

Tuesday Afternoon Session, 1:00 p.m., November 15, 1966

(THEREUPON, the following proceedings were had in Court's chambers:)

THE COURT: Let the record show that we are in chambers with counselors, and that the Court has discussed with counselor Bailey his objections to that portion of the argument made by Counselor Spellacy earlier this morning relating to certain unrefuted testimony and evidence adduced by the State during the trial of this case.

The Court overruled Mr. Bailey's objections, and his motion for mistrial, and these rulings are at this time reaffirmed; the Court believing that the record of this case will show that refutations of this claimed testimony could have come from persons other than the defendant himself, had the defense chose to adduce such witnesses, or to examine witnesses adduced by the defense in the areas in which Counselor Spellacy argued.

However, the Court in a desire to be fair and also having in mind several United States Court of Appeals decisions, which has spoken in ~~this area, is now advising Counselor Bailey and~~

Sherman that in its charge the Court will instruct the jury as follows:

That the defendant has seen fit to exercise his constitutional right and not testify from the stand in his own behalf. In making this decision he was within his legal rights. The fact that the defendant did not testify must not be considered by you for any purpose in arriving at your verdict. You are not permitted to draw any inference from his failure to testify.

The Court also is advising counsel that it intends to further instruct the jury in language perhaps not precisely as now given, but in substance, which will be as follows:

The State in closing arguments referred to certain unrefuted testimony presented by the State. I charge you as a matter of law that any intimation or suggestion in such argument attempting to place the burden on the defendant himself to deny such testimony, must be wiped from your mind and memory and disregarded by you in your deliberations.

Anything further, gentlemen?

MR. BAILEY: May the record also disclose that we have had reproduced for the

benefit of the Court two pages extracted from the testimony on direct examination of Fred Drenkhan, police officer, wherein Mr. Drenkhan was asked:

"Did you have further conversation with him?"

Answer: "We asked him if he had any extra-marital affairs. The only one he mentioned at that time was Susan Hayes. He said this was the only person he knew."

"Mr. Bailey: May we approach the bench?"

"The Court: Yes."

The objection to the line of questioning was lodged, and it was sustained.

We feel this record is barren of any evidence that justified the comments on defendant's infidelity or extra-marital affairs as the case may be, and it was prejudicial error, again, because as we stated in our motion for directed verdict, although some of these people may have forgotten about Susan Hayes, it takes very little to resurrect her as an image of infidelity attributable to the defendant, and we think the area being as sensitive as it is, this is what resulted from the mention however quick and oblique as made by Mr. Spellacy in his opening argument.

THE COURT: Again, the Court in overruling the defendant's objection to this line of argument had in mind not only the testimony just referred to by Counselor Bailey, which he has reproduced, but also State's Exhibit 27, which has been received as an exhibit in this case, wherein reference is made to the Susan Hayes affair.

Anything further, gentlemen?

MR. BAILEY: Well, for the record, I suppose, your Honor, to indicate the purpose of bringing this up I should renew my motion for mistrial, on the infidelity comment.

THE COURT: Let the record show the motion is overruled.

(Thereupon proceedings were resumed in the courtroom, in the presence and hearing of the jury, as follows:)

THE COURT: Good afternoon, ladies and gentlemen.

THE JURY: Good afternoon.

THE COURT: Ladies and gentlemen, you will bear in mind that at the outset of the closing arguments and summations this morning, the Court instructed you that these final arguments or summations are not evidence, and will not be so considered by you.

That is true of what you have heard  
by way of argument, and what you will now hear  
by way of further argument.

For purposes of the final argument for  
and on behalf of the defense, the Court will call  
Counselor Bailey.

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