

VOIR DIRE EXAMINATION OF LOUIS H. FREIREICH (continued)

By Mr. Spellacy:

Q Mr. Freireich, have you ever been a witness in any kind of a case?

A I was a witness in an accident case one time.

Q How long ago would that have been, roughly, if you can estimate?

A About twelve or thirteen years ago.

Q Now, is there anything about that experience as a witness in an accident case, that would prevent you from being fair and impartial in this case?

A Not that I know of.

Q Let me ask you this: were you one of the parties in a lawsuit?

A No, I was not.

Q You were a witness for one of the parties, is that correct?

A That is correct.

Q Do you have any close friends or relatives who are police officers or associated with any police department?

A Close friends?

Q Yes.

A Not close.

Q You have acquaintances, then, who are police officers?

A Well, the Police Chief lives around the corner from me and I talk to him, I say Hello when I see him.

Q And who would that be?

A That is Gus Yanke of Berea.

Q The Berea Police Chief, is that right?

A Yes.

Q Do you discuss police business with Chief Yanke?

A Not at any time that I ever recall, and I hope I never have to.

Q Now, Judge Talty will tell you that in weighing the testimony of police officers, that you are not to give them any greater weight or any lesser weight solely because they are police officers, that you are to weigh the testimony just like you would any other witness, taking all things into consideration, would you do that?

A I would.

Q And merely because he is a police officer, if police officers testify here, you don't have to give them any greater weight or any lesser weight solely because they are police officers, will you follow that instruction?

A I would.

Q Do you have any friends or relatives who are associated with the County Coroner's Office?

A No.

Q It is anticipated that representatives of that office

will also testify here, and if Judge Talty were to give you the same instructions that just because they are public officials, that you should not give them any greater weight or any lesser weight solely because they are public officials, would you follow that instruction of law?

A I would.

Q Now, do you realize in our system of justice, the defendant is presumed to be innocent until proven guilty, you understand that?

A Yes, I do.

Q And that the burden is upon the State of Ohio to prove him guilty beyond a reasonable doubt, you understand that, too?

A Yes.

Q Judge Talty, at the proper time, will instruct you as to the definition of reasonable doubt, will you follow the instruction that Judge Talty gives to you at that time as to the definition of reasonable doubt?

A I will.

Q I also anticipate that Judge Talty will tell you that there are various types of evidence, what we refer to as direct evidence, that is, evidence from a witness as to what he saw, what he heard, and then there is also what we refer to as circumstantial evidence, that is, evidence from which you as a juror, may infer a fact from facts that

are proven to you by witnesses, and that is what we mean by circumstantial evidence.

Now, an example of that would be that assuming when we came in the building this morning, that the sun was out, the temperature was in the 70's, the streets were dry, the grass was dry, the buildings were dry, the trees were dry, and we didn't have occasion to look out the building until we went out on our noon recess, and when we went out, we saw that the streets were wet, there were puddles in the sidewalk, the buildings were wet, the grass was wet, the trees were wet, we could reasonably infer from that set of facts that sometime between the hours of nine o'clock and twelve o'clock when we went out for our noon recess, that it had rained.

This is what we mean by circumstantial evidence. Do you follow that?

A I follow you, but I -- I wouldn't go along with that.

Q All right. You wouldn't --

A Unless I had proof, it actually rained. They may have watered the streets.

Q Well, sir, I was just going to clarify that.

If you saw that just the streets were wet, you come to two inferences, that it had rained, or that they had watered the streets.

But if you saw puddles on the sidewalk, and the

buildings were wet, and the grass was wet, and the trees were wet, you could reasonably infer from that set of facts that it had rained, isn't that right?

A I suppose you could.

Q Now, if his Honor Judge Talty were to tell you that circumstantial evidence, properly proven, is just as good as direct evidence, would you follow that instruction?

Do you understand the question, Mr. Freireich?

A Will you repeat that once more?

Q If Judge Talty were to tell you that circumstantial evidence, properly proven, is just as good and just as binding as direct evidence, would you follow that instruction of law?

A No, I would not. Sorry.

Q Then you would not be able to take the law that his Honor Judge Talty gives to you, is that right?

A I didn't think I would be asked that.

Q Pardon me, sir?

A I didn't think I would be asked that.

Q My question is, sir, would be able to take that principle of law that Judge Talty gives to you?

A I don't believe I could.

Q You would then not be able to apply this --

A May I explain myself?

Q No. You would then, if selected as a juror, be unable

to follow the law that the Court gives to you and apply that law to the facts in this particular case, is that right?

MR. BAILEY: I am going to object to that as put.

THE COURT: Overruled. Do you understand the question, Mr. Freireich?

A I would take the -- I would follow the orders that you would issue.

THE COURT: Will you please put the question?

Q Would it be fair then to say, Mr. Freireich, in other words, that you don't believe in circumstantial evidence?

A I do not believe in circumstantial evidence.

Q All right, sir, you have answered my question. Then you would not on that principle be able to follow what Judge Talty tells you, is that right?

MR. BAILEY: I object.

THE COURT: Sustained. May I see Counselors, please?

(Thereupon Court and Counsel conferred at the Court's bench, out of the hearing of the jury panel, as follows:)

THE COURT: Gentlemen, I believe the proper question at this point, is whether or not he would be able to follow the law that the

Court gives him with respect to circumstantial evidence, if the Court charges him on the law of circumstantial evidence, would he be able to follow the law that the Court would give him.

MR. SPELLACY: I already asked him that question and he said he couldn't.

MR. SHERMAN: I think he is confused in the example.

MR. BAILEY: I object, your Honor, because I don't think the old chestnut about the rainstorm adequately advises the prospective juror as to what circumstantial evidence is, and there is an awful lot of confusion among laymen as to what it is.

I think if proper questions are put describing a true set of strong circumstantial facts, that the witness would respond, yes, being a scientist.

But I don't think he has got a clear picture of what he is going to be asked to do.

THE COURT: Well, you gentlemen understand my present state of mind, with respect to what the next question should be, do you?

MR. SPELLACY: Yes, your Honor.

(Thereupon proceedings were resumed within the hearing of the jury panel, as follows:)

By Mr. Spellacy:

Q Mr. Freireich, if Judge Talty as a matter of law, were to instruct you that circumstantial evidence properly proven is just as good as direct evidence, could you follow that instruction?

MR. BAILEY: I object.

THE COURT: Overruled.

A How would that be that you could properly --

Q Sir, my question is simply would you follow the instructions -- I will rephrase it.

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If Judge Talty were to tell you that circumstantial evidence, properly proven, is just as good as direct evidence, would you follow that instruction of law?

A No, I would not.

MR. SPELLACY: Challenge for cause, your Honor.

MR. BAILEY: I would like an opportunity to examine, your Honor. I don't think circumstantial evidence has been defined properly to this witness or this prospective juror. I would like an opportunity to do that.

THE COURT: You may inquire, Counselor.

VOIR DIRE EXAMINATION OF LOUIS H. FREIREICH

By Mr. Bailey:

Q Mr. Freireich, if either side relies on circumstantial evidence to prove a fact such as the guilt or innocence of Doctor Sheppard, the instruction that Judge Talty will give you is that unless the circumstances showed in your experience and judgment that Doctor Sheppard, and only Doctor Sheppard, committed the crime, and that all other possible perpetrators are excluded by this evidence, unless the proof is that strong circumstantially, that you must acquit, and you must only accept that proof which pinpoints Doctor Sheppard and excludes everyone else, and any lower stage in that you can and will be directed in fact to find him not guilty.

Now, if the circumstantial evidence is put to you for consideration with that very strict rule, could you follow the Court's instructions in that regard?

MR. CORRIGAN: Objection.

MR. SPELLACY: Objection.

THE COURT: Objection sustained.

The prospective members of the panel are instructed to disregard the question in that form.

Counselor will please put the question again in the proper form, if you intend to restate it, Counselor.

Q Has anyone ever explained to you -- and the answer is just yes or no -- has anyone ever explained to you or tried to explain to you what circumstantial evidence is?

A Yes, they have.

Q As an attorney or as a member of a profession?

A No, just amongst the fellow members in the office.

Q All right. So these are all non-lawyers who have given you this information?

A Yes.

Q As a result of these conversations, you have some idea in your mind as to what circumstantial evidence is, as we use in this court, is that right?

A Yes.

Q Now, Mr. Freireich, if you were to walk into a room that was locked from the outside, and you saw one man with a smoking pistol in his hand, and another man lying dead on the floor, and you were satisfied from the physical and the scientific evidence that the gun that shot that man was held at least twelve feet away, far beyond the reach of an arm, could you conscientiously find as a fact that the person holding the gun rather than the decedent and no one else had fired that shot, without any direct evidence by a witness that they saw this shot fired?

MR. CORRIGAN: Objection.

THE COURT: Objection sustained.

Q If the Court instructed you that as a citizen and a juror, assuming you were seated on the panel, that you had a duty by law to consider and act upon any kind of evidence that might be admitted by the judge for your consideration, would you refuse to do that duty?

A What do you mean by that again, sir?

Q If the Court were to instruct you, assuming that you became a member of this panel, that you have a duty in the law to consider and act upon as you may see fit any evidence of whatever type that trial judge allows you to hear as a juror, would you refuse to obey that instruction?

A I might be stupid, but I just don't quite get some of the reasoning.

Q You do not understand the question, Mr. Freireich?

A No.

Q You understand that if you become a juror, that you will be asked to judge the facts in the case?

A I understand.

Q You will be asked to decide which witnesses to believe, and what inferences to draw from the facts which are proven to your satisfaction?

A Right.

Q The trial judge, on the other hand, is the person who gives you the rules to be applied, and exercises his judgment on the law as he gives it to you, and he is your

only source of what the rules are to be applied, not your own ideas as to the law, but only what Judge Talty says.

Now, if Judge Talty says that you have a duty to consider all of the evidence, direct or circumstantial or any kind of evidence that you may be permitted to hear as a juror, and to make your judgment upon that evidence, would you refuse to follow his instruction?

A No, I would not.

Q Now, you have told us that you have a pre-conceived notion of what circumstantial evidence is, and that you have gotten it from conversations with friends or business associates.

But if Judge Talty tells you that the law says circumstantial evidence is something very different than you thought it was, but nonetheless that is what the law says, as he describes it, could you accept his instruction and put aside whatever notions you may have had in the past as to just what this circumstantial evidence is all about?

A I have my own opinion of circumstantial evidence and no one can change it.

Q No one can change it?

A No.

Q Do you represent that you could never convict a man on circumstantial evidence?

MR. SPELLACY:

Objection.

THE COURT: Objection sustained.

Q Would your opinion about circumstantial evidence or your concept of it prevent you from finding a man guilty if only circumstantial were offered to prove that guilt, despite the instructions of the Court to the contrary?

MR. SPELLACY: Objection.

A It would.

THE COURT: What was your answer?

A It would.

THE COURT: The answer may stand.

MR. SPELLACY: The same challenge, your Honor.

THE COURT: The question is permitted. The answer may stand.

May I see Counselors, please?

(Thereupon Court and Counsel conferred at the Court's bench out of the hearing of the jury panel, as follows:)

THE COURT: Do you wish to inquire further, Counselor Bailey?

MR. BAILEY: I am not satisfied he understands what we are talking about, but I can't think of any other way to put it to him.

I will not oppose the challenge for cause.

THE COURT: You will not oppose the challenge for cause?

MR. BAILEY: No, sir.

(Thereupon proceedings were resumed within the hearing of the jury panel, as follows:)

THE COURT: Let the record show that the State's challenge for cause, not being opposed by Counselor Bailey, is hereby granted.

MR. BAILEY: Excuse me, your Honor. May the record show that we join in that challenge?

THE COURT: The record may show that you join in the challenge.

Mr. Freireich, the Court wishes to thank you and express the gratitude of each of us participating in this trial, with respect to your willingness to serve here as a juror, sir, if you were selected as a juror.

The Court is going to excuse you now, and wishes to commend you for your frankness and your forthrightness, and the manner in which you have responded to Counselor's questions.

Before excusing you, however, Mr. Freireich, the Court is duty-bound and hereby instructs you

that you shall not discuss any opinion, sir, which you may have about the merits of this case, or permit anyone else, even members of your family, sir, to discuss their opinions that they may have about this case, about the merits of it, until such time, Mr. Freireich, as you know for a certainty that a jury has returned its verdict in this case in this courtroom.

Do you understand my instructions, sir?

MR. FREIREICH: I do.

THE COURT: And will you follow them, Mr. Freireich?

MR. FREIREICH: Yes, I will.

THE COURT: Thank you, sir, and you are hereby excused.

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