduct "wrongful." Accordingly, this Court, pursuant to R. Evid. 403, must balance the probative value against the potential for unfair prejudice.

For this reason, in assessing evidence thus far, the Court has applied some temporal restraints. At some point in time, the remoteness of Samuel Sheppard's actions, even actions perceived by Marilyn Sheppard, cause their their probative value to be substantially outweighed by the potential for unfair prejudice. However, a larger time window is involved in the admission of "marital discord" evidence than with "motive" evidence. A marital affair which is offered to prove "motive" must pertain to an ongoing affair or an affair which still has the possibility of being resumed, *see* Memorandum Opinion of March 5, 2000. Extramarital activity offered to prove "marital discord" deals with more than the present because, in this regard, evidence going further back in time would affect the strength of the marriage and could be a cause for marital disharmony.

## Considerations of Improper Character Evidence, Rule 404

The Court does not interpret either the “motive theory” or the “marital discord” theory to be precluded by Evid. R. 404's prohibition on character evidence. The character of Samuel Sheppard, in and of itself, is not being called into question under either theory. Rather, both theories involve the consideration of prior acts as a motive for either Samuel Sheppard (in the case of the motive theory) or Marilyn Sheppard (under the marital discord theory) to act. Thus, this evidence is admissible under Evid. R. 404(B), which acknowledges the impropriety of character evidence but provides for evidence of other acts for a non-character purpose.<sup>1</sup>

### The Susan Hayes Affair

With the above discussion as a backdrop, the Court now examines the evidence proffered thus far.

In general, evidence of an extramarital affair between Samuel Sheppard and Susan Hayes which began in approximately 1952 and continued until 1954 is relevant for two reasons. First, because a reasonable juror *could, see* Evid. R. 104, find that this affair was ongoing on July 4, 1954, it provides a potential motive. The Hayes affair continued with some interruptions while Hayes lived in Ohio. After she moved to California in late 1953, they saw each other when Samuel Sheppard was visiting California with Marilyn in March, 1954. Samuel Sheppard and Susan Hayes last had physical relations in March, 1954; however, they continued to correspond into May, 1954. In light of the fact that Ms. Hayes lived in California (thus making more frequent contact impracticable) but that the two had resumed contact in March, 1954 and continued to correspond,

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<sup>1</sup> The Court rejects the State's theory that evidence adduced thus far has “opened the door” to the admission of character evidence.

a reasonable juror could conclude that Samuel Sheppard was still in the throes of an ongoing affair - which, as stated in the March 5, 2000 Memorandum Opinion, would cause this to be admissible proof of a motive for Samuel Sheppard to kill Marilyn Sheppard.

Moreover, the evidence is also relevant under the marital discord theory because a reasonable juror could find that Marilyn Sheppard was upset about the Hayes affair, as evidenced thus far by Marilyn Sheppard's comments to Mildred Adler when Samuel Sheppard and Susan Hayes danced in her presence. Here, the marital discord, if any, caused by the Hayes affair, would have been relatively recent to the time of the Marilyn Sheppard homicide.

At the same time, the Court did not permit the entire Susan Hayes trial deposition transcript to be admitted. Questions concerning whether Samuel H. Sheppard was having other affairs at the same time as his affair with Susan Hayes were not permitted. In this regard, there is no evidence that other affairs (assuming there were any) were ongoing (which is necessary for the motive theory) or that they were known to Marilyn Sheppard (which is necessary for the marital discord theory).

#### **Testimony Regarding Samuel and Marilyn Sheppard's Divorce Discussions**

Similarly, the Court allowed testimony about 1953 discussions which occurred in 1952-53 between Samuel Sheppard and Dr. Hoversten which indicated that Samuel Sheppard considered divorcing Marilyn Sheppard and that he was of a state of mind that his father would not have approved of a divorce. This evidence, which coincided in time with the ongoing Susan Hayes affair, was relevant as proof of motive.

This evidence was also relevant under the marital discord theory. The evidence was of a nature that a reasonable juror could conclude that Marilyn Sheppard learned from Samuel Sheppard that he was unhappy in their relationship -- once communicated to her, this information could have

a lasting deleterious effect on the marriage.

At the same time, the Court has excluded evidence of similar discussions probative of marital discord which took place in 1950. These discussions were too remote in time, and thus their prejudicial effect substantially outweighs their probative value.

### **The Robert Bailey Proffered Testimony**

Finally, the State has proffered the testimony of Robert Bailey, whom they intend to call as a witness. In the Spring of 1954, Robert Bailey, husband of a Bay Village Hospital employee and a friend of the Sheppards, read a letter from Susan Hayes to Samuel Sheppard which had been sent to the hospital and opened by his wife. He also witnessed Marilyn Sheppard come to the hospital and ask Mrs. Bailey for the letter. Marilyn Sheppard was visibly upset and stated that she intended to divorce Samuel Sheppard and drag his name "through the mud."

The Court will allow the State to call Mr. Bailey. If he testifies as proffered, his testimony is evidence of recent marital discord. When the Court addressed this evidence in its March 5, 2000 Memorandum Opinion (which, incidentally was before the proffer), the Court only addressed this evidence as it related to proof of motive. In this regard, the Court noted that this evidence as proof of motive, depended upon Samuel Sheppard having learned of Marilyn Sheppard's comments (which could have then enraged him into killing Marilyn Sheppard). But as proof of marital discord, the Bailey testimony is direct evidence of Marilyn's outrage which could have caused her, in whole or part, to argue with Samuel Sheppard on July 4, 1954.

Whether these prior acts of marital discord would have caused an eruption on July 3-4, 1954 is a matter of the weight of the evidence, not its admissibility. The point is that a reasonable juror *could* so find – and thus the Court will admit the evidence.

**Conclusion**

The Court is mindful that evidence of this sensitive nature has both a tendency to be relevant and a tendency to be unfairly prejudicial. It is impossible to draw a bright line as to when to admit and exclude this evidence. To simply allow the State to admit evidence of any extramarital activity under its theory that marital discord was growing, would go too far and be unfairly prejudicial. To exclude all evidence in this regard would be to unfairly leave the jury with the impression that the Sheppard marriage was unquestionably blissful. In the end, the Court believes its middle approach balances these various concerns.

3-23-2000  
Date

  
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Ronald Suster, Judge