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Sub 1930

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	}	ON INDICTMENT FOR MURDER.
<i>v.</i>		ON ERROR.
JOSEPH LENNON, alias Red Lennox, <i>Plaintiff-in-Error.</i>	}	BRIEF FOR THE STATE.

The plaintiff-in-error, Joseph Lennon, together with Stephen Hayton, John Blaszak, alias Scoop, Charles Cane, alias Murphy, alias Dopey Benny, and, John Nolan, alias Johnny Irish, was indicted for the murder of one Edward Turella on September 30, 1926, and was tried October 15, 1928, the trial lasting up to and including October 23, 1928. There was a severance as to defendants Hayton and Blaszak, so that the defendants Cane, Lennon and Nolan were tried together. The jury returned a verdict of guilty of murder in the second degree against these three defendants. This appeal is taken by the defendant Joseph Lennon, only, who was sentenced on November 15, 1928, to a term of thirty years imprisonment in the State Prison.

The writ of error was not taken until November 14, 1929, *only one day short of one year after the judgment*, the period allowed for the taking of an appeal.

There are four points argued by the plaintiff-in-error as reasons for reversal: the first of which is that the verdict was against the weight of the evidence. We shall therefore discuss the evidence under Point One, and we submit that the verdict was justified by the evidence.

## POINT I.

The evidence produced by the State may be somewhat classified into four Groups:

1. The testimony given by eye-witnesses.
2. The testimony of the accomplice Hayton.
3. The testimony of Detectives and officers as to the manner of arrest, behavior of the defendants at the time of the arrest, and the statements, oral and written, made by the defendants.
4. Testimony of medical and ballistic experts.

The theory of the State was that the killing of Edward Turella grew out of an attempted perpetration of a robbery by these defendants. First, of a diamond pin worn by a companion of Turella's, and second, of \$5,000 which the defendants thought was in the possession of Turella and his companion Carrione, who also was shot and killed on the same occasion.

Elsie Crete Naugle, the first eye-witness, testifying on behalf of the State, testified to the following facts: (p. 41, etc.)

Early in the morning of September 30, 1926, she, accompanied by Edward Turella and Carrione, went to a saloon at 308 Washington Street in an automobile. That while she was outside of the premises Turella and Carrione went inside, and during the few minutes she remained outside, another automobile drove up with five men in it, who parked their car behind that in which she was. She heard them speaking about dividing some money. Shortly thereafter the five men went into the premises while she was still outside. About twenty minutes later she, too, went in, being invited by Turella to come in and have a drink. (p. 44, L. 20.)

No. 308 Washington Street was a saloon with a large barroom in the front and a room in the rear, marked on the Map Exhibit S-1, Room B. Room B was separated from the barroom by an old-fashioned swinging door. She, Miss Naugle, with Turella went into Room B, where they were seated at a table with Carrione and a girl by the name of Martin. (p. 45, L. 25) In the same room, at a table next to theirs, were seated the defendants Nolan, Cane and Lennon. All three of them were identified by the witness. After awhile there was dancing to the music of a player piano, and the witness started to dance with Turella, while Mae Martin was dancing with the defendant Lennon. (p. 47, L. 30) *While Lennon was dancing with Mae Martin the witness saw Lennon reach over and punch Carrione (who was still seated at the table), under the chin.* Carrione, at the time, was wearing a diamond stick pin. At this instant Turella ran over to help Carrione. (p. 49, L. 18.) Then John Blaszak, alias Scoop, one of Lennon's companions, started fist fighting with Turella, and then pulled out a gun and fired a shot at Turella's back. *She heard many more shots fired after that,* (p. 50, L. 9) *but she does not recall who the other persons were who fired them.* During the early part of the fight, Cane, one of the other defendants, kept putting nickels in the player piano to continue its operation. Neither Turella nor Carrione had weapons and were fighting with their fists only. (p. 57, L. 18.) Scoop was also striking Turella over the head with the butt of his gun. (p. 57, L. 2.) During this confusion of general fighting the witness Naugle escaped and ran outside. While outside she saw the same five men, including the defendant, walk into their car and calmly drive away. The witness then went in and found Turella lying in a pool of blood, and

called an ambulance. Turella died in a few hours later.

Mae Martin testified (p. 87, etc.) that she was at the cafe on the day and at the time in question, when Turella and Carrione came in and sat at a table with her, and that a few minutes later the five defendants came in, of which five she personally knew only John Blaszak, alias Scoop; and she identified Lennon as one of the five. Presently Turella and Elsie Naugle came in and joined them at the table, where she was seated with Carrione. She testified that upon Scoop's order or suggestion, she, Mae Martin, got up and danced with Lennon, with whom she was not acquainted, *and that while she was dancing with Lennon, the latter grabbed Carrione by his tie and then reached over for Carrione's waist, and that Carrione had a diamond stickpin in his tie at the time.* (p. 90, L. 36.) Carrione at the time was standing at the piano; that as Lennon reached for Carrione's tie and struck him, a general free-for-all fight started, at which time she attempted to escape by a rear door but was stopped by one of the five, who called out "don't leave nobody out". Then she attempted to get out by the swinging door, at which time she heard several shots. One of the five came up to her and said, "Come back before I put you full of holes." (p. 92, L. 39.)

Stephen Hayton, one of the five, testified on behalf of the State (p. 108, etc.) that he was employed by Blaszak (Scoop) as a driver; that on September 29, 1926, he drove Scoop over to Montclair and that about one o'clock in the morning they went to the Parody Club in Newark, where they met Lannon, Nolan and Cane, and each had several drinks. Then they, all five, went to 308 Washington Street, where they occupied some tables in the rear room and continued drinking,

singing and carousing; that while the remaining four were drinking the witness Hayton had to walk out occasionally and watch the automobile which they had left outside the premises. *Hayton was presently sent out by Blaszak to bring a package from the automobile. He gave the package to Blaszak.* Up to this time there were no fights and they were all singing, drinking and playing. *This package, according to Cane's statement to detective Dimond, contained guns.* (p. 209, L. 1) *Hayton testified that the package which he gave to Blaszak was taken into the mens' room where the five defendants had congregated.* Hayton was again sent out to watch the car; he did this several times, and while he was outside in the car he heard the rattling of chairs inside which was followed by gun shots and people screaming and running out of the building. (p. 16, L. 1) *Shortly thereafter Blaszak and the three defendants on trial, including Lennon, came out, got into the car and drove to New York.* (p. 117, I. 9.) When they got to New York Hayton was given \$5. by Blaszak and told to return to Newark. He did not see Blaszak or the other three defendants again until they were arrested.

The testimony of Frederick Woerner, the bartender at the premises, corroborated the above facts in general with this one further particular: that he saw Lennon, *described by him as the red-headed fellow, grab Carrione by the back of the neck (indicating the manner) and that he, Woerner, was at that time shot by Cane, the bullet grazing his leg.* This shot was then followed by several more shots, but witness cannot state just who fired the various shots. (p. 127, L. 30, etc.) *Then after the shooting and killing the five assailants walked out of the premises as if nothing had happened.* (p. 129, L. 28.) *That at the time Lennon grabbed Carrione by the neck the latter was not doing anything to Lennon.* p. 129, L. 24.)

John Greenwald testified that he was a porter at the premises, and that on this occasion he looked under the swinging door and saw the fight; that one of the men who was fighting pointed a gun at him, upon which he ran out "to beat the band". (p. 190, L. 10.)

James Buffardi testified that he was a jeweler and that he sold a diamond stick pin (the description of which was identical with the one Carrione was wearing) to Carrione for \$85.

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Winfield Beisel testified that he was a motor vehicle officer of Allentown, Pa., and that on October 14, 1926, he arrested Lennon and Cane in Allentown, and upon searching them he found a 38 calibre gun upon the person of Lennon, which gun was marked in evidence as Exhibit S-11. (p. 153, L. 28.) This gun had four loaded shells and one empty shell. He further testified that *Lennon admitted to him that that was his gun.* (p. 148, L. 26)

Orrin E. Boyle, District Attorney of Lehigh County, Pennsylvania, testified that he heard Cane say in the Court House at Allentown, Pa. at a time when Cane and Lennon were being sentenced on a certain charge, the following:

"I shot a man in Jersey intending to kill and rob him; maybe that will help."

This was said in Lennon's presence (c. p. 160, L. 28.)

Thomas Dimond, a detective connected with the Prosecutor's office of Essex County, testified that he had several conversations with the defendants Cane and Lennon in the county jail at Allentown; that during these conversation (p. 199, etc.) he advised Lennon and Cane that they were accused of the murder of Turello, and Carrione. Cane gave

an extensive narration of what had occurred, which corroborated all of the above stated facts, and upon being asked what was their motive, Cane said, (p. 208, L. 31.)

“Well, Lennon, Nolan, Blaszak and myself were informed that one of these guineas had five G's in his pocket, and then Nolan sent this kid out to get the guns.”

(This was afterwards corroborated) that Blaszak sent Hayton to get the guns, which were brought in and all five went into the mens' room, where the guns were distributed. Cane stated that he saw “Irish Johnny” (Nolan) sink a bullet into the head of the big Italian boy, whose back was against the wall, (p. 211, L. 28) and that as he fell Irish Johnny (Nolan) fired two more shots into the body of the big Italian fellow. (p.. 210, L. 12.) Then Cane described their escape to New York, which is in line with the statements given above. Nolan stated to Detective Dimond, however, that it was Dopey Benny (Cane) who fired one shot into one of the “Italian boys” and two shots into another “Italian boy”, and that he saw Blaszak fire another shot into the body of the one Dopey Benny had shot into first. (p. 217, L. 12) *When Lennon was interrogated by Detective Dimond he started to tremble violently and his hands were shaking, and he said “I have nothing to say, I am going to get a lawyer”.* (page 218, L. 21, etc.)

Nolan made a written statement, admitted in evidence as Exhibit S-14, (Case p. 386) which corroborates all the facts above given, and shows the full co-operation of Lennon in the fight. His alleged reason for the fight is that Turella and Carrione were passing remarks at the party of five, and that Lennon got up and struck a fellow who

was dancing with a girl. (Meaning Turello who was dancing with Naugle.)

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Doctor Harrison S. Martland, Chief Medical Examiner for Essex County, performed an autopsy on the body of Turello, *and found four bullet wounds*. From the body he extracted three bullets, marked Exhibits S-8, S-9 and S-10. Exhibits S-8 and S-9 were .38 calibre bullets; Exhibit S-10 was of .45 calibre. (p. 27, etc.)

The State produced Major Calvin Goddard, the well-known expert on the science of ballistics, whose reputation and experience are world-wide. (p. 259, and 260.)

Ballistics is a science requiring a highly technical knowledge of firearms, the process of their manufacture, the different types manufactured by the various companies at different times and periods; the peculiar markings and impressions left on bullets by defects, impurities, fouling, rust, etc.; the distinction of markings and impressions left by these various agents; the distinctive characteristics of all makes and methods of firearms and munitions fired through them, and deals largely with the identification of weapons, bullets, shells and powders.

Major Goddard is the perfecter of an instrument known as the comparison microscope, which has two barrels; one bullet, let us say the fatal bullet, is placed in one arm or barrel and the test bullet is placed in the other arm or barrel, and the images of the bullets under these two barrels of the microscope are carried together horizontally by reflections from prisms in the two ends of the cross arms. These two images meet under a single lens, so that a composite image is formed with one-half

of one bullet and one-half of the other. Thus, the one-half will be the nose of one bullet, and the other half will be the base of the other bullet. These bullets are revolved under the microscope until markings of identity are found. To explain in detail all the various indications of identity between two bullets in respect to their being fired by the same gun would necessitate the re-production of a large part of Major Goddard's testimony, which is found on pages 259, etc. It suffices to say that no two gun barrels are precisely similar, and no matter how carefully made, there are defects in the barrel which will leave their markings of identification on the bullet fired through that barrel; that while there are differences in the casual markings on bullets fired from a gun due to different conditions of rust and fouling existing at different times, with respect, however, to certain fundamental markings on bullets fired from a given arm, the bullet is exactly like every other bullet fired from that arm. (p. 263, L. 8, etc.)

Exhibits S-8, S-9 were bullets recovered from the body of Edward Turella, and were of .38 calibre. (p. 27, L. 16; p. 29, L. 18; p. 30, L. 12.) Exhibit S-11 was a .38 calibre gun, which was found in the coat pocket of the defendant Lennon, and the defendant Lennon admitted to be his. (p. 143, L. 30). This gun contained four bullets and one exploded shell, which were also put in evidence as Exhibit S-12, (p. 145, L. 18.)

BY COMPARING EXHIBITS S-8 AND S-9 WITH THE TEST BULLET FIRED THROUGH EXHIBIT S-11, THE GUN FOUND UPON THE DEFENDANT LENNON AND ADMITTED BY HIM TO BE HIS, MAJOR GODDARD IN CONCLUSION TESTIFIED THAT EXHIBIT S-8 AND S-9, THE FATAL BULLETS, WERE FIRED

THROUGH DEFENDANT'S GUN, EXHIBITS S-11. (p. 27, L. 33, etc.)

The photographs of these bullets are marked in evidence, Exhibits S-17 to 25, inclusive. Upon these photographs were marked the lines created by defects in the barrels upon the fatal bullets and the test bullet, all these marks coincide perfectly. The few differences of markings on the fatal bullet and the test bullet are due to the rusty condition of the gun at the time the test bullet was fired. See cross-examination of Captain William Jones, (expert, testifying for the defendants.) (p. 325, etc.)

Captain Jones practically admitted that the differences in the markings were due to the different condition of the gun at the time of the shooting and at the time of the firing of the test bullet. Thus, it is clear that Captain Jones, for the defendants, corroborated rather than weakened the testimony of Major Goddard.

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At the close of the case, therefore, there was abundant testimony showing the guilt of the defendant Lennon. Eye-witnesses testified as to his striking Carrione, Turella's partner, in the chin, and as to his grabbing him by the waist, and the free-for-all fist fighting. Hayton's testimony, taken in connection with Nolan's statement shows that guns were distributed among the five, including Lennon, in the mens' room in the back of the saloon just before the fight started. There is testimony to show that Lennon reached for Carrione's diamond pin, and there is a statement to the effect that all five had previously agreed to rob Turella and Carrione of \$5,000 which they, the five, thought Turella and Carrione had on their persons: we have the testimony of Detective Dimond to the effect that when he accused the defendant Lennon of

the murder of Carrione and Turella, Lennon trembled and refused to say a word; that he had an active part in the general fighting he cannot deny. In addition to all this we had the positive evidence of Major Goddard that the fatal bullets were fired from Lennon's gun. NEITHER LENNON NOR ANY OF THE OTHER DEFENDANTS TOOK THE STAND TO DENY ANY OF THE FACTS WHICH SHOWED THAT LENNON NOT ONLY PARTICIPATED IN THE FIGHT BUT THAT HE FIRED TWO SHOTS WHICH WERE FATAL TO TURELLA.

Upon this state of facts this Court cannot say that the verdict was against the weight of the evidence.

"It is an elementary rule that where there is evidence from which the jury might properly find the defendant guilty, the issue is one for the determination of the jury, and the Court will refuse to direct a verdict of acquittal on the ground that there was no legal evidence of the defendant's guilt. *State v. Krupin*, 100 N. J. L., 7.

"On this question, the appellate court will only consider whether there was sufficient evidence to go to the jury, and will not disturb the verdict unless it find that there was such a lack of evidence that the verdict must have been the result of prejudice, mistake or passion.

*State v. Grace*, 98 N. J. L. 341.

"The effect of such an assignment (that the verdict is against the weight of the evidence) is the same as that on a rule to show cause where the reason assigned is that the verdict is against the weight of

the evidence. The competency of the evidence is not to be weighed."

*State v. Morehouse*, 97 N. J. L. 285, at p. 296.

"The Court should not set a verdict aside, even although, in its opinion, the jury might, upon the evidence, have found otherwise.

*Queen v. Jennings*, 93 N. J. L. 353."

All of these decisions are approved in the case of *State v. Treficanto*, Vol. 7, N. J. Adv. Rep. p. 752. Not yet officially reported.

We herewith quote the opinion of the Court of Errors and Appeals on the question of weight of evidence given in the *Treficanto* case.

"On the question of a verdict being against the weight of the evidence in a criminal case, certain principles of law come in aid of a verdict of guilty. One is that under *Pamph. L. 1921*, p. 951, in all cases where the entire record is brought up with the writ of error, if from consideration of the entire evidence it appears that the verdict was not against its weight, the court will not go further and consider whether the defendant was guilty beyond a reasonable doubt. *State v. Fischer*, 97 N. J. L. 34; 36; affirmed, 98 Id. 293. (Italics ours.)

"To justify the setting aside of a verdict as against the weight of the evidence that fact must be so clear as to give rise to an inference that the verdict was the result of mistake, passion, or prejudice. *State v. Grace*, 98 N. J. L. 341; *Leary v. West Jersey and Seashore Railroad Co.*, 1 N. J. Mis. R. 549, 550; or partiality also *State v. Karpowitz*, 98 N. J. L. 546.

"And the court should not set a verdict aside even though in its opinion the jury might, upon the evidence, have found otherwise. "*Queen v. Jennings*, 93 N. J. L. 355; *State v. Grace*, *supra*.

"Even if the defendant's witnesses had outnumbered those of the state that would afford no ground for setting the verdict aside as against the weight of evidence. *Bowell v. Public Service Corp.*, 77 N. J. L. 230; *State v. Grace*, 98 *Id.* 342; *State v. Karpowitz*, *Ibid.*, 546; *Barwick v. Blauvelt*, 2 N. J. Mis. R. 270; *Fornierotto v. Board of Public Utility Commrs.*, 6 N. J. Adv. R. 1631."

It is respectfully submitted therefore, that the verdict of the Jury was amply sustained by the evidence, and that it should not be set aside.

#### POINT II.

Assignment and Specification No. 3.

This brings for error the following portion of the charge,

"If you should find beyond a reasonable doubt, as I have outlined that doubt to you, that these defendants, or any of them, or all of them, killed Turella with an intent merely to do grievous bodily harm and not perpetrate or attempt to perpetrate a robbery, they would be guilty of murder in the second degree."

Plaintiff-in-error's argument is that under the facts in the case defendants could not have been found guilty of second degree murder because the State's theory was a killing committed in the attempted perpetration of a robbery, and that it was only because of this portion of the charge that

the jury were led to find the defendant guilty of second degree murder.

That State's theory was a murder committed in the perpetration or attempted perpetration of a robbery. The state contended and still contends, that there was sufficient evidence for such a finding. However, the undisputed evidence was that there was a general fighting, described as a free-for-all by some of the witnesses, in which the defendant Lennon actively participated. Even if it was not defendant Lennon who shot and killed Turella, he would have been guilty of murder as an aider and abettor. It is held in *State v. Carlino*, 98 N. J. L. 48, that,

“Crimes Act § 106, 107, are not attempts to change the common law as to the guilt of persons associated in a common enterprise which results in homicide, and where death of any one results from the crimes therein specified, it is clearly intended that one may be held guilty, though he was not the actual assailant, if he was guilty on the theory of constructive presence.”

In our case we have actual presence and participation.

In the case of *State v. Donato*, Vol. 8, N. J. Adv. Rep., p. 41, it was again held that those aiding and abetting other persons in the commission of a second degree murder would be guilty as principals. In the Donato case the four defendants were engaged in a general fight. Subsequently, one (only one) of them attacked a supposed antagonist, and in attempting to strike the mistaken antagonist with a base-ball bat, he struck and killed a little girl by the name of Katherine McGee, a bystander. Two of the defendants were found guilty of second degree murder and two of them were found guilty

of manslaughter. It was there contended that such a verdict was inconsistent, and the Court held as follows:

“The defendants seem to contend that the verdict is inconsistent and repugnant and therefore illegal in that two of the defendants were convicted of murder in the second degree and two of manslaughter. The answer is that on an indictment for murder two of the defendants may be convicted of murder in the second degree and two of manslaughter, if the evidence will legally support such verdicts. *Whar. Hom.*, § 47, 653.”

In the case at bar, defendant could be found guilty of second degree murder, not merely as aider and abettor by reason of the active part taken by him in the fight, but also as the very killer of Turella, as it was from his gun that the fatal bullets were fired.

The charge of the Court in this respect was correct and favorable to the defendants. Following the portion of the charge assigned for error the court charged as follows: (p. 369, L. 10.)

“If you should find any of them guilty of murder in the first degree or guilty of murder in the second degree under the terms that I have outlined to you, any other persons acting with him in his presence, those who aided and abetted or assisted in the commission of the crime, no matter if it be murder in the first degree or murder in the second degree, according to your findings of fact, beyond a reasonable doubt, would be equally guilty with him before our law, they being accessories, and by reason of that fact, principals.”

The Court iterated and reiterate, over and over again, that the evidence as to each one of the defendants must be considered separately, and that admissions of one should not be considered as prejudicial against the others, and that the evidence as to each must be applied separately. (p. 374, L. 31 to 40; p. 375, L. 13 to 22, and L. 35 to p. 376, L. 10; p. 377, L. 9 to 20; 377, L. 30 to 40; p. 381, L. 13 to 23.

In the portion of the charge assigned for error, the Court was not attempting to hold one defendant for the crime of the other. The Court was merely defining second degree murder as a killing which is the result of an intent to do grievous bodily harm.

It is respectfully submitted that the charge of the court was correct and that it did not in any way attempt to hold any one defendant responsible for the crime of another, and that the Court's charge taken as a whole, gave the correct law; and that finding of second degree murder was amply sustained by the evidence.

### POINT III.

#### Assignment and Specification 4.

The following portion of the charge is assigned for error.

"The defendants make no effort to take the stand to testify, each for himself in his own behalf. In that connection, I want to say to you that if facts are testified to which concern the acts of the defendants, which he could by his oath deny, his failure to testify in his own behalf, there is a presumption that he cannot truthfully deny it."

Your Honor's attention is called to the fact that

the portion of the charge assigned for error and argued under Point 3 of plaintiff-in-error's brief is incorrectly quoted. The record shows that the correct quotation is as follows:

"The defendants make no effort to take the stand to testify, each for himself in his own behalf. In that connection, I want to say to you that if facts are testified to which concern the acts of a defendant, which he could by his oath deny, his failure to testify in his own behalf, *raises a strong presumption that he cannot truthfully deny them.* (Italics ours)

The charge as given by the Court is precisely in the words of the charge in the case of *State v. Boccadoro*, Vol. VII N. J. Adv. R. 305. (Reported in 144 Atl. 612.) Such a charge was assigned for error in the Boccadoro case on the ground that the State had failed to prove any facts that the accused was called upon to deny. The Boccadoro case was one of purely circumstantial evidence. The Court, passing upon the question, held that the charge was correct.

The charge is again an exact quotation from *State v. Kisik*, 99 N. J. L. 388, wherein the rule is given that,

"If facts are testified to *which concern the acts of the defendant* which he could by his oath deny, his failure to testify in his own behalf raises a strong presumption that he cannot truthfully deny them."

(Italics ours.)

In the case at bar there was ample evidence connecting the defendant directly with the killing, and there were many facts which he could have denied and did not.. Thus: That he struck Car-

rione in the chin; that he grabbed Carrione by the waist; that he participated in the fist fight; that he had any part in the agreement to rob Carrione of his pin, or to rob Turella and Carrione of \$5,000; that he was present when the guns were being distributed in the rear room, and finally, that it was his gun, and by inference he, who fired the two shots fatal to Turella.

No error on this point is shown.

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POINTS IV and V are abandoned by plaintiff-in-error.

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POINT VI.

Assignment and Specification 7.

This argues that the verdict is against the weight of the evidence, as this point has been argued at length under Point I, we deem it unnecessary to argue it any further.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

JOSEPH L. SMITH,  
Prosecutor of the Pleas.

SIMON L. FISCH,  
First Assistant Prosecutor.



