

THE COURT: Counselor Bailey?

MR. BAILEY: Your Honor, rather than call another witness, I should at this time like to read in the testimony of Doctor Foster, as arranged for yesterday.

THE COURT: As agreed upon between counselors yesterday in Chamber?

MR. BAILEY: Yes.

THE COURT: Ladies and gentlemen of the jury, yesterday counselors reached an agreement in Chamber with respect to reading into the record the testimony of Doctor Foster given in the 1954 trial, subject to their rights at this time to object where they feel necessary to the testimony as admitted in 1954.

Counselor Bailey will now proceed to read that part of -- he will proceed to read Doctor Foster's testimony.

Please proceed, counselor.

MR. BAILEY: Yes, your Honor. If it please the Court, and ladies and gentlemen, I am going to read Question and Answer in each case.

THE COURT: Keep your voice up, counselor.

MR. BAILEY: I will, your Honor.

MR. SPELLACY: May the record reflect, Judge, that it will be both direct and cross examination?

MR. BAILEY: I will read the entire testimony. For the record, your Honor, I am reading from Page 5833 of the transcript of the 1954 trial, Wednesday Morning Session, December 8, 1954, 9:15 o'clock a.m.

(Reading:)

"THEREUPON, the defendant, further to maintain the issues on his part to be maintained, called as a witness CLIFFORD C. FOSTER, who, being first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION OF CLIFFORD C. FOSTER

"By Mr. Garmone:

Q Will you state your name, please?

A Doctor Clifford C. Foster.

Q Where do you live?

A 1260 Andrews Avenue, Lakewood, Ohio.

Q Are you married?

A No, sir.

Q How long have you lived in and around the County of Cuyahoga?

"A With the exception of being away to school, all my life.

Q How old are you, Doctor?

A 47.

Q Did you attend school in the City of Cleveland?

A Yes, sir.

Q What is the first school that you attended?

A St. Joseph Academy.

Q After leaving St. Joseph Academy did you enter high school?

A Yes, sir.

Q What high school did you attend?

A Cathedral Latin.

Q After your graduation from Cathedral Latin did you further your education?

A Yes, sir. I attended the College of Osteopathy and Surgery, Kirksville, Missouri, graduating in 1930.

Q After your graduation in 1930 from the College in Missouri did you further your education abroad?

A Yes. I spent seven months at the University of Vienna, that is at the Allgemeines Krankenhaus, which is a training hospital for the University of Vienna, and that was in the clinic of Professor Newmann, the ear, nose and throat clinic of that particular hospital.

Q And how much time did you spend at that institution,

Doctor?

"A I would say approximately five months.

Q Now, when is the first time that you took your profession up at the Bay View Hospital, what year?

A Six years ago, 1948, with the inception of the hospital.

Q Had you had some training before coming to Bay View at any other hospital?

A Other than at Newmann's Clinic, I served a preceptorship, or what might be known as an assistantship to Doctor Leonard Rensch, a certified eye, ear, nose and throat specialist in the City of Cleveland, and following that is when I went to the University of Vienna.

Q Do you specialize in any particular branch?

A I specialize definitely in eye, ear, nose and throat. I am a certified member of the American College of Ophthalmology and Otolaryngology and have held that, have practiced eye, ear and nose and throat exclusively in the past ten years.

Q Now, coming down to the 4th day of July, 1954, did you see Doctor Sam Sheppard?

A Yes, sir.

Q And where did you see him?

A In his room in Bay View Hospital.

Q And will you tell the jury the approximate time of

your visit in the room that was occupied by Doctor Sam Sheppard?

"A The approximate time was 2:10 in the afternoon.

Q Now, after your entrance into the room, did you make some observations of Doctor Sam Sheppard?

A Well, I observed that he had a marked swelling of the right side of his face.

Q Did you make any other observations?

A That his eye was rather swollen and he had an ecchymotic appearance of the eye, that is, it was beginning.

I noticed that he had a faded area on the left side lateral to, I would call it, the thyroid cartilage, but we know it as the Adam's apple.

Q Now, at that point, when you say a faded area, can you be a little more specific on that particular observation, please?

A Well, a faded area would be where there had been an extravasation of blood, but it was more or less fading out.

That's the only way I can describe it. Maybe you could describe it as being a livid area.

Q Did you make any further observations of his person?

A Yes. He had a swelling at the base of the skull. As I recall it, it was more to the left side. It was not discernible as far as the patient being erect or lying in bed, but it was discernible if you flexed his neck forward

you could see evidence of swelling, and certainly you could palpate swelling.

"Q Did you palpate swelling in that area that you have just described?

A Yes, sir.

Q Now, the area that you just described to the jury prior to the last description of the bated mark around his Adam's apple, as a doctor did that indicate injury to you?

A Well, it would indicate that he had -- that the patient must have had some injury to that area.

Q Now, how much time would you say you spent in performing the observations that you have described to the jury and other things that you did while you were in the room?

A Well, the entire time, Mr. Garmone, was from 2:10 and I recall very specifically writing on the chart and noting the time was 2:50, so I would say that I was in the room at least forty minutes.

I did go out of the room to obtain an ophthalmoscope to examine Doctor Sam's eye grounds and his pupillary reflexes, and I asked him about pain, where he had pain. He told me in his neck, as I have described.

He couldn't open up his jaw very well. He was not incoherent, but --

Q Well, at that point, during the course of the conver-

sation, was he able to speak fluently?

"A Oh, I would say mentally he could, but he had to talk kind of through closed lips. He couldn't open his mouth very well.

Q What was the reason for that, from the observation you made, Doctor?

A Well, I would say an injury to his cheekbone. I know it as the malar bone, and when we have an injury there, it can affect the temporal mandibular joint, which opens and closes our jaw.

Q Now, during that period, were you able to observe how far he was able to open his mouth during the conversation that you have just related? Can you express an opinion?

A Well, he couldn't open it to the full extent.

Q Doctor, when you made this examination where you looked into his eyes, did you do something in that room at that time?

A Well, the room was semi-dark.

Q And what did you do, if anything?

A I didn't tilt the venetian blinds, I lifted the one venetian blind in order to have proper illumination for better evaluation of his injuries.

Q Now, you kept the venetian blind lifted while you made the observations and examinations of his eyes?

A No, sir.

"Q Did you later --

A Technically, I used the ophthalmoscope and examined his fundi, the nerve head, whether or not he had any retinal separations that can happen from a blow, and it was following this that I asked him if he had any more pain, and he said in his right chest.

Q Did you do anything concerning that pain in the right chest by way of examination?

A May I answer that in my own way, Mr. Garmone?

AQ Yes.

A Using an ophthalmoscope or a small flashlight, you might say, it was certainly not adequate to observe the chest or observe to the full extent his facial injury, and I --"

MR. BAILEY: At this point an objection is noted in the record. Shall I skip these, your Honor, or read them in?

THE COURT: May I see counselors, please?

MR. BAILEY: Yes.

(Thereupon counsel and the Court conferred at the Court's bench out of the hearing of the jury.)

THE COURT: Please proceed, gentlemen.

"Q Well, what did you do regarding the pain that he com-

plained of in the area of the chest, Doctor?

"A In order to adequately observe it, I lifted the venetian blind so I had proper illumination.

Q Now, during that period that the blinds were up, was there some complaint that came from Sam by the way of talk?

A Yes, sir. He complained that the light hurt his eyes, so I kindly dropped the venetian blind.

Q That was the only day and the only time that you had seen Sam, is that right?

A Yes, sir.

Q After the 4th of July, I believe you left the City of Cleveland and went to the City of Detroit?

A That's right. I attended a convention at Detroit.

Q Now, Doctor, I will hand you what has been identified here as Defendant's Exhibit YYY, and ask you if in this report, hospital report, your report is incorporated therein?

Will you look it over and see?

A Yes, sir.

Q And your report is depicted on page 11 of Defendant's Exhibit YYY, is that correct?

A Yes, sir."

MR. BAILEY: May the record reflect, your Honor, that what is recorded in this testimony

as Exhibit YYY is present as evidence in this case as State's Exhibit 72, the hospital record.

MR. CORRIGAN: It is so stipulated, your Honor.

THE COURT: The record may so show.

"Q Now, during the period that you were in Doctor Sam Sheppard's room, Doctor Foster, did you observe his emotional state?

A Well, I would say the boy was extremely upset.

Q What if anything did you observe him do?

A Well, you mean -- he was lying in bed, he was somewhat restless.

Q Anything else?

A I don't quite get pointedly what you --

Q What is the fact whether or not he was crying during the period you were --

A Oh yes. I meant to cover that with "upset." He was crying. He was certainly, in my interpretation, rather in mental shock.

Q How long have you known Doctor Sam Sheppard, Doctor Foster?

A Oh, I have known Sam since he has been a little boy. Professionally, I believe Doctor Sam came to Bay View in a professional status in 1951 or 1952. I believe it is '51, the summer of '51.

"Q Were you there prior to the time that Sam came to Bay View in a professional status?

A Definitely.

Q And for how long a period prior to his coming?

A Well, that would be -- the hospital opened up in 1948 to '51 would be three years.

Q Now, Doctor, I will again hand you the exhibit that has been marked Defendant's Exhibit YVYV, and ask you to read to the jury the report that you made that is incorporated in the Bay View Hospital report.

A Well, under "Findings," I have here "A marked swelling, an ecchymosis of the right eye and orbital tissue extending over entire right side of face.

"A contusion is noted on the left side of the neck anteriorly.

"2. Marked edema, suboccipitally."

Under "Diagnosis," I have "Contusion of eye and orbital adnexa.

"2. Probable fracture of maxillary," and in parentheses "the malar and zygomatic bone."

I don't have "bone" there, but I refer to that as malar and zygoma.

"Contusion of left side of neck. Contusion of suboccipital tissues.

"Recommendation: Intermittent hot and cold packs

or ice bag to the face, and to X-ray the facial bones," meaning the maxillary and the zygoma or the malar bone.

"Q Now, this report was prepared by you?

A Definitely.

Q And on what day?

A July 4, 1954.

Q Shortly after you had made the observations and the observation that you have described to the jury, is that correct?

A Yes, sir.

"Mr. Garmone: That is all, Doctor.

"CROSS EXAMINATION OF CLIFFORD C. FOSTER

"By Mr. Parrino:

"Q Now, I see in this report, Doctor, that there was something about a fracture of the --

A Malar.

Q Where is that, please?

A "Probable fracture of the maxillary. (Malar and zygoma.)" That is part of the maxillary bone.

Q Where would that be?

A That is the bone, Mar. Parrino, that is more or less the lateral side of the orbit, and the zygoma bone is this bone here that is an extension of the temporal bone.

Today it is known in the later anatomies -- the anatomy I have refers to it as the malar bone, but I notice in later

nomenclature that this is the -- this is known as the whole zygomatic arch.

Q Well, as a matter of fact, you later learned, as a result of certain X-rays that were taken, that there was no fracture of that bone, isn't that correct?

A Yes, sir. I assumed there was no fracture.

Q Did you determine that or did you not?

A By X-ray?

Q Yes.

A I assumed that inasmuch as I did not have an X-ray report to the fact that it was not fractured, that it was not fractured.

Q Well, you knew that X-rays were taken of the bones of his face, did you not?

A Yes, sir.

Q Did you ever examine those X-rays?

A I looked at them very briefly on a wet film, and the technique used would certainly not bring out, by proper positioning -- let me state it this way --

Q Well, the question is simple, I think, Doctor: Did you ever examine the X-rays?

A Yes.

Q And when did you examine them?

A I examined those after I had left Doctor Sam's room, and they were wet. They were still in solution.

"Q What time did you examine the X-rays?

A Well, I would say approximately it was after I left there, 2:50 or five minutes of three, three o'clock.

Q And you say the X-rays were still wet?

A Yes, sir.

Q On those wet X-rays did you see any fractures? Yes or no?

A No.

Q Did you examine those X-rays later?

A No.

Q At any time?

A They were not suitable, Mr. Parrino, for my observation.

Q Well, did you examine those X-rays later at any time?

A No, sir.

Q Now, Doctor Foster, you have examined a patient, have you, before the 4th, who was suffering from brain injuries, in your experience as a doctor?

A Yes, sir.

Q And I presume that you have done that on numerous occasions in your years of work?

A In suspected brain injuries, yes, sir.

Q Well, have you ever examined persons with actual brain injuries? Yes or no?

15.

"A Yes, sir.

Q In numerous cases?

A I wouldn't say numerous, no, sir.

Q Now, in some of these cases that you have examined where there were brain injuries, did you ever examine the eyes?

A Yes, sir.

Q And in these cases where there was brain injuries, is there something unusual that occurs insofar as the eyes are concerned?

A Well --

Q The eye grounds.

A Do you want a recent injury or one that has been for some time?

Q A recent injury, within the last twelve hours?

A Two hours, eight hours, twelve hours?

Q Yes.

A Would you restate that question again, Mr. Parrino?

Q Yes. Where you have a brain injury and you examine that patient within, oh, eight or nine hours, what happens to the eye grounds?

A Well, edema, papule edema, as it is known, may occur.

Q What does that mean?

A A swelling of the nerve head, but depending on where the brain injury has occurred.

"Q What else happens to the eye grounds where you have brain injury that you can observe within eight or nine hours?

A Perhaps loss of vision. Maybe that isn't answering your question directly.

Q What else?

A All that I can state would be papule edema.

Q Well, you didn't find any of that with Doctor Sheppard, did you?

A No, sir.

Q What does your report say as to what the results were of your examination of his eyes?

A The report states nothing, because I did not find any papule edema.

Q So that, then, your findings were negative as to the eye grounds, right?

A Yes, sir.

Q They were normal as to the eye grounds?

A Yes, sir, to the best of my knowledge.

Q Now, you say that you examined the anterior part of the neck, isn't that correct, Doctor, or the front of the neck?

A Observed, yes, sir.

Q And there you saw what you described to Mr. Garmone as a faded area, is that correct?

7
"A Yes, sir.

Q And what was the size of this faded area?

A I would say three-quarters of an inch by three-quarters, something like a thumb mark.

Q A thumb mark?

A Yes, sir.

Q Now, there was no laceration there, was there?

A Definitely not.

Q Now, Doctor, where I would take my thumb and press it up against some part of my body, like my forehead here, with some force, for some period of time, say, minutes, ten minutes, an hour, two hours, and apply substantial force, then I remove it, will you describe to the jury what happens in that area beneath where the force was applied?

A Is this a pressure or impact?

Q A pressure, as I have indicated, pressure against the forehead, against the thigh, against the arm, any part of the body, what happens to that part of the body at the skin and beneath the skin where the pressure is applied?

A In my opinion, at first it would be faded.

Q At first it would be faded, you say?

A By that I mean blanched.

Q Yes.

A Depending upon the force of the pressure used, that would injure the capillaries, and those capillaries could

extravasate blood and you would have a blue discoloration.

"Q I see. And for how long would that continue, that blue discoloration? How long could you see it? Minutes later or hours later?

A Well, that would be rather --

Q In your experience?

A -- difficult to tell. I haven't had any experience of one putting a thumb and holding it that long, Mr. Parrino.

Q I see. Well, assume that a person would be holding his hands behind his neck in this way (indicating) to support the neck -- can you see that, doctor?

A Yes, sir.

Q (Continuing) -- and perhaps with his thumbs in front of the neck, in the anterior portion thereof, and holds the back with force for some time, would you have that fading in the back of the neck?

A Are we talking about the back of the neck or front?

Q Yes, we are talking about the back now. Would you have that same fading in the back of the neck?

A Well, I suppose you could, yes, sir.

Q There is no doubt about it, is there, Doctor?

A Well, there's always doubt and there's always probability, Mr. Parrino.

Q I see. Now, at the time that you saw Doctor Sam, did

you have any conversation with him?

"A Yes, sir.

Q Did you ask him what happened on the morning of the 4th and the night of the 3rd?

A Yes, sir.

Q And did he tell you?

A Yes, sir.

Q What did he say?

A I asked him what happened.

Q What did he say?

A He said that all that he could remember was a scream, that he ran upstairs, using his word, he was clobbered; that he didn't know whether it was by one or two people or assailants, and that he followed an assailant to the beach and there he was struck again.

And I said, "Well, Sam, what in the world were you hit with?"

And he said, "I don't know, Cliff." He said, "I think it was a hand, a judo blow, a fist."

Q He said that to you?

A Yes, sir.

Q All right. What else did he say?

A And that he awakened lying in the water with his head up on the beach.

Q Anything else?

1 "Q That is your total description, is it, sir?

A Well, I can go in -- I mean, how far do you want me to go?

Q I think that is enough for the time being, sir.

Now, you say that he was somewhat restless, is that a fact?

A Well, a man crying at intervals and being upset, I would say the man was restless. He was certainly uncomfortable.

Q Well, he wasn't -- he didn't appear to be unusually uncomfortable or unusually restless to you, did he?

A For him, yes, sir.

Q For him. But in answer to one of Mr. Garmone's questions, you did state that he was just somewhat restless, did you not?

A I probably used that term.

Q Yes. Now, in examining the man, and speaking with him, did he appear alert to you?

A I would put it as alert as one can be under the circumstances.

Q How?

A As alert as one can be under the circumstances.

Q Well, using the term alert as we normally know it to be, laymen, the jury, the persons in this courtroom, yourself, in the general sense of the word?

A As far as cerebrating, yes.

"Q Did Sam appear to be alert?

A As far as being able to think, yes, sir.

Q And was he able to answer all questions clearly and lucidly?

A Well, I don't think my questions were that pointed for clarity and lucidly.

He answered questions, yes, sir, I mean, it would be a normal thing for a friend and colleague to ask him what happened; he told me.

Q Now, my question is this: Did he appear to answer these questions to you clearly and lucidly? Yes or no, if you can.

A Yes, sir.

Q He did. But still you say he was in a state of mental shock, right?

A Oh, from the standpoint of his being upset and crying, emotionally upset, yes, sir.

"Mr. Parrino: That is all. Thank you, Doctor.

"REDIRECT EXAMINATION OF DR. CLIFFORD C. FOSTER

"By Mr. Garmone:

"Q Doctor, holding the neck, as was described to you by Mr. Parrino, would that in and of itself cause the swelling that you described that you received through the palpation

that you performed on the back of his neck?

A Well, Mr. Parrino, Mr. Garmone, stated specifically to hold it for a certain period of time, two hours, as I recall, and I don't think that his neck -- that he held it continually for any stated period of time. I don't know.

Q Well, would it bring about the swelling that you discovered by your palpations?

A No, sir. I am of the firm opinion that it had to come from injury, not from holding.

Q Now, Doctor, have you ever observed, in your experience where concussion was present but there was absent the papule edema?

A Will you state that again, Mr. Garmone?

Q In your experiences, have you witnessed where there was present a concussion but an absence of papule edema?

A You mean palpable edema?

Q Palpable edema.

A Certainly. I have picked them out of automobiles with a broken neck with no edema or no palpable edema.

Q Doctor, have you ever been present in surgery with Doctor Sam?

A Many times.

Q And during that period of times that you were present in surgery with Doctor Sam Sheppard, were you able to observe his temperament?

4 "A Yes, sir.

Q Will you tell the jury what kind of temperament Doctor Sam Sheppard has under the conditions that your observations were made in surgery?

A I would say that Doctor Sam in surgery is a very calm, even surgeon. I know I have observed the boy in many instances where if it were me working, perhaps under the conditions -- I would say he is quite a calm surgeon and I have never seen him really become flustered in surgery.

Q Have you, in your experiences as a doctor, seen other doctors lose their temper in surgery, Doctor Foster?

A Definitely, yes.

"Mr. Garmone: That is all, Doctor.

Thank you.

"RE-CROSS EXAMINATION OF DR. CLIFFORD C. FOSTER

"By Mr. Parrino:

"Q Will you name one doctor that you saw lose his temper while performing a surgical operation, Doctor?

A I don't think that -- this may be beside the point, Mr. Parrino, but --

Q How?

A I don't think that is a fair question to me, Judge, to name a doctor, professionally --"

MR. BAILEY: After a ruling, the
answer is given by the witness:

"A Yes, I have seen Doctor Lusinger over in Philadelphia, when an assistant would get in his way, he would rap his knuckles. In fact, I was assisting him one time and he rapped my knuckles.

Q I see. And you would call that losing his temper?

A Well, and I also --

Q The point is, sir, this -- will you answer my question?

A Yes, I have seen him lose his temper by throwing a hemostat down and obviously losing his temper.

I have seen him -- I mean, I have seen that situation, and in some situations the dismissal of a surgical nurse because perhaps she didn't hand over the right instrument at the right time. Yes, sir, I have seen those things.

Q Now, Doctor, you say that you didn't think that Doctor Sam Sheppard held his neck for two hours, is that correct?

A You proposed the question of holding a neck -- or holding an area for a certain length of time. I stated that I don't know.

Q How?

A I don't know, but I don't think that Doctor Sam held his neck continuously for any two-hour period of time.

Q Were you at Sam's home on the morning that this crime occurred?

A No, sir.

Q You don't know whether or not Doctor Sam Sheppard was

holding his neck for one minute, five minutes, ten minutes, one hour or two hours, isn't that correct?

A Continuously, you are correct.

Q How?

A Not for any continuous time. I don't know that.

Q You didn't see him until 2:10 in the afternoon?

A Yes, sir."

MR. BAILEY: And that concludes
the testimony of Doctor Clifford Foster.

THE COURT: May I see counselors,
please?

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

MR. CORRIGAN: At this point I think
the jury should be instructed and the record
should reflect, that it is stipulated by and
between counsel for the defense and the State,
that if Doctor Foster were here, he would testify
as was read from the record by counselor Bailey.

THE COURT: Counselor Bailey?

MR. BAILEY: Agreeable.

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

THE COURT: Ladies and gentlemen

of the jury, it has been stipulated by and between counselors for the parties to this action, that if Doctor Foster had been present this morning, that he would have testified to you as has been read to you from the transcript of 1954, which has just been read to you by counselor Bailey; and you will regard it as evidence and testimony in this case.

Now, ladies and gentlemen of the jury, it is the luncheon hour, so we will recess for lunch; and while you are away on your luncheon recess you will bear in mind the instructions given you on each occasion when you leave this room.

You shall not discuss this case or what you have heard of it amongst yourselves. You shall not permit anyone else to do so, nor shall you permit yourselves to overhear anything that relates to this cause by any means of communication, bearing in mind in detail the specific instructions given you with respect to newspapers, printed material, radio or television.

We will stand recessed until 1:30.

(Thereupon an adjournment was taken to 1:30 p.m., Friday, November 11, 1966, at which time the following proceedings were had:)