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WRIT OF ERROR

NEW JERSEY, SS:

THE STATE OF NEW JERSEY to the Chief Justice and other Justices of our Supreme Court of Judicature.

(SEAL)

GREETING:

FORASMUCH as in the record and proceedings, and also in the giving of judgment, in a certain plaint, and which was in our said Supreme Court of Judicature, before you, between the State of New Jersey, Defendant-in-Error and Ernest Fiumara, Plaintiff-in-Error, manifest error hath intervened to the great damage of the said plaintiff-in-error, Ernest Fiumara, as it is said: We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the party aforesaid in this behalf; DO COMMAND YOU, that if judgment be thereupon given and confirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the fifth day of January, next, together with this writ and the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey, ought to be done.

WITNESS, Our Chancellor and President of our said Court of Errors and Appeals, at Trenton, aforesaid, the 16th day of December, A. D., One Thousand, Nine Hundred and Thirty-One.

THOMAS A. MATHIS,
Clerk.

J. VICTOR D'ALOIA,
Attorney.

RETURN

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain Schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,
C. J.

WRIT OF ERROR.

NEW JERSEY, TO:

TO DALLAS FLANNAGAN, Esquire, Judge of the Court of Quarter Sessions of the County of Essex; Because in the record and proceedings,

(L. S.) and also in the giving of judgment upon a certain indictment against Harold Corbett, John Crisifulli and Ernest Fiumara, late of the City of Newark, county of Essex and State of New Jersey, for conspiracy:

Pro ut the said indictment, whereof, before you, they, Harold Corbett and Ernest Fiumara, hath been indicted and are therefore convicted by a certain jury of the county, taken between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, the said John Crisifulli not appearing for trial, as it is said, manifest error hath intervened to the great damage of the said Harold Corbett and Ernest Fiumara, as from their complaint we have received information, we being willing, in this behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to them, the said Harold Corbett and Ernest Fiumara command you that if judgment be thereon given then that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same to our Justices of our Supreme Court of the State of New Jersey, on the 11th day of April, 1931, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error what of right and according to the law ought to be done.

WITNESS, WILLIAM S. GUMMERE, Esquire, our Chief Justice, at Trenton, aforesaid, the 23rd day of March, 1931.

FRED L. BLOODGOOD,
Clerk.

J. VICTOR D'ALOIA,
Attorney for Fiumara

JOSEPH ZEMEL,
Attorney for Corbett.

RETURN OF JUDGE.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX } ss.

I, Dallas Flannagan, Judge of the Court of Quarter Sessions in and for Essex County, New Jersey, DO HEREBY CERTIFY and return to the Supreme Court of Judicature of the State of New Jersey the indictment and judgment of the Court and proceedings and an entire record of the proceedings had at the trial of the case together with all matters touching and concerning the same as by the whithin Writ to me directed, I am commanded.

In Witness Whereof, I have hereunto set my hand and official seal of said (SEAL) Court at Newark, Essex County, New Jersey, this 21st day of April, A. D. 1931.

DALLAS FLANNAGAN,
Judge of the Quarter Sessions Court
of Essex County, New Jersey.

RETURN TO WRIT.

STATE OF NEW JERSEY, }
} ss.
COUNTY OF ESSEX }

Be it remembered, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex on the third Tuesday in September, in the year of our Lord, one thousand nine hundred and thirty, by the Honorable William S. Gummere, Chief Justice of the Supreme Court of Judicature, of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of Edward E. Gnichtel, Oscar A. Biertumpfel, Louis G. Weimer, Herbert J. Strahan, Joseph A. Glutting, Max E. Stern, Charles Metzger, Philip Katz, John Picken, A. D. Way, August Deuchler, George Reohm, John H. Pannullo, Julius Sharff, Joseph R. Sorenson, Morriss Schlessinger, Edward Kohn, Russell P. Walker, George L. Statts, Harry Frieland, John H. Driscoll, J. Paul Neiwirth, Ernest A. Dreher, Sr., good and lawful men of the said County of Essex, duly commissioned and then and there duly sworn and charged to enquire in behalf of the State of New Jersey, in and for the said County of Essex, it is presented in manner and from following to wit:

Essex County to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that on the sixth day of October, in the year of our Lord, one thousand nine hundred and thirty, Harold Corbett, John Crisifulli and Ernest Fiumara, at the City of Newark, in the County of Essex aforesaid, did conspire, confederate and agree together to cheat and defraud Harry McCabe and Daniel Ruder, Junior, partners, trading under the

firm name of McCabe and Ruder, of their moneys, goods and chattels by threatening to steal, take and carry away and by stealing, taking and carrying away, the moneys, goods and chattels of the said firm of McCabe and Ruder.

And the Grand Jurors aforesaid, upon their oath do further present that in execution of said conspiracy and agreement and to effect the object thereof afterward, on the sixth day of October, in the year of our Lord one thousand nine hundred and thirty, at the City of Newark, in the County of Essex aforesaid, the said Harold Corbett, John Crisifulli and Ernest Fiumara did demand of the said Daniel Ruder, Junior the sum of seventy-five dollars and did then and there threaten to steal, take and carry away the goods and chattels of the said Harry McCabe and Daniel Ruder, Junior, partners, trading under the firm name of McCabe and Ruder, to wit: certain trucks, unless the said sum of seventy-five dollars was paid to them, the said Harold Corbett, John Crisifulli and Ernest Fiumara by the said firm of McCabe and Ruder.

And the Grand Jurors aforesaid, upon their oath do further present that in execution of said conspiracy and agreement and to effect the object thereof afterward on the eighth day of October, in the year of our Lord one thousand nine hundrad and thirty, at the City of Newark, in the County of Essex aforesaid, the said Harold Corbett, John Crisifulli and Ernest Fiumara did demand of the said Harry McCabe, the sum of seventy-five dollars and did then and there threaten to steal, take and carry away the goods and chattels of the said Harry McCabe and Daniel Ruder, Junior, partners, trading under the firm name of McCabe and Ruder, to wit; certain trucks unless

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the said sum of seventy-five dollars was paid to them, the said Harold Corbett, John Crisifulli and Ernest Fiumara, by the said firm of McCabe and Ruder, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

JOSEPH L. SMITH,
Prosecutor of the Pleas.

On the eighteenth day of November A. D. Nineteen hundred and thirty, on which day the said Indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, and to be delivered to the Clerk of the Court of Quarter Sessions, in and for said County of Essex, and then and there the said indictment was duly delivered and duly filed by the Clerk of said Court and an entry of such order and delivery and filing was then and there made in the minutes of said Court at the same time pursuant to the statute in such case made and provided.

And afterwards, that is to say on the twentieth day of November A. D., Nineteen hundred and thirty, at a Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Hon. Dallas Flannagan, Presiding Judge of the Court of Common Pleas, Harold Corbett and Ernest Fiumara, in the custody of Harry L. Huelsenbeck, Sheriff of the County of Essex aforesaid, and the said Harold Corbett and Ernest Fiumara being brought before the bar in their own proper person and forthwith being demanded of and concerning the premises in the above indictment

specified and charged upon them, how they would acquit themselves thereof, say that they are Not Guilty thereof, and therefore for good and evil they put themselves upon the country, &c., and Joseph L. Smith, Prosecutor of the Pleas of said State, for said County of Essex in this behalf doth the like.

Therefore, let a jury thereupon come before the Court of Quarter Sessions to be holden at Newark, in and for the County of Essex, on the tenth day of March A. D. Nineteen Hundred and Thirty-one, then next ensuing twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said Harold Corbett and Ernest Fiumara to recognize upon their oath whether the said Harold Corbett and Ernest Fiumara are Guilty of the premises in the said indictment specified or Not Guilty because the said Joseph L. Smith, Esquire, Prosecutor, &c., as the said Harold Corbett and Ernest Fiumara puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

And afterwards, that is to say, on the tenth day of March, A. D. Nineteen hundred and thirty-one, at the same Court of Quarter Sessions, holden before the Honorable Dallas Flannagan, Judge of the Court of Common Pleas, comes the said Joseph L. Smith, who prosecutes as aforesaid, and the said Harold Corbett and Ernest Fiumara, and the jury of whom mention is before made, and by Harry L. Huelsenbeck, Sheriff of the County of Essex, for this purpose empanelled and returned

after the following challenges were exhausted, by the State 3, by the defendants 10 and by consent 1, to wit, 1, Fred Germer, 2, Samuel Reiter, 3, Joseph M. Garven, 4, Thomas K. Handy, 5, George H. Hoffman, 6, Frank A. Giraud, 7, William G. Gray, 8, John J. Goff, 9, William Stewart Hough, 10, Robert E. Jackson, 11, George W. Elmquist, 12, William L. Guerin, being called were sworn upon that jury who to speak the truth of and concerning the premises and thereupon the trial of said issue was commanded and continued.

At the close of the State's case, Counsel for both defendants made motions for a direction of verdict of acquital, which motions were heard by the court and denied.

And at the close of the whole case Counsel for both defendants made motions for a direction of verdict of acquital which motions were heard and denied by the Court.

When the jury returned into Court in charge of the officer sworn to attend them and then and there in the presence of the Prosecutor, Defendant and Court, do say upon their oath, "We find both defendants, Harold Corbett and Ernest Fiumara, Guilty in the manner and form as is set forth in the indictment, and so they say all.

The Court ordered the Clerk to receive the verdict of the jury in open Court in the absence of the Judge and that court remain open for that purpose.

By request of Joseph Zemel, counsel for defendant Harold Corbett, the jury was polled and when the roll was called each juror, for himself answered, "Guilty in the manner and form as is set forth in the indictment".

Return to Writ.

(Judgment signed)
(March 23, 1931)
DALLAS FLANNAGAN,
Judge

Whereupon all and singular, the premises being seen and by the Court now here fully understood, on this 23rd day of March A. D. Nineteen hundred and thirty-one, the Court, Hon. Dallas Flannagan do order and adjudge that the said defendant, Harold Corbett, be imprisoned in the Penitentiary of this county for a term of eighteen months at hard labor upon this conviction, without costs.

(Judgment signed)
(March 23, 1931)
DALLAS FLANNAGAN,
Judge.

And on this 23rd day of March, A. D. Nineteen hundred and thirty-one, the Court Hon. Dallas Flannagan, do order and adjudge that the said defendant, Ernest Fiumara, be imprisoned in the State Prison of this State for a term of two years at hard labor upon this conviction without costs. And the defendants be in Mercy Etc.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

Tuesday, March 10, 1931

STATE OF NEW JERSEY, *vs.* HAROLD CORBETT and ERNEST FIUMARA,	On Indictment No. 33 Dec. T. 1930 for Conspiracy.

Before Hon. Dallas Flannagan, Judge.

Simon L. Fisch, First Assistant Prosecutor of the Pleas, for the State.

J. Victor D'Aloia for defendant Ernest Fiumara.

Joseph Zemel for defendant Harold Corbett.

(A jury is called and sworn.)
(Mr. Fisch opens in behalf of the State.)

DANIEL RUDER, sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Fisch.

Q. You live in Newark? A. Yes.
Q. How long have you lived in Newark? A. Thirty-two years.
Q. What is your business? A. Trucking business.
Q. Where is your place of business? A. 120 New York avenue.
Q. And have you a partner in that business? A. Mr. McCabe.
Q. How long have you been in the trucking business? A. With McCabe nine years.
Q. And before that? A. With my father.
Q. How long? A. Fifteen years.

Q. And were you in the trucking business in October of last year? A. Yes.

Q. And were you at your place of business on a Monday, the 6th of October, last? A. Yes.

Q. And did anybody come to your place of business on that day? A. Three men pulled up in a Cadillac touring car.

Q. And do you see any of those men here? A. There is two of them (indicating).

Q. Will you point them out. A. Corbett and Fiumara.

Q. That is the two defendants here in court? A. Yes.

Q. And there was a third man, you say? A. Yes.

Q. Did you know any of those men before that day? A. I knew two of them—or one of them.

Q. Which one did you know? A. Corbett.

Q. You did know Corbett before that? A. Yes.

Q. How long had you known him? A. Oh, five or six years.

Q. Now, you say they pulled up in a Cadillac touring car? A. Yes.

Q. Did any of them speak to you? A. They called me outside.

Q. Did you go out? A. Yes.

Q. Did you get in the car? A. I stood alongside of the car.

Q. Did any of them speak to you there while you stood alongside of the car? A. Yes. They told me they wanted to go to work.

MR. D'ALOIA. We object to the they.

Q. Did any of them speak to you? A. Yes or no. A. Yes.

Q. Now, which one? A. Corbett.

Q. What did he say? A. He said he wanted to go to work at $75 a week to protect the trucks.

Q. To protect the trucks? A. Yes.

Q. And what else did he say, if anything? A. Well, he said he wanted to get put on the payroll so he would not have any trouble, the trucks would not be stolen.

Q. What else, if anything, did he say? A. He said if he did not get put on the payroll, why, we were going to have trouble.

Q. What else? A. That is about all, I guess.

Q. What else, if anything, did he say would happen unless you gave him $75 a week?

MR. D'ALOIA. I object. Leading.

THE COURT. I think it is, but the witness apparently has been exhausted. He is asked if he can remember anything else and he said no. Go ahead. I will allow it.

Q. Answer the question. A. What was the question?

Q. What else, if anything,—what did he say would happen unless you gave him the $75 a week? A. Well, I told you they said the trucks would be stolen.

Q. Did he say who would steal the trucks? A. No.

Q. What is that? A. They would take the trucks.

Q. That they would take the trucks? A. That is right.

Q. And was anything said with regard to what these trucks were used for? A. No, sir.

Q. And what then did you say to them? A. I told them I would talk it over with my partner, McCabe.

Q. And then what happened? A. They said they would be around in a couple of days.

Q. Now, did anything happen to any of your trucks on that day? A. The next morning.

MR. D'ALOIA. That is objected to.

MR. FISCH. I think it is perfectly proper to show the circumstances.

THE COURT. I will allow it.

MR. D'ALOIA. No. If something happened to the trucks, we cannot be held responsible for that. A lot of things may happen to this man's trucks. He may have trouble with the labor union.

THE COURT. Well, it depends on what was done.

MR. D'ALOIA. I know, but the general question, "Did something happen to the trucks". Suppose one of the men in his employ was dissatisfied and did something with the trucks. There might have been a thousand people who might have done something to his trucks that day.

THE COURT. Is this the very same day?

MR. FISCH. The following morning.

THE COURT. I will allow it.

Defendants' counsel pray an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q. What, if anything, happened to your trucks the following morning? A. Two trucks were taken out of the garage.

Q. Was there anything in them? A. Empty beer barrels.

Q. And were they subsequently recovered? A. No.

Q. Never recovered? A. No.

Q. Now, you say they were taken out. What do you mean by that? A. Stolen.

MR. D'ALOIA. That is all objected to under that original objection.

THE COURT. Well, I will overrule the objection and give you an exception except to that part of the witness' statement that they were stolen. I will strike that out, and what happened to the trucks, did they disappear or what?

Let the exception be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

WITNESS. We found them down in the railroad yard.

THE COURT. I thought you said they were not recovered.

WITNESS. The empty barrels, I thought he meant.

THE COURT. What you mean to say is your trucks disappeared from your garage?

WITNESS. Yes, sir.

Q. And did you subsequently find the trucks? A. Yes.

Q. Where? A. Down on Wilson avenue.

Q. What about the contents? A. We did not get them back.

Q. Those were the empty beer barrels A. Yes.

Q. They were gone? A. Yes.

Q. And the trucks were found downtown? A. Yes.

Q. Now, did you speak to your partner, Mr. McCabe, about this visit of the defendants? A. Yes.

Q. Now, what, if anything, did you do about this matter? A. We did not do anything. The only thing we said we would not pay them.

MR. D'ALOIA. If this is a conversation between the parties——

THE COURT. Who are you talking about?

MR. FISCH. I consent that be stricken out.

Q. Did you report the matter to the police? A. Yes.

Q. When did you report it to the police?

THE COURT. You mean you and your partner said that between you?

WITNESS. Yes.

THE COURT. In the absence of the defendants?

WITNESS. Yes, sir.

THE COURT. Strike it out.

MR. FISCH. I consent it be stricken out.

Q. When did you report it to the police? A. October 6th.

Q. How did you report it, that is, did you report it by telephone? A. Telephone.

Q. Now, on the 8th of October were you at your place of business with your partner? A. Yes.

Q. And did you see any of the defendants on that day? A. A car stopped at 102½ New York avenue.

Q. And that is a short distance from your place of business? A. Yes.

Q. And you and your partner were both there? A. Yes.

Q. And did you discuss that matter of the car being there? A. Yes. We looked out and seen the car.

Q. Was it the same car you had seen on the 6th? A. Yes.

Q. What did you or your partner then do? A. I called police headquarters. In the meantime this car pulled away and McCabe started to follow them.

Q. In another automobile? A. In another automobile.

Q. Now, did you see the defendants after that? A. Yes, when they picked them up on Ferry street.

Q. Well, did you see them? A. Yes.

Q. Where? A. Ferry street, near Jackson street.

Q. How did you come to be down on Ferry street near Jackson street? A. I had a couple of detectives in my car.

Q. And you went out in a car, also? A. Yes.

Q. You were not in the same car with your partner? A. No.

Q. You were in your own car? A. Yes.

Q. What did you do? A. We went down looking for them.

Q. Did you see what happened? A. Yes. They pushed them into the curb at Ferry street and Jackson street and took them to Headquarters.

Q. And you saw the defendants arrested? A. Yes.

Q. And did you identify these defendants at Police Headquarters? A. Yes.

Q. And you say these are two of the three men? A. These are two.

THE COURT. The second time you saw the same car did you see who was in the car?

WITNESS. No. They were a couple of hundred feet away from where I was.

THE COURT. And that is the car your partner followed?

WITNESS. Yes, sir.

THE COURT. And you waited until the police came and you went somewhere?

WITNESS. The police came, yes.

Q. You went with some of the police? A. Yes.

Q. In your car? A. Yes.

Q. I believe you testified that you saw these defendants arrested. A. That is right.

Q. Now, did you see whether they were taken from an automobile? A. Yes, they were.

Q. And what automobile were they taken from? A. A Cadillac.

Q. The same car you had seen on the 6th? A. Yes.

Q. And also the same car you had seen out in the street that afternoon when your partner followed it? A. That is right.

CROSS EXAMINATION by Mr. Zemel.

Q. Corbett worked for you. A. No, sir.

Q. Never in his life worked for you? A. No.

Q. At no time? Did you ever give him any money at any time? A. No.

Q. Never paid him any wages at all? A. No.

Q. Did he work for your father? A. He might have.

Q. You were in business with your father, weren't you? A. Yes, but I drove a truck, too.

Q. In what business were you in 1928, the summer? A. Trucking business.

Q. At New York avenue? A. Yes.

Q. And Corbett did not work there? A. Well, I do not know whether he did or not.

Q. So far as you know, Corbett never worked there, is that right? A. That is right.

Q. When did you first meet Corbett in your life? A. He used to hang around this garage where we kept the trucks, Duffy's Coal office.

Q. And he came to you on October 6th and he said that he wanted to work for you at $75 a week, is that right? A. Yes.

Q. What did you say? A. I did not need him.

Q. And then he went, is that it? A. That is right.

THE COURT. Then that is the first time they came to see you and one of them asked you for $75 a week. You said, "We do not need you."

WITNESS. That is right.

Q. That was on October 6th? A. Yes, sir.

Q. That is all the conversation you had with him that day? A. That is all.

THE COURT. I thought you said before that you told them you would talk it over.

WITNESS. I did, your Honor.

THE COURT. Well, you did tell him you would talk it over with your partner?

WITNESS. That is right.

THE COURT. Now, I understood you to say you told them you did not need them.

WITNESS. I told them we would not pay them.

THE COURT. Well, what was it you told them you were going to talk over with your partner?

WITNESS. They wanted $75 a week to protect the trucks.

THE COURT. I understand that. What I cannot understand is this. You said just

now that you told these men that you did not need them and you said at another time that you were going to talk it over with your partner.

WITNESS. Well, I did say I would talk it over, but I told him I would not pay it. They said, "Talk it over with your partner." They wanted $75 a week, and I told them I would talk it over with McCabe, but we would not pay them.

Q. The first time you met them on October 6th, did you speak with Corbett or all three? A. There were three of them in the automobile.

Q. Which one of them spoke to you, or did all of them speak to you? A. Well, Corbett done the talking.

Q. And just what did Corbett say? A. He said he wanted $75 a week to protect the trucks. He wanted to go to work.

Q. Will you give me the exact words he used? A. I just told you.

Q. Will you say just the words he told you? A. He said, "Put us to work for $75 a week to protect the trucks."

Q. And you said you would talk it over with your patrner? A. That is right.

Q. And then you called up the police, is that right? A. Yes.

Q. Nothing else said at that time? A. That is all.

Q. Did you speak to anybody about this case? A. What do you mean?

Q. Did you speak to anybody about this case? A. You mean the policemen?

Q. Yes. A. Yes.

Q. When did you last speak to them? A. Just before we came in here.

Daniel Ruder, for State, Cross.

CROSS EXAMINATION by Mr. D'Aloia.

Q. Now, when Corbett asked you to give him $75 a week to protect your trucks he said that, didn't he? A. Yes.

Q. Fiumara did not say a word, did he? A. No.

Q. At no time did Fiumara say anything to you, did he? A. No.

Q. And it seems that you asked them to come back. You said you would see your partner. A. He said he would be back in a couple of days.

Q. You said, "I will talk to McCabe"? A. Yes.

Q. And you would let them know? A. Yes.

Q. How soon after that did you call up the police? A. The same afternoon.

Q. You did not discover that one of your trucks was missing until the next morning. A. That is right.

Q. Well, did you call up the police before your trucks were missing? A. No. We called up the police about these fellows trying to shake us.

Q. All you had was a conversation with Corbett and Corbett said to you he wanted $75 a week to protect your trucks?

MR. FISCH. I object to that portion which says it is not so. This witness has testified it was so. That is not so, the shaking part.

Q. It was true they, in fact, tried to shake you, and wanted $75 to protect your trucks?

MR. FISCH. I object to that. This witness testified that unless the $75 was paid, they were going to take their trucks.

THE COURT. That is asking for the witness' conclusion.

MR. FISCH. I am trying to show that

conclusion was erroneous from his own testimony.

THE COURT. Perhaps that is so, but I think the proper procedure is to strike it out.

MR. FISCH. I move to strike it out.

THE COURT. Strike it out.

Q. Now, on the morning of the 6th of October, what time was it you talked to Corbett?

MR. FISCH. I object to that. There is no evidence it was in the morning.

Q. Well, on that day. A. Well, before these fellows—

Q. No. Answer my question. What time was it on the 6th of October that this automobile came up and you went out and had a talk with Corbett? A. About noon time.

Q. This is Corbett (indicating)? A. Yes.

Q. You know him? A. Yes.

Q. You have seen him around the place where your trucks were stored? A. Yes.

Q. You do not know whether he was ever hired as a driver? A. He never worked for me.

Q. But he might have worked for your father or Mr. McCabe. A. No, he never worked for Mr. McCabe.

Q. Now, that noon when he came around, what did he say, using his words? A. He wanted $75 a week.

Q. And what did he say? Did he say, "Hello, Mr. Ruder?" A. I don't know whether he did or not.

Q. Well, we are trying to find out what he said. A. He come around and said he wanted $75.

Q. What did he say? A. I am trying to tell you what he said.

Q. No, use his words. Did he say, "Hello, Ruder?" A. I do not know whether he did or not.

Q. What was his first remark? A. I am trying to tell you.

Q. No, you are not. I want you to give us his words.

THE COURT. He wants you to quote him.

WITNESS. He pulled up and said he wanted to be put on the payroll.

Q. What did he say? Give us his words. A. I am trying to tell you.

Q. Can't you say, Corbett said, "I want to be put on the payroll"?

MR. FISCH. I object to that. Why have counsel suggest to the witness what he would like to have the witness say. The witness said all along that this man said "we" and counsel tried to put in his mouth the word "I".

Q. All right. I want you to put yourself in Corbett's place and give us the conversation; not your words, his words. A. "We want to get put on the payroll."

Q. What did you say? A. I told him I would talk it over with McCabe.

Q. You are sure about that? A. That is all that Corbett said.

MR. FISCH. I object to that.

MR. D'ALOIA. Well, he can say that is all he said.

THE COURT. No. You did not ask him that.

Q. Is that all that Corbett said? A. He mentioned the $75 a week for protection.

Q. Now, you said he said, "We want to be put on the payroll." A. That is right.

Q. And you said, "I will talk to my partner about it". A. He told me the amount they wanted.

Q. What did he say? A. Come around—he said, "We want to get put on the payroll for $75 a week to protect your trucks.

Q. And you said, "We do not need you?" A. I said, "I will talk it over with McCabe.

Q. When did you say you did not need them? A. At the same time I said we would not pay it.

Q. No, you told the Court that is what you said when you talked it over with Mr. McCabe.

MR. FISCH. No. That is not what the witness said.

THE COURT. He said in court that he also told the man he would not pay it.

Q. Now, you said to Corbett you would not pay it. A. Right.

Q. Was that before or after you said, "I will talk to McCabe about it"? A. That was before.

Q. And you stood there and said, "I will talk to McCabe"? A. I will see what McCabe has to say.

Q. And he said, "All right, we will come in in a couple of days"? A. Yes.

Q. That is what he said? A. Yes.

Q. Fiumara never said a word. A. No.

Q. You know Fiumara? A. Well, I seen him around.

Q. He drove a truck for you. A. No.

Q. Drove a truck for McCabe? A. No.

Q. At no time? A. No.

Q. You are sure about that? A. Positive.

Q. Have you any books down there showing the men you hired during the last two or three years? A. No.

Q. You did not keep any books? A. Yes, we have a book.

Q. What did you say no, sir, for? Now, have you a book or haven't you? A Yes.

Q. Now, do you keep it? A. Sometimes.

Q. Does it contain the names of your truck drivers? A. Yes.

Q. Now, have you seen it recently? A. Yes, about a month ago.

Q. Would you say that Fiumara's name is not in there? A. Positively.

Q. He never worked for you or McCabe? A. No.

Q. On this particular occasion, the 6th of October, he never said a word? A. No.

Q. And you never said a word to him? A. That is right.

Q. Now, the automobile drove away, didn't it? A. Yes.

Q. And that was around noon. What time did you call the police? A. About two or three o'clock.

Q. Nothing had happened that afternoon to any of your trucks? A. No, sir.

Q. You made some statement to the police about a man by the name of Corbett. Did you tell them what name, a fellow by the name of Corbett came here and wanted to be put on the payroll to protect our trucks? A. Yes.

Q. Now, the next day you did not see them, did you, the 7th? A. No.

Q. Now, on the 8th, you say that you saw an automobile with Corbett in it, about 200 feet away from your place. A. That is right.

Q. And your partner trailed the car, is that right? A. That is right.

Q. And you trailed your partner's car with a

couple of detectives, is that right? A. When the detectives come down, I drove them downtown.

Q. Now, on the 8th of October, did you talk with Fiumara at all? A. No.

REDIRECT EXAMINATION by Mr. Fisch.

Q. Just what did you tell the police when you called them up on the telephone on the 6th? A. Well, I told them these fellows come—

MR. D'ALOIA. I move to strike that out.

THE COURT. Strike it out.

Q. What did you say to them when you called them up on the telephone?

MR. D'ALOIA. To whom?

MR. FISCH. The police.

MR. D'ALOIA. I brought out the fact he called up the police. What he said to them, we cannot be bound by.

THE COURT. Do you object to it?

MR. D'ALOIA. Yes, sir.

MR. FISCH. Counsel opened the door. Counsel asked this witness whether he told the police thus and so, and what he did tell the police. He asked a part of the conversation. I have a right, I submit, to then go into it and have the witness tell us the entire conversation which he had with the police. Your Honor will find toward the latter part of the cross examination Mr. D'Aloia asked if he did not tell the police certain thing and mentioned Corbett's name and said that Corbett had been there.

THE COURT. No. I hardly think the door is opened. I think Mr. D'Aloia asked the witness if he did not tell the police that Corbett was there.

MR. FISCH. I think he went a little further than that and even if that was the extent of it, I submit the door has been opened for this witness to say what he did tell the police.

THE COURT. No. I will sustain the objection.

HARRY McCABE, sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Fisch.

Q. Where do you live? A. I live 120 Rutgers street, Belleville.

Q. What is your business? A. Trucking business.

Q. And is Mr. Ruder your partner? A. Yes.

Q. How long have you been engaged in the trucking business? A. About nine years with Mr. Ruder.

Q. And before that? A. I was in the trucking business three or four years and jitney business by myself.

Q. And where is your place of business? A. 120 New York Avenue.

Q. Now, on the 6th of October, last, did you have a conversation with your partner, Mr. Ruder? A. Yes.

Q. And subsequent to that conversation and a few days—two days afterwards, did you see an automobile parked a short distance from your place of business? A. Yes.

Q. Where was that automobile parked? A. About 200 feet away from our office.

Q. And about what time of day was it? A. I am not sure of the time. It was early in the afternoon.

Q. And what kind of car was it? A. Cadillac. Open Cadillac car.

Q. And where was your partner at the time that you saw that car? A. He and I were across the street talking.

Q. And did you and your partner have any conversation with reference to the car? A. Yes.

Q. How many people were in that car? A. Three.

Q. What then did either you or your partner do with reference to this matter? A. Why, he said, "There is the car—

MR. D'ALOIA. No. Wait a minute.

Q. No, you cannot tell us what he said. A. Mr. Ruder called up the Police Department.

Q. And what did you do? A. Well, the car started off and I followed him.

Q. What did you follow in? A. With my own car, a Buick.

Q. And what course did the car take? A. It went east on New York avenue and north on Adams street to Walnut street, on Walnut street to Lang street and went south on Lang street and turned around and met me at Lang street and Walnut street.

Q. What do you mean by that? A. Well, I was going east on Walnut street and I had not got to the corner at the time they turned south on Lang street. Then they continued north and met me.

Q. What do you mean by met you? A. Well, both cars came together at that corner.

Q. You mean they came together head-on? A. Very near.

Q. Very near head-on? A. Yes.

Q. So was the progress of your car blocked in the direction that you were going? A. Well, slightly, yes.

Q. And then did you bring your car to a

standstill? A. Well, I almost stopped. I turned left and continued on Lang street north.

Q. And then what happened? A. Why, I turned west on Lafayette street and—

Q. Pardon me for interrupting you. When this cas pulled in front of yours—

MR. D'ALOIA. I object to that question. There is not any evidence that any car pulled in front of this witness' car.

THE COURT. Well, he said that he met his car. Can you illustrate that on this blackboard how this car went?

WITNESS. Yes, sir.

THE COURT. Just make a little diagram there, roughly, to give us an idea.

WITNESS. This is Walnut street (indicating). Lang Street. They came down Lang street and I continued east along Walnut street, and when I got here just about to make the turn, they were coming back, just coming by me. I kept right on going. I do not know where they went after that.

Q. Well, at that place where these cars came together that you have indicated, did anybody speak to you? A. Somebody said, "Do you want to see us?"

Q. Where was this somebody? A. They were in that Cadillac car.

Q. And that was one of the three? A. Yes.

Q. And did you answer them? A. No.

Q. And then you continued on, did you? A. Yes.

Q. And then what course did you take and what course did this car take? A. I went north on Lang street until I got to Wilson avenue, and turned West on Wilson avenue until I hit Lafayette street and went west—sort of southwest on La-

fayette street, and I went about a block and this Cadillac was going east or northeast on Lafayette street, and when they got even with me they hollered that they wanted to talk with me.

Q. You say when they got even with you. A. Yes, when we both pulled together. They were on one side and we were on the other.

THE COURT. Both going in opposite directions?

WITNESS. Yes, sir.

Q. And did somebody speak to you? A. Yes. I am not sure it was a call from the car.

Q. What was the call? A. "Wait a minute. We want to talk to you."

Q. Then did you stop? A. Yes.

Q. Then what happened? A. Why, a fellow named Crisifulli walked across the street.

Q. Anybody else? A. Yes. Corbett followed.

Q. Do you see him here in court? A. Yes.

Q. Which one is Corbett? A. The tall fellow. The first one.

Q. The first one nearest to me? A. Yes.

Q. And then you say Crisifulli and Corbett both came over to your car? A. Yes.

THE COURT. Came over from where?

WITNESS. From the Cadillac car.

Q. And where was the other defendant? A. There was another man sitting in the car, but I did not know who it was.

Q. And he stayed in the car, did he? A. Yes.

Q. And when they came over to your car, what conversation, if any, was had with you? A. Why, Crisifulli said to me, "Did you talk to Ruder yet, or did he mention anything about that $75 for protecting your trucks?" I said, "Yes, we had a conversation about it, but" I said that Mr. Ruder at that time was sick and he did not have much

time to talk the thing over, and so we let it drop, and he said, "I heard you lost a couple of trucks with empties." He said, "Now, I think if we were on the payroll I think we could get those back for you," and so Corbett said, when we protect your trucks and one thing and another.

Q. What is that? A. Corbett said, "We could protect your trucks if we were on the payroll and nobody would steal them." That is about all that was said.

Q. What, if anything, was said with regard to any other truckmen paying? A. He said there were other truckmen on the payroll.

Q. What is that? A. He said they were on the payroll of other truckmen.

Q. Did he say what for? A. Protecting trucks.

MR. D'ALOIA. All this conversation I ask your Honor to instruct the jury is not binding on the defendant Fiumara. This witness does not say he was there, nor it was in the car.

MR. FISCH. Well, we are not finished with whether he was in the car or not. The testimony is that these three defendants were arrested and taken out of that Cadillac car.

MR. D'ALOIA. Yes, but at this particular juncture this witness said two men came out of the car and the third man was left there.

THE COURT. Well, I will reserve that. I will wait until I find out whether or not his testimony is the other man in the car was Fiumara, and if it was, that will be one situation, and if not, another.

MR. D'ALOIA. Well, at this time he says he does not know who this man was.

THE COURT. Well, there is no use of striking it out. If the Prosecutor does not follow it further, and if he does I will entertain your motion. Go ahead.

Q. Now, what, if anything, was said by either of the men, either by Crisifulli or Corbett in that conversation with reference to what would happen if the money was not paid?

MR. D'ALOIA. I object to that question, because it is leading.

THE COURT. All right. Reframe it, Mr. Prosecutor.

Q. What else, if anything, was said by Crisifulli or Corbett in that conversation? A. "Your trucks and pleasure cars will be bothered if we are not on the payroll."

Q. If what? A. If we are not on the payroll.

Q. Now, can you give us the exact words that were used with reference to that?

MR. D'ALOIA. This is all subject to my objection.

THE COURT. All right.

A. Your trucks and pleasure cars will be bothered plenty if we are not put on the payroll.

Q. And what did you say then? A. I said, "As far as I am concerned, you won't be put on the payroll, but I will talk it over with Mr. Ruder.

Q. And from there where did you go? A. I went up to the warehouse.

Q. And then where did you go? A. We started to cruise down neck with Mr. Ruder's car and two detectives, I think, two detectives in my car and three detectives in the other car, and we cruised around and sighted the Cadillac and on

Wilson avenue one of the cars pulled in front of the Cadillac and they arrested the three men.

Q. What three men were brought out of that Cadillac? A. Fiumara, Corbett and Crisifulli.

Q. Now, on the day before this occurrence when these men were arrested and you had this conversation what, if anything, happened to any of your trucks?

MR. D'ALOIA. That is objected to.

THE COURT. Now, when you—you saw the truck come up and drive—the Cadillac drive up alongside of your car.

WITNESS. Yes, sir.

THE COURT. And then you saw them again.

WITNESS. Yes, sir.

THE COURT. And two of the men come over and began to talk to you?

WITNESS. Yes, sir.

THE COURT. Now, could you recognize the third man in that Cadillac?

WITNESS. No, I couldn't. At Headquarters I only picked out two men.

Q. Now, what, if anything, happened to any of your trucks on the day before this 8th of October?

MR. D'ALOIA. That is objected to.

THE COURT. Well, this is the same event.

MR. FISCH. Yes, your Honor.

THE COURUT. I will allow it.

Counsel for defendant Fiumara prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q. You may answer the question. A. Our truck was stolen and another truck from the same garage was stolen on that morning.

Q. Your truck, what was the contents of it? A. Empty beer barrels.

Q. Did you subsequently recover the truck? A. We recovered the truck.

Q. Where? A. Down on Wilson avenue.

Q. What about the contents of it? A. The trucks were empty.

Q. That is, the empty beer barrels were gone? A. Yes.

CROSS EXAMINATION by Mr. D'Aloia.

Q. You never talked with Fiumara on the 6th, 7th or 8th of October at any time, did you? A. No.

CROSS EXAMINATION by Mr. Zemel.

Q. Whose beer barrels were these? A. Why, we were carting for a concern in Newark.

Q. How long did you know Corbett? A. Since the 8th of October. I did not know him then, even.

Q. And he never was employed by you? A. No.

Q. You never paid him any money? A. No, sir.

Q. You are in the place of business every day, are you not? A. Not every day, no.

Q. But if he were employed there, you would know about it? A. Yes.

Q. At that time were you having any trouble with labor or labor unions? A. No.

Q. Had you ever had any trouble with labor unions?

MR. FISCH. I object. Immaterial.

DIRECT EXAMINATION by Mr. Fisch.

THE COURT. I will sustain the objection.

Q. Wasn't a trucking union being formed at that time? A. Not that I know of.

OSCAR J. LEUDDEKE, sworn in behalf of the State.

Q. You are connected with the Newark Police Department? A. Yes.

Q. Attached to the detective bureau at Headquarters? A. Yes.

Q. And did you have occasion to see Mr. Ruder on the 8th of October? A. I did.

Q. And where? A. At 120 New York avenue.

Q. And what did you do? A. Why, I was called in to the office, Deputy Chief Brex, with Detective Staats, LaBagliva and McGovern. The chief told us—

Q. He gave you some instructions? A. That is right.

Q. And as a result of those instructions, what did you do, where did you go? A. We went to 120 New York avenue.

Q. Did you see Mr. Ruder there? A. Mr. Ruder.

Q. And what did you do? A. Mr. Ruder told us to wait there a few minutes, that a Mr. McCabe was out trailing—

MR. D'ALOIA. I object to that conversation.

Q. He told you something. A. Yes.

Q. And then did you wait there? A. We did.

Q. And then what did you do? A. Why, we turned around after Mr. McCabe come back and spoke to Mr. Ruder.

Q. You saw Mr. McCabe? A. Yes.

Q. And you saw Mr. McCabe speak to Ruder? A. Yes.

Q. Then after that what did you do? A. We were facing west and turned our car around and drove east on New York avenue and went down New York avenue somewhere down on Lang street.

Q. Who was with you? A. Detective Staats, LaBagliva McGovern and Mr. Ruder.

Q. And where was Mr. McCabe? A. In another car.

Q. Did you see his car? A. I did.

Q. And did you see a Cadillac car? A. Well, after we had left 120 New York avenue and rode around for about five or six minutes, Mr. McCabe pointed the car out, a Cadillac touring car.

Q. Mr. McCabe, the man that was in your car? A. No. The man that was in the other car. He drove up alongside of us and said, "There goes the car."

MR. D'ALOIA. I move to strike that out.

THE COURT. Strike it out.

Q. And at what point was that when he did that? A. That was at the junction of Wilson avenue and Ferry street.

Q. And did you see anybody in that Cadillac car that was pointed out? A. Three men.

Q. And then what did you do? A. We trailed the car as far as between Jackson street and Madison street on Ferry street and pulled the car into the right hand curb. We got out and stuck them up with guns in our hands. We had the three of them get out of the car and we searched them.

Q. What three men got out of the car? A. Corbett, Fiumara and Crisifulli.

Q. And were those the three men who occupied

the car from the first time you saw it that day? A. Yes.

Q. Then what did you do? A. We put the three men into the Headquarters car and brought the three men to Headquarters.

CROSS EXAMINATION by Mr. D'Aloia.

Q. You only saw the car after McCabe had pointed it out at the junction of Wilson avenue and Ferry street? A. That is right.

Q. And how long had you been down to 120 New York avenue? A. About five or six minutes.

Q. You had been traveling around for some time? A. No traveling at all. Stood right there.

Q. What time did you go down from Police Headquarters to Ruder's place? A. Somewhere between three and 3:30.

Q. You stayed there for a while? A. Five or six minutes.

Q. And you got in what car? A. In Ruder's car.

Q. Now, when you left this place at 120 New York avenue, there was not anybody around, was there? A. No.

Q. So that after going east on one street and north on another, when you got to the corner of Wilson avenue and Ferry street, you saw a car with McCabe in, that is right? A. We seen it before we got there.

Q. I know, but at that juncture he pointed out a Cadillac? A. That is right.

Q. And from that time on you kept the Cadillac in sight and you ran it in the gutter between Jackson street and Madison street on Ferry street and you took three men who were in there into custody? A. That is right.

WARREN T. MOFFAT, sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Fisch.

Q. Sergeant Moffat, do you know the defendants in this case? A. Yes.

Q. And do you know a man also Crisifulli who is one of the defendants but who is not on trial at this time? A. Yes.

Q. Did you see them at Police Headquarters? A. I did.

Q. When was that? A. The night of October 8th.

Q. And who brought them to police headquarters, if you recall? A. Why, detective Staats, Leuddeke, LaBagliva and McGovern, I believe it was.

Q. Did they have any conversation with them in your presence? A. Yes.

Q. What was it? A. Why, I was present at a conversation with Deputy Chief Brex.

Q. And who was the conversation had with? A. With Crisifulli.

Q. And was anybody—that is the fellow that is not here, is that right? A. Yes.

Q. And were these two defendants present at the time that conversation was had? A. No.

Q. And was any conversation had with either of these two defendants? A. With Corbett, yes.

Q. What was that conversation?

MR. D'ALOIA. I object to that as far as Fiumara is concerned.

THE COURT. It is not binding on Fiumara. The jury will understand it is only binding on Corbett.

Q. Please tell us what the conversation was. A. The conversation was that they admitted being down on New York avenue to see Ruder, and

in an effort to obtain some money, $75 or $100 a week for protection to drive these trucks or protect the trucks.

Q. That is what Corbett said? A. Yes.

Q. What else, if anything, was said at the conversation that you recall? A. At that time?

Q. Yes. A. With Corbett, you mean?

Q. Yes, Corbett first. A. That they were asking for this money for—

MR. ZEMEL. I object to this form of answering. I think the witness ought to state the words.

THE COURT. If you can put it in a different form. Who was doing the talking, Brex or yourself.

WITNESS. Well, at this time I was doing the talking.

THE COURT. Well, if you can put it in this form, I said to so and so, and he said to so and so, instead of summarizing it. All right. Proceed.

WITNESS. In the presence of Detective Cosgrove, Anderson and Shine, Corbett admitted that they were down to—

MR. ZEMEL. I object.

THE COURT. You are putting it in exactly the form I asked you not to. I asked you to put it in the form I suggested, that is, I said so and so and Corbett said so and so. Now, what you are doing is giving us the final conclusion, and that is objected to and in order to obviate that objection I want you to put it in this other form.

Q. Will you relate the conversation? A. I asked Corbett what his business was in that vicinity at the time of the conference with Ruder and McCabe, and he said they were down there

to get a little protection money, they were asking $75 a week for the three, he, Fiumara and Crissifulli, to be put on the payroll and protect Ruder's trucks.

Q. To protect what? A. Ruder's trucks, Ruder and McCabe, and he made a statement to that effect.

Q. And was that the extent of the conversation as you recall it? A. As I recall it, yes.

Q. Now, were you present at any conversation that was had at Police Headquarters with the defendant Fiumara? A. Yes.

Q. And what was said at that conversation? A. The same line of questioning, asking—

MR. D'ALOIA. I move to strike out that same line of questioning.

THE COURT. Well, the same line of questioning does not convey any idea at all. We will strike it out.

WITNESS. I asked Fiumara what he was doing in the presence of Corbett and Crisifulli and he admitted being down to Ruder and McCabe with them in the car and told about the visit.

MR. D'ALOIA. Will you please follow the Court's instructions? Now, tell us what he said.

WITNESS. He said he was down there —admitted being there in the company of these other two men and went to—on the course of travel and cruising that section.

THE COURT. You charged him with that?

MR. FISCH. No, he did not charge him.

Q. Will you please relate the conversation. A. He said he was cruising in that vicinitty with Corbett and Crisifulli and had stopped on Lafay-

ette street. While he stopped Crisifulli and Corbett left the car, with him driving, and went over to McCabe and spoke to McCabe, who had been following them, and wanted to know if he wanted to see them, and he did not know the conversation, and later he was picked up by the Headquarters detectives and taken to Headquarters. He admitted after questioning at Headquarters—

MR. D'ALOIA. Wait a minute. I move to strike that out.

THE COURT. Will you not stop using that word?

WITNESS. He said, as he said in the statement, that he was down there doing business for consideration money.

Q. That is the word he used, he wanted some consideration money?

MR. D'ALOIA. No. He said they were down there because they were doing some work.

THE COURT. We do not need you, Mr. Counsel, to recite what the witness said.

Q. He said he was down there doing business for some consideration money? A. Yes.

Q. And did you ask him anything about that? A. I asked him what he was to receive this consideration money for, and he said for protecting the trucks, so they are not hijacked on the road, and give him some service there, protection of the trucks and machines.

CROSS EXAMINATION by Mr. D'Aloia.

Q. Did you make any note of what was said? A. Only what I can recall from his statement.

Q. Well, is his statement here? A. I believe it is.

Q. Have you got it anywhere? A. I have not. It is in the care of the Prosecutor.

Q. Let us see, he said he was cruising in that neighborhood with Corbett and Crisifulli? A. Yes.

Q. He said he had not talked to McCabe or Ruder? A. Yes.

Q. And he said to you that he was in that neighborhood for a little consideration money to protect property? A. He was in company with Corbett and Crisifulli for that purpose.

Q. I know, you said he was with them. A. Yes.

Q. But he did not talk to Ruder or McCabe at any time? A. No.

Q. He told you that he himself was willing to get a job protecting trucks for a consideration?

MR. FISCH. I object to that.

Q. Did he tell you that? A. He didn't.

Q. Did he tell you that he asked McCabe for a job? A. No.

Q. Did he tell you that he used to drive a truck for Mr. McCabe? A. He was not talking to Mr. McCabe.

Q. Did he tell you he used to drive? A. No.

Q. So the sum and substance of your conversation with Fiumara was this, he did not talk to Ruder, he did not talk to McCabe and he was sitting down there in a car while Corbett was talking?

MR. FISCH. I object to that.

Q. Was that the substance of your conversation with him? A. He was there, but in the car. Corbett and Crisifulli were transacting the business.

MR. D'ALOIA. I move to strike that out as a conclusion.

MR. FISCH. I object to it being stricken out.

MR. D'ALOIA. Well, I am going to ask one question. I first insist that motion be granted.

THE COURT. Motion denied.

Counsel for defendant Fiumara prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q. Do you mean to tell me he used the expression while Corbett and Crisifulli were transacting business, or was that used? A. Well, in that term, while they were doing business with McCabe, why, he sat in the car.

Q. Do you mean to tell me he used the word "transacting"? A. I could not say. I do not say those were his words.

Q. Well, that is what we were trying to find out.

MR. FISCH. I object. That is not what counsel was trying to find out at all, for he was asking for the sum and substance of the conversation.

Q. You were down there in the presence of the two police officers and you interviewed Fiumara. A. Yes.

Q. You asked him if he talked to Ruder? A. Yes.

Q. And he said no, he didn't? A. Yes.

Q. You asked him if he talked to McCabe and he said no? A. Yes.

Q. Then you went at him something like this —weren't you in the car when Crisifulli and

Corbett came across the street; that is the question you put to him. A. No.

Q. What question did you put to him? A. Where were you when this conversation took place.

Q. What did he say? A. "I was in the car."

Q. And he said he did not hear it? A. Yes.

Q. And he said that he did not know what they were saying? A. That is true.

Q. And you asked him again, what were you doing around that place with those fellows, and he said he was cruising around? A. No.

Q. Well, what was the next question you put to him? A. As I recall, I asked him what he was doing down there.

Q. And what did he say? A. Talking to McCabe and Ruder.

Q. Well, he just told you he had not talked with them. A. I mean they were talking with Ruder and McCabe, Corbett and Crisifulli.

Q. But he did not know what was said. A. I asked him what was the talk about and he said, "We are trying to get on the payroll for six bits."

Q. Well, when was it he told you that he didn't know what the conversation was? A. At that time.

Q. So he did tell you or you asked him if he knew what Crisifulli and Corbett were talking about, and he did answer and say, "I don't know." A. Well, he said he did not know what they were talking about.

Q. Did you make any notes of this conversation A. No.

Q. It was some time ago. A. October.

Q. You have interviewed a lot of people since then? A. A few, yes.

Q. Didn't you ask him if he had not asked Ruder for $75 a week? A. No, I didn't.

Q. Uh? A. No.

Q. What makes you think so long? A. Well, I just—it was Corbett and Fiumara——

Q. No, Did you ask Fiumara, did you go to McCabe or to Ruder and demand $75 a week? A. Yes.

Q. And he said no, he didn't, that is right? A. Yes.

Q. Now, how long did you keep Fiumara under that interrogating strain while you were putting questions to him, how long did you keep him upon questioning him? A. About a half an hour.

Q. Would you make it an hour? A. Possibly.

Q. Would you make it an hour and a half? A .No.

Q. And when you put the questions to him, you put it to him this way, didn't you demand of Ruder or McCabe $75 a week, or something like that? A. No.

Q. He never admitted to you that he did? A. Not him, no.

REDIRECT EXAMINATION by Mr. Fisch.

Q. What did he say to you about that? A. Why, he did not admit that he did, but he was in on the case.

MR. D'ALOIA. I move to strike that out.

THE COURT. Well, did he say that?

WITNESS. That Corbett and Fiumara were looking for two bits apiece, meaning six bits, that would be $75 a week for the three men.

Q. Did he admit that he was in on it? A. yes.

RECROSS EXAMINATION by Mr. D'Aloia.

Q. Was that at the end of the hour or beginning? A. It may have been about the middle of the hour.

STATE RESTS.

MR. D'ALOIA. Insofar as the defendant Fiumara is concerned, I ask for the direction of a verdict of acquittal. Mr. Ruder and Mr. McCabe said he did not talk to them. There is not any conspiracy charge made out against Fiumara and the conversation which took place between Crisifulli and Corbett and Mr. McCabe are not binding on him.

THE COURT. Motion denied.

Counsel for defendant Fiumara prays an exception to this ruling of the Court. Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

MR. ZEMEL. At this time I move for the direction on behalf of the defendant Corbett upon the ground that the State has failed to make out a case under this indictment. The indictment which is commonly called conspiracy, a conspiracy has been defined in various ways. It is not an offense that is easy to define, but in general the essence of every conspiracy, whether civil or criminal, is one thing and that, sir, is a corrupt bargain or agreement, and the mere fact that two people or more people join in the doing of an

act which is illegal is no evidence or indication that there is a corrupt agreement to do that act. The burden of proving the agreement is, of course, upon the State. The State, as I see it, has failed to show one word. There is not a line of testimony about any corrupt agreement such as would go to make up a conspiracy in this case and, therefore, sir, I move you for a direction.

THE COURT. You mean that the State has introduced no direct testimony to show that at any particular time or place these three people got together and by conversation said, "we will do thus and so with this conspiracy?

MR. ZEMEL. I mean they have not introduced any direct testimony to that effect, or introduced any indirect testimony from which an inference or substance can be drawn.

THE COURT. Motion denied.

Counsel for defendant Corbett prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

(Recess for one hour.)

AFTER RECESS

Mr. Zemel opens in behalf of the defendant Corbett.

Mr. D'Aloia opens in behalf of the defendant Fiumara.

Harold Corbett, Defendant, Direct.

HAROLD CORBETT, defendant, sworn in his own behalf.

DIRECT EXAMINATION by Mr. Zemel.

Q. Mr. Corbett, where do you live? A. 190 Elm street.

Q. Do you recall speaking to Mr. McCabe or Mr. Ruder about October, 1930? A. Yes, I do.

Q. Where did you speak to them? A Why, I went alone over to his place of business and asked him about the job I was going to work for him, being I worked for him before.

Q. When did you work for him before? A. 1928, from May until August, when the beer business got slow and he laid me off and said he would start me up the following year.

Q. What work were you doing for them from May to August, 1928? A. I was carting beer.

Q. Where were you carting it from? A. I was carting it from across the street, from the warehouse, his garage.

Q. Where were you carting the beer to? A. I was delivering it to saloons all down neck.

Q. You quit work in August? A. Yes. He laid me off in August.

Q. When he laid you off did he tell you to come back again? A. He told me he would put me back when things picked up.

Q. While you worked they paid you? A. $50 a week.

Q. By cash or check? A. By cash.

Q. Who paid you? A. Ruder.

Q. Did McCabe ever pay you? A. Once or twice when Ruder was away.

Q. How many trucks did they have? A. Seven or eight, but they didn't work them all. They only worked two or three.

Q. In October, 1930, who did you see? A. Mr. Ruder.

Q. And what did you say to him and what did he say to you? A. I asked him about going to work again and he said, "Oh, I will give you $50 a week, and maybe start you next week." I said, "No, it is worth more than that to cart high powered beer around. I want $75."

Q. What did he say? A. Oh, he said, "I can't give you any more."

Q. Did he tell you to come back again? A. Yes.

Q. And when did you go back. A. Why, I didn't go back any more.

Q. You only saw him the once? A. He told me to see him in two or three days and think it over, and if I wanted to work for $50 to come around.

Q. You did not see him any more? A. No.

Q. Why not? A. I did not bother. He told me he would look for me and I thought probably he didn't consider it.

Q. Did you say anything to him about protection? A. No, I didn't.

Q. Did you say anything to him about consideration? A. No.

Q. Did you say anything about something happening to his trucks? A. No, I didn't.

Q. Or to his touring cars? A. No, sir.

Q. Do you recall the time you were arrested? A. Yes.

Q. When was that? A. I just cannot recall the date. I remember it was in the afternoon.

Q. Where did it take place? A. Why, on Ferry street between VanBuren and Jackson, in front of the Ironbound Theatre.

Q. Who arrested you? A. Leuddeke, Staats and McGovern and somebody else. I do not know the other fellow.

Q. Did they have a warrant for your arrest? A. No, they didn't.

MR. FISCH. I object.

THE COURT. It does not make any difference. He has answered it.

Q. Did they tell you what they were arresting you for? A. No, they didn't.

Q. Where were you taken to when you were arrested? A. They took me up to Headquarters.

Q. And what happened there? A. Why, they kept me there until—they took me in Chief Brex' office and then from there they shipped me over to the First Precinct and from there they brought me back to Headquarters at twelve o'clock at night and kicked me around until five o'clock in the morning trying to make me admit I stole empties.

MR. FISCH. I object.

THE COURT. Sustained.

Q. Tell us just what happened. A. Why, they brought me upstairs and wanted me to make a statement out that I went over there and tried to get money out of Mr. Ruder.

Q. What did you tell them? A. I denied it. I said I never went there.

MR. FISCH. I object to the form of the question.

Q. Do you know the name of the officer who wanted you to make the statement? A. Why, Sergeant Moffat and his gangster squad.

Q. What did you tell them? A. I told them I did not do it, I went there for work.

Q. How long did they keep you there? A. Why, they kept me from twelve until half past four or five o'clock in the morning.

Q. Did they say anything about beer barrels being stolen? A. Yes. They tried to make me admit I stole beer barrels.

Q. Did you make a statement? A. Yes. I was near dead.

Q. What did they beat you with? A. Rubber hose and kicked me around with their shoes.

Q. What happened the next morning? A. After that they took me to the First Precinct.

Q. How long were you kept there before you were let out? A. About five or six days.

Q. And what was your physical condition when you were let out?

MR. FISCH. I object.

A. I was very sick.

THE COURT. There was an admission testified to.

MR. ZEMEL. Yes. there was.

THE COURT. Well, the objection should have been made at that time, but I think I will allow it, anyhow.

Q. Did any part of your body bother you? A. Yes. I was all black and blue and I had a pain in the spine for a month after that.

Q. Did you go to a doctor? A. Yes. I went to a doctor.

Q. And he treated you for that? A. Yes.

THE COURT. I am allowing this, but I wish you to understand it is irregular. When a statement is offered, if there is any objection to it on the ground it is not voluntary, the time to raise the question is then, for the reason that the admisibility of the statement is a question for the Court and not for the jury. When counsel fails to do that and pursues the course you are— However, I will let you go ahead.

MR. ZEMEL. No, I will not pursue it.

CROSS EXAMINATION by Mr. D'Aloia.

Q. At any time did you have any agreement with Fiumara to get some money out of Ruder or McCabe? A. No, I didn't.

Q. Did Fiumara speak to you or Ruder or McCabe at any time to get some money out of them? A. No.

Q. He was with you at the time you were arrested. A. Why, I picked him up a second before the officers locked us up.

Q. Where did you pick him up? A. At Wilson avenue and Lafayette street, on the corner.

CROSS EXAMINATION by Mr. Fisch.

Q. What was the name of this doctor that treated you? A. Dr. Santora.

Q. Now, you were never paid by Ruder and McCabe by check? A. No. I was paid in cash.

Q. And when you went to see Ruder you went there in a Cadillac car, didn't you? A. Yes.

Q. Cadillac touring car? A. Yes.

Q. And where did you leave the car? A. Why, it stopped right in front of the place.

Q. And did you go into Ruder's place? A. I got out and he was coming out of the office. He was going away. He had his hat and coat on.

Q. Did you go in the place? A. In the office?

Q. Yes. A. No, I didn't

Q. Where did you speak to him? A. Right alongside of the office.

Q. And who was with you? A. I was alone.

Q. Nobody with you at all? A. No, not at that time. Nobody was with me.

THE COURT. Now, when you were in the Cadillac car, who was with you?

WITNESS. Nobody.

THE COURT. You were all alone?

WITNESS. I was all alone.

Q. And you say there was nobody with you at that time? At what time was there somebody with you? A. I was never there with anybody, but I passed there.

Q. With whom? A. With Crisifulli. I went to pick Crisifulli up at his house. He was sick.

Q. Who else? A. Nobody else.

Q. Was Fiumara? A. No, sir.

Q. Wasn't Fiumara with you when you were arrested? A. Yes, but I picked him up at Wilson avenue and Lafayette street.

Q. You are sure about that, are you? A. Yes.

Q. So that the first one in the car was yourself? A. Myself and Crisifulli. I went over to his house.

Q. And then you picked up Fiumara? A. Yes.

Q. You did not know at that time that you were being followed by any police officers? A. No, I didn't.

Q. And on that day before you were arrested you saw McCabe, didn't you? A. McCabe called me on Lafayette street.

Q. Did you see McCabe? A. Yes. He stopped me.

Q. You did not tell us about that, did you, on your direct examination? A. You did not ask me about it.

Q. You did not tell us about it. A. You did not ask me about it.

Q. But you did see McCabe? A. Yes.

Q. And where did you see him? A. He stopped us on Lafayette street.

Q. He stopped you. Now, how did he stop you? A. He waved and said, "Wait a minute, I want to see you."

Q. And when he waved you say he waved and said, "Wait a minute, I want to see you." Did

he shout that across the street? A. He beckoned with his hand.

Q. Did he shout that across the street? A. I would not know whether you call it a shout.

Q. Or are you interpreting his wave as meaning wait a minute? A. No. He said that, too. I overheard the words.

Q. Who was driving your car? A. I was driving the car.

Q. Who was sitting alongside of you? A. Crisifulli.

Q. Where was Fiumara? A. We did not pick him up yet. We were going down Lafayette street.

Q. And then did you get out of your car? A. Yes. I got out. We stopped.

Q. Who got out with you? A. Why, when I went over there he started asking me about beer kegs.

Q. Who got out with you? A. I got out alone.

Q. Did anybody follow you? A. I called Crisifulli.

Q. And then you had a conversation with McCabe over by his car? A. He asked me did I know anything about beer kegs. He said there were some beer barrels stolen on me, do you know anything about it, and I said no, and he said to look around some of them barrel yards and see if you can see them.

Q. He said that? A. Yes.

Q. And what did you say? A. I said, "All right."

Q. Was that all the conversation you had with him? A. No, and I asked him about the job. I asked him, Dan told me he was going to put me to work, but I said, he wants to give me $50

a week and I want $75 driving a beer truck. I said it is worth that now.

Q. And Crisifulli was there at that time when you had that conversation? A. I called him over.

Q. What did you call him over for? A. McCabe said to call over Crisifulli.

Q. Do you know why? A. No. I suppose to tell him the same thing he told me.

Q. Didn't you ask McCabe for some money? A. No, I didn't.

Q. You did not ask him for any money? A. No.

Q. And the first time when you saw Ruder how much money did you ask him for? A. Well, we were talking about the job. He offered me $50 a week and I said I wanted $75 driving a beer truck.

Q. Anything mentioned about $100? A. No. I said I thought it was worth $75 driving a beer truck.

Q. You thought it was worth $75? A. Yes.

Q. Did you go up to him and say to him that you wanted a job, that you wanted to work for him? A. No. I asked him what about going to work again.

Q. Or did you go up to him and ask him how about getting on the payroll? A. No, I didn't say that. I asked him about going to work.

Q. And did you ask him about getting $75 or $100 a week? A. No, I didn't.

Q. Didn't you tell the police that you walked over to Ruder and asked him and told him how about getting on his payroll? A. No. After they beat me up——

Q. Didn't you tell that to the police. A. That was forced out of me. I would say anything that moment. I was suffering.

Q. Did you say that to the police? A. Yes.

Q. And did you tell the police about asking or saying about getting $75 a week? A. No. They told me. I said, yes, yes, to everything they said.

Q. Well, you told them? A. Well, they told me first, did you do this, this, this, this, and I said, "Yes!" I was suffering.

Q. And did you tell them Ruder was delivering beer? A. No.

Q. And did you tell the police the money was to be used for protecting his trucks? A. No.

Q. And did you tell the police that Ruder said he would have to see his partner McCabe? A. No, sir; they told me that.

Q. Did you tell that to to police? A. I said yes to everything they said to me, being they beat me around four or five hours.

Q. Did they say to you that they knew that Ruder was selling beer? A. No.

Q. And did you tell the police that McCabe told you that he would let you know and that he pulled away in his car? A. I said anything at that time.

Q. Did you tell that to the police? A. That was forced out of me.

Mr. FISCH. I ask that that be stricken out as not responsive.

Q. Did you tell that to the police? A. They asked me and I said yes to it.

Q. You mean to say the police asked you did Ruder say to you that he would let you know, is that what you mean? A. No. They asked me first didn't you do this and didn't you do that, and I said yes.

Q. Well, what did they say about that ques-

tion? A. They said, "Didn't you steal beer kegs," was the main thing.

Q. And did you say yes, that you stole the beer kegs? A. They made me say yes. I ducked it for three hours first.

Q. And then you said, "Yes, I did steal the beer kegs". A. No, I didn't steal the beer kegs.

Q. Well, didn't you say just a moment ago that they made you say yes? A. Not about the beer kegs.

Q. Well, isn't that what you said? A. I probably made a mistake if I did. I do not recall.

Q. Well, didn't you tell the police you stole the beer kegs? A. No.

Q .And didn't you say yes to that? A. No. They beat me up and let me go.

Q. Well, they asked you about the beer kegs? A. Yes.

Q. And what did you say about the beer kegs? A. I said I didn't know nothing about them.

Q. And didn't they tell you that you stole the beer kegs? A. I do not recall. I was sick and tired from getting beat up, and they said, "Sign your name," and I signed my name on the thing and that was all. That was in the morning after four or five hours and in the morning they took me to the First Precinct.

Q. And did you tell them you stole the beer kegs? A. I do not know whether I did. I was beat up.

Q. A little while ago you said you did tell them you stole the beer kegs and then you said you didn't. Now, which is it? A. I don't remember. I was beat up so bad.

Q. And did you tell the police that you picked up Crisifulli on New York avenue? A. They

told me about it. They already said I picked him up.

Q. Did you tell them that? A. I do not recall.

Q. And did you tell them that you were in the Cadillac car accompanied by Fiumara. A. I do not recall.

Q. What do you mean when you say you do not recall? A. I do not remember.

Q. And did you tell them the route that your car took? A. No, I do not remember.

Q. You do not remember whether you told them or not? A. No.

Q. Well, which route did your car take? A. I don't know.

Q. After you left New York avenue, what route did your car take? A. I went down New York avenue to Adams street, I think. I am not sure.

Q. And then what direction did you take on Adams street? A. I went to Elm street, I think.

Q. Which way on Adams street did you go, right or left? A. To the left.

Q. And then when you got to Elm street, which way did you go on Elm street? A. I went to the right.

Q. To what street did you go? A. Over Van-Buren, I think, to Walnut street.

Q. Do you know where Lang street is? A. Yes.

Q. Did you go to Lang street? A. Lang street?

Q. Yes. A. I do not remember going to Lang street.

Q. Didn't you go right on Lang street to Walnut street? A. No, I think I turned into Van-Buren street.

Q. Now, didn't you tell the police that you had driven down New York avenue to Adams street and left on Adams street to Elm street? A. I do not remember telling them that.

Q. Well, if you told them that do you say they forced you to tell them that that was not true, that they kicked you around? A. Yes. They beat me up and I said yes to anything and they typewrite it and I signed it.

Q. Now, did you turn your car around and drive back up Elm street to Polaski street? A. No. I think I turned up VanBuren street to the left and Lafayette street to my right.

Q. You know where Polaski street is? A. Yes.

Q. Didn't you turn right on Polaski street to Lafayette street? A. No.

Q. And didn't you turn into Lafayette street between Merchant street and Lang street? A. No, I turned off VanBuren street. I went down Lafayette street.

Q. Now, where did you notice McCabe driving his car? A. On Lafayette street.

Q. And he was driving toward you? A. Yes.

Q. And wasn't that between Merchant street and Lang street on Lafayette street? A. It was near Merchant street, I think.

Q. Uh? A. I think it was near Polaski street.

Q. And in this talk that you had with McCabe when you were telling the police about this, did you tell the police that McCabe said that he was busy—that McCabe said Ruder was busy and that his was wife was sick? A. I do not remember saying that to the police.

Q. Now, who were these officers who you say kicked you around? A. Sergeant Moffat's squad.

Q. Who? A. Cosgrove, Shine, Anderson, Moffat.

Q. All of them beat you, did they? A. Yes.

Q. Did you tell that to the judge in the police court? A. No, I did not get chance to say a word there.

Q. Did you tell that to the judge? A. Not in the police court.

Q. Did you ever state it to anybody outside of your lawyer, anybody in authority? A. Why, I told it to quite a few people. You mean in the line of a doctor?

Q. No, a police officer or Prosecutor or a Judge or police official? A. No, I am telling it to you, though.

Q. Now, for the first time, is that right? A. Well, I told you it——

Q. You do not mean that you came to my office and reported it? A. No. I am telling it here and I told it to people outside.

Q. Now, you did sign a statement, didn't you? A. Yes.

Q. And is this the statement which you signed? A. I do not know what is on the statement. There is my handwriting.

Q. That is your signature, is that right? A. Yes.

Q. And you say you did not know what is in it? A. No.

Q. Didn't you read it? A. I was too sick to read it, and dizzy.

Q. And it was not read to you? A. Yes, it might have been read to me.

Q. Uh? A. It might have been read to me.

Q. And you do not know what is in it? A. No.

Q. Can you read it now? A. Yes, I can read it.

Q. You would not have any difficulty in reading it now? A. No. I am feeling all right now. I guess I could read it.

Q. Now, Crisifulli and Fiumara had no business at all with this business of yours trying to get this job? A. What do you mean had no connection? What are you talking about?

Q. Well, you said you went to see Ruder and you also spoke to McCabe about getting this job. A. I went to see Ruder.

Q. Now, Crisifulli or Fiumara had no connection with that at all. A. Not that I know.

Q. And did you tell that to the police? A. I do not remember that.

Q. Can you tell me how there came into this statement the fact that Crisifulli and Fiumara did not know that you were trying to get money from McCabe and that they are in no way connected with the case? A. Well, when I told the detectives about when I went there for the job they asked me who was with me and I said I was alone.

Q. Well, now, can you tell me how that came into this statement that I am showing you?

MR. D'Aloia. Of course, this is in the absence of Fiumara.

MR. FISCH. Yes, this is all with reference to Corbett himself.

THE COURT. I think so.

Q. Can you tell me how that got into this statement? A. Well, when they asked me that, if they went with me to ask for the job, and I said no. Probably that is how it got in.

Q. And that is the last line of this statement, isn't it, just before your signature? A. Yes. It is near the last.

Q. Well, it is the last, isn't it; the very last

line, isn't it? A. Let me see it. I cannot see. Yes, that come about when they asked me about the job.

Q. Now, it is the last line in your statement just before your signature. A. Yes.

Q. And you were compelled to sign this because you had been beaten up? A. Certainly I was beaten up.

Q. Now, can you tell us how it came about that that was put in this statement? You say you told it to the police, right? A. Yes.

Q. Now, can you tell us how it came about that they put that in the statement after they were beating you up to get you to sign or do anything that they wanted you to? A. Well, that is when they asked me when I was alone. I told them afterwards, I said I really went there to work.

Q. Is that your explanation of it in the statement? A. I don't understand you.

Q. You knew that Crisifulli and Fiumara at that time were under arrest. A. What is that?

Q. You knew that Crisifulli and Fiumara at that time were under arrest. A. Yes, they were arrested with me.

Q. And you knew they were charged with this offense with you?

MR. D'ALOIA. I object to that, to the form of the question in behalf of Fiumara. He asked if you knew Fiumara was charged at the same time with the same offense. He did not know anything of the kind. If he did know it it was rank hearsay.

Q. You knew that they were charged with the commission of the same offense you were charged with.. A. I did not know what we were locked up for.

Q. You did not? A. Not then.

Q. When did you find out? A. Upstairs when they brought us to headquarters.

Q. Yes, at the time this statement was made up and the time you signed the statement, you knew then, didn't you? A. You will have to say it over again. I do not quite understand.

Q. What is there about it that you do no understand? A. Well, I cannot hear you so plainly. I am a little deaf in one ear.

Q. You knew when this statement was being signed, or signed, you knew at that time, didn't you, that Fiumara and Crisifulli had been arrested with you and that you had all been charged with the commission of the same offense.

MR. ZEMEL. I object.

MR. D'ALOIA. That is objected to.

MR. ZEMEL. I sat here patiently and permitted counsel to go on and he repeats the same question.

THE COURT. The only question is whether you knew what charges were made. He just wants to know if he knew they were charged with some crime when he made this statement to the effect that they were not there.

Counsel for defendant Corbett prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q. Will you answer that question, please? A. You will have to say it again.

Q. (Question read.) A. Well, the detectives told us upstairs—told me upstairs and put us in the line-up there.

Q. And then you knew it? A. And then Ruder and McCabe were up there——

Q. You knew it then. A. Knew what?

Q. That you were all arrested and charged with the same offense. A. I knew we were arrested. I did not know what we were charged with.

Q. You did not know what you were charged with? A. No, not then.

Q. Now, they questioned you, did they, about the beer barrels? A. Yes. They questioned me about them.

Q. And did you tell them that you knew where they were? A. No, sir.

Q. Did you tell them that you had taken the beer barrels? A. No, sir.

Q. And have you any difficulty in hearing me now? A. No. I can hear you.

Q. And then after this statement was signed, did you see Deputy Chief Brex? A. Did I see him?

Q. Yes. A. Why, I seen him a few minutes after that.

Q. Didn't you see him shortly after the statement was signed, uh? A. No, sir.

Q. And didn't you have a conversation with Deputy Chief Brex? Never had a conversation with him at all? A. Yes, when they first brought me in there.

Q. Didn't you have a conversation with him after this statement was signed? A. No.

Q. And didn't he ask you what you meant in this statement when you said that you asked Ruder about getting $75 or $100 a week? A. He did not ask me.

MR. ZEMEL. I object. The witness testified there was no such conversation.

THE COURT. It is entirely proper for counsel to specify definitely just what was said, because it may have the effect of refreshing his recollection. I will allow it.

Q. Answer the question, please. (Question read.) A. He was not there. They took me to the first precinct.

Q. No, after the statement was signed. A. After they were through with me?

Q. And didn't Chief Brex ask you that? A. I did not see him at all.

Q. Did you ever—did Brex ever ask you that question? A. No. he didn't ask me.

Q. And didn't you tell him that you wanted that money for protection money? A. No.

Q. To protect his trucks? A. No, sir, I didn't.

Q. And didn't Brex then ask you what you were going to do about it if they did not give you the $75 or $100? A. No, he didn't.

Q. And didn't you tell Brex that you were going to take their trucks? A. No, I didn't say nothing of the kind, because Ruder was a good friend of mine. Why should I do anything like that?

Q. Now, you say you did not have any such conversation with Deputy Chief Brex in his office at Police Headquarters? A. No, I didn't.

Q. Now, you say that Ruder is a good friend of yours? A. Well, I have known him for quite a number of years.

Q. Never had any trouble with him? A. No.

Q. Do you know of any reason why he should make this complaint against you? A. Well, he told me out in the corridor the last time the case came up he wants to get paid for the beer barrels. He thought we did not take them, and he

said naturally somebody has got to make good for them.

Q. And do you know of any reason why he should have called up the police on the first day when you saw him and before these barrels were taken? A. I do not know of any reason that he should call up, only the barrels were stolen.

Q. Before the barrels were stolen?

MR. ZEMEL. I object. He does not know what reason provoked him to call up the police.

THE COURT. He was just asked if he knew any reason why Ruder should make the charge. If he does he can say so.

Q. Can you give any reason for that? A. He wanted to get paid for the beer kegs. He don't care who took them. I being over there for the job he figured I took them.

Q. Even before they were taken? A. I did not know when they were taken.

Q. Now, by the way, have you ever been convicted of crime? A. Yes, assault and battery.

Q. You were convicted of atrocious assault and battery, weren't you? A. Atrocious was it? I do not recall.

MR. ZEMEL. I object.

THE COURT. I will allow it.

Q. Weren't you convicted of atrocious assault and battery in August, 1926, before Judge Van-Riper? A. I was convicted of assault and battery.. I do not remember the atrocious.

(Paper marked S-1 for identification.)

Frank E. Brex, for State in rebuttal, Direct.

DEFENDANTS REST.

FRANK E. BREX, sworn in behalf of the State in rebuttal.

DIRECT EXAMINATION by Mr. Fisch.

Q. Deputy Chief Brex, you are connected with the Newark Police Department? A. Yes.

Q. And have been for how many years? A. Next month will be twenty-seven years.

Q. And I show you S-1 for identification and ask you whether you ever saw that before. A. I did.

Q. And where? A. In my office at Headquarters.

Q. And after you saw S-1 for identification did you see the defendant Corbett? A. I did.

Q. Where? A. In my office.

Q. And did you have any conversation with him? A. I did.

Q. And did you speak to him relative to this statement, S-1 for identification? A. I did.

Q. And did you ask him what he meant by the statement that he wanted—that he was looking for $75 or $100 a week? A. I did.

Q. And what did he say? A. He said it was for protection, to protect the trucks of Ruder.

Q. And did you then ask him what he was going to do about it if they did not give him the money? A. I did.

Q. And what did he say? A. And I said, "Suppose they would not give you the $75 or $100, what did you intend to do?" He said, "I intended to take the trucks."

Q. Now, at that time, Chief, did he complain to you that he was bruised or beaten? A. Why, no.

Q. Did you see any marks on him or any evidence of his having been beaten or bruised? A. None at all.

MR. ZEMEL. I ask that the time be fixed.

THE COURT. You better fix the time, Mr. Prosecutor.

Q. When was it? A. I believe it was the night after the arrest.

Q. The night after he was arrested? A. Yes. I first saw him in the afternoon, October 9th, on the line-up, and I saw him the next evening around probably nine or ten o'clock in my office.

Q. And was that when this conversation took place? A. Yes.

Q. And who was present when that conversation took place? A. Sergeant Moffat, there may have been one or two others, but I do not recall. Sergeant Moffat sitting at the opposite side of my desk and the defendant Corbett was seated at the end of the desk.

CROSS EXAMINATION by Mr. Zemel.

Q. You were not present when this statement was made, were you? A. No, sir.

Q. And how long was Corbett in your presence the second night that you saw him? A. Probably a half hour or an hour.

Q. And how long was he in your presence the first time you saw him? A. You mean the afternoon of the arrest, perhaps a half an hour in the line-up and identification.

Q. And what was he charged with when you first saw him? A. Why, trying to shake down Ruder.

Q. And what is the technical name he was charged with? A. I guess conspiracy, to extract money.

Q. How long was he kept in Police Headquarters, if you know? A. Of my own knowledge, I don't know.

Q. When did your department first take over the matter? A. Why, a day prior to the arrest of these two defendants, on October 8th.

Q. And on October 8th or a day prior to October 8th? A. No, a day before the line-up. A day before the arrest of Fiumara, Corbett and Crisifulli.

Q. That would be October 7th. A. I think it was the day before. It might have been two days before, but I think it was the day before the arrest of these fellows.

Q. I do not quite understand. You say you saw them before they were arrested or after? A. No. I interpreted your question to mean when did I first take up the matter. You mean the case.

Q. When was Police Headquarters first notified about a complaint being made against Corbett and Fiumara?

MR. FISCH. I object to that on the ground it is not cross examination.

THE COURT. I will allow it.

A. A day before the arrest of these defendants.

Q. A day before they were arrested? A. That is my recollection.

Q. And when did you first see them in your office? A. The next day.

Q. That is the day of the arrest, is that right? A. Yes.

Q. That is October 8th? A. No. I think that would be the 9th. I am not sure. I may be mistaken of the date, but I know as a result of a conversation I had with Mr. Ruder the next day these people were brought in.

Q. Was it a telephone conversation? A. No, an oral one, a personal one in my office.

Q. Have you your notes of that conversation? A. No, only general recollection of it.

Q. You made notes. A. I have seen the statement that Mr. Ruder made that same day.

Q. Did you take a pencil or paper and make any notes at that time? A. No.

Q. You speak on the telephone a great many times a day? A. Yes, but this was no telephone call.

Q. He came there personally? A. Yes.

Q. You are sure about that? A. I am positive.

Q. Who, Ruder or McCabe? A. Ruder.

WARREN T. MOFFAT, recalled in behalf of the State in rebuttal.

DIRECT EXAMINATION by Mr. Fisch.

Q. Were you present at Deputy Chief Brex' office at a conversation which was had between the Deputy Chief and the defendant Corbett? A. Yes.

Q. And at that time did Deputy Chief Brex have in his possession Exhibit S-1 for identification, a statement of Corbett? A. Yes.

Q. And did Deputy Chief Brex at that time ask Corbett what he meant by the words in the statement that I asked him how about getting—about $75 or $100 a week? A. Yes.

Q. And what did Corbett say to that? A. That was to be for protecting his trucks.

Q. And did Deputy Chief Brex then ask him what he was going to do about it if he did not get the money? A. Yes.

Q. What did he say to that? A. They were going to hijack his trucks, take his trucks.

Warren T. Moffat, recalled in rebuttal, Direct.

Q. By the way, did you witness this statement, S-1 for identification? A. Yes.

Q. And were you the one who took the statement from the defendant? A. I was present, yes.

Q. And who else was present? A. Detective Crosgrove, Anderson and Shine.

Q. And was this defendant beaten with a rubber hose or anything else? A. No.

Q. Uh? A. No.

Q. Any violence used on him? A. No.

Q. Did you threaten him in any way? A. No.

Q. Make any promises to him? A. None whatever.

Q. And was there put down in the statement the things that he said? A. Just as he said.

Q. And did he tell you that Crisifulli—withdraw that.

CROSS EXAMINATION by Mr. Zemel.

Q. What time of day, Sergeant, was he brought over from the First Precinct? A. Time of the day?

Q. Yes. A. I believe it was around nine o'clock in the evening.

Q. Nine o'clock in the evening? A. Yes.

Q. Nearer to midnight than nine. A. No.

Q. Sure about that? A. Yes.

Q. And how soon after that did you get this statement? A. Well, I would say about eleven o'clock or so.

Q. In other words, about two hours after he got there? A. Yes.

Q. And when he first was brought over there, what was done with him- A. He was questioned relative to this case.

Q. Who questioned him? A. I did.

Warren T. Moffat, recalled in rebuttal, Cross.

Q. And, as a matter of fact, he was questioned until five o'clock in the morning, wasn't he? A. No.

Q. Are you sure about that? A. Oh, yes.

Q. Was anyone else present in the room while he was being questioned? A. Why, at intervals, yes.

Q. Who came there at these intervals? A. Why, Detective Anderson, Shine, Detective Cosgrove was there all the time.

Q. When this typewritten statement was made you typed that all at one sitting, didn't you? A. Yes.

Q. And what time did you start to type? A. I believe it was around eleven o'clock or so.

Q. And then as you asked each question and he answered it, you typed the question and answer? A. As he gave his own story it was taken down on the paper.

Q. You did not put any questions to him. A. He was asked questions, yes.

Q. You mean you asked him questions or someone else? A. I asked him questions.

Q. No one else did. A. No.

Q. You are sure about that? A. Yes.

Q. And when did you start to question him? A. I would say it was around eleven o'clock or so.

Q. He was brought there at nine, is that right? A. Yes.

Q. And did you see him as soon as he was brought there at nine? A. Yes.

Q. What did you say to him when he was brought there at nine o'clock? A. Why, I just questioned him along these lines pertaining to this case.

Q. And did you put the questions to him the same as you put them down on the statement? A. Exactly.

Q. However, did you not see fit to type these questions and answers until eleven o'clock, although he started to give them to you at nine. A. Yes.

Q. And you witnessed the signature, of course? A. Yes.

Q. How long did it take you to type this paper? A. Oh, about a half an hour to an hour.

Q. Then you started to type it at eleven o'clock? A. Yes.

Q. And you did not type steadily because you had to ask questions? A. Yes.

Q. And Brex was not in the room at any time? A. No.

Q. You are sure about that? A. Yes.

Q. And it was about midnight when you finally finished typing? A. About midnight, yes.

Q. And Corbett had been arrested what time that day, do you know? A. Well, that I could not say, only from what I have heard and learned.

Q. So that the first time you saw Corbett was nine o'clock that night? A. Yes.

Q. You are positive that no other officer or detective was in the room during the time—during the entire time you were taking this statement? Am I right about that? A. There were other officers there.

Q. There were other officers there? A. Yes.

Q. How many of them? A. Well, at the most, four.

Q. And Detective Anderson was there, or Sergeant Anderson? A. Yes.

Q. And Shine was there?

MR. FISCH. He has testified they were.

Q. And Cosgrove was there, too, wasn't he? A. Yes.

Q. What room in police headquarters was this

statement taken? A Why, the statement was taken in the Family Court.

Q. In the Family Court? A. In the Family courtroom.

Q. That is in the building adjoining police headquarters? A. It is in the police headquarters building.

Q. Do you recall Corbett saying to you that he wanted to know what charge he was held for?

A. Yes.

Q. And do you recall Corbett saying to you that he wanted to get in touch with his lawyer?

A. No, I did not.

Q. You do not recall that? A. No.

Q. You had no warrant for Corbett's arrest?

MR. FISCH. I object to that. That does not make any difference. This man did not arrest him.

MR. ZEMEL. Here is a person being held by the police. Now, if he is being held by the police without any authority, we want to show that.

THE COURT. Well, you can, if you can show that. You are asking whether or not he had a warrant for his arrest.

MR. ZEMEL. Yes, sir.

THE COURT. Well, if he had reasonable ground to believe he committed a crime.

MR. FISCH. This was not the arresting officer, anyhow.

THE COURT. Where was this, at Police Headquarters?

WITNESS. At the First Precinct.

THE COURT. Who was in charge.

WITNESS. Why, Deputy Chief Brex was in charge.

Q. You say you were not holding him in custody? A. He was in custody, but I was not holding him.

Q. You had nothing to do with holding him? A. No.

MR. FISCH. I object. It is not cross examination.

THE COURT. Sustained.

FREDERICK ANDERSON, sworn in behalf of the State in rebuttal.

DIRECT EXAMINATION by Mr. Fisch.

Q. Detective Anderson, you are connected with the Newark Police Headquarters? A. I am.

Q. I show you S-1 for identification and ask you if you witnessed the signature of the defendant Corbett to that paper. A. I did.

Q. And were you present at the time that it was signed? A. Yes.

Q. And were you present during the time when the information was obtained that is contained in the statement? A. I was.

Q. Did you beat Corbett up? A. Positively not.

Q. Did you see anybody beat him up? A. Positively not.

Q. Anybody strike him with a rubber hose or anything else? A. No, they didn't.

Q. Did he complain to you or anybody else that he had been struck or beaten? A. No.

Q. Did he say he would sign anything because he was beaten? A. Positively not.

CROSS EXAMINATION by Mr. Zemel.

Q. What time did you first see Corbett that night? A. Why, in the neighborhood of nine o'clock.

Q. And were you present when this statement was taken down? A. I was.

Q. Sergeant Moffat typed it, is that right? A. No.

A. No. Sergeant Moffat questioned him and Detective Cosgrove took it down on the typewriter.

Q. You are sure about that? A. Positively.

Q. And who put the questions? A. Moffat.

Q. And do you recall without looking at the statement the first question that Sergeant Moffat asked Corbett? A. The first question he asked him what he was doing down in that neighborhood.

Q. And then Corbett answered? A. Absolutely.

Q. And Mr. Cosgrove wrote it down on the typewriter? A. Yes.

Q. And you were present when Corbett was brought in? A. I was.

Q. And the first thing that Corbett said when he was brought in was, "I want to make a statement, is that correct?" A. No, not the first thing he was brought in. He was brought in nine o'clock.

Q. What did he say? A. That I don't know. I was not there when Sergeant Moffat was talking to him.

Q. You were when the statement was taken? A. Positively.

Q. And did Corbett say he wanted to make a statement, or did Sergeant Moffat ask him if he would make a statement? A. I don't know.

Q. Do you know whether Sergeant Moffat asked him whether he wanted to make a statement? A. That I don't know.

Q. What time did they start to make the statement? A. In the neighborhood of eleven o'clock.

Q. Will you tell us what happened there be-

tween nine and eleven? A. That I don't know. Sergeant Moffat was talking to Corbett.

Q. You were there all the time? A. No, not then.

Q. Was there anybody else in the room that you know of while the statement was being taken? A. Detective Shine, Cosgrove, Moffat and myself.

Q. That is four? A. Four altogether.

Q. What time of the night was this statement finished? A. Well, I should say it was between a half hour and an hour. That would be between 11:30 and 12.

Q. Do I understand you right that you first saw Corbett that night at eleven o'clock? A. Nine o'clock.

Q. Now, when you saw him at nine o'clock, for how long a time were you in his presence? A.Well, I was not in his presence at all then at nine o'clock.

Q. You saw him. A. I just saw him come in, that is all.

Q. And you did not stay in the same room with him for more than a minute or so, is that right? A. That is right.

Q. When did you again come into the same room he was in? A. When he wanted to make a statement.

Q. When was that? A. Between nine and eleven.

Q. And so between nine and eleven you did not see him at all? A. I just saw him at intervals.

Q. Didn't you just tell me you saw him at nine and eleven? A. Well, I saw him in between nine and eleven, but I was not staying there all the time in the same room with them.

Q. You walked in and out of the room? A. Once or twice.

Q. About how many times? A. Say four times.

Q. And when you walked in the room for these four times, how long a period did you stay in the room? A. Four or five minutes.

Q. So you were there approximately four or five minutes at intervals out of the two hours? A. Yes.

Q. And you do not know what happened there during those two hours? A. No, sir.

JOSEPH COSGROVE, sworn in behalf of the State in rebuttal.

DIRECT EXAMINATION by Mr. Fisch.

Q. Detective Cosgrove, were you at Police Headquarters on the night when this statement, Exhibit S-1 for identification was taken? A. I was.

Q. And did you witness it? A. I did.

Q. And were you in the room where this statement was taken? A. Yes.

Q. And by whom was it taken? A. Sergeant Moffat and I wrote it. That is, I typed it.

Q. That is, Sergeant Moffat asked the questions? A. He was interviewing him.

Q. And as he got the story and as you got the story, did you type it? A. I did.

Q. Now, during this period of time were you in the room with Moffat and Corbett? A. I would say almost all of the time.

Q. Now, did you beat him up? A. No, sir.

Q. Did you see anybody beat him up? A. No.

Q. Did you see anybody there with a rubber hose or any other instrument? A. No.

Q. Did anybody touch him at all? A. No.

Q. Did he say that he would sign anything? A. No.

Q. Uh? A. No.

Q. And where was the information obtained that was put in this statement? A. From his mouth, sir.

Q. Did you put in anything that he did not say? A. Absolutely not.

CROSS EXAMINATION by Mr. Zemel.

Q. What time did you first see him that night? A. In the vicinity of nine o'clock when he was brought to Headquarters.

Q. And you started to take the statement at eleven? A. Thereabouts.

Q. And you were in his presence or he in your presence during the period of nine to eleven? A. I was in his presence most of the time.

Q. And Mr. Anderson was in there occasionally? A. Yes, as he testified.

Q. About four or five times? A. Yes.

Q. And what time did you start taking down the statement? A. I should say around eleven o'clock.

Q. And you were in the room between nine and eleven? A. I was.

Q. And did Mr. Corbett do any talking between nine and eleven? A. He and Sergeant Moffat, they were talking together.

Q. Did you overhear their conversation? A. Some I did and some I didn't.

Q. You were not paying much attention? A. No. I was there to take the statement.

Q. And at nine o'clock when Mr. Corbett first came into the place he did not say, "I want to make a statement," did he? A. I do not recall.

Q. Well, did he say it in your presence? A. I do not remember.

Q. Do you know how the discussion started about making a statement, who brought up the

subject of making a statement? A. Corbett was willing to put what he knew into the statement.

Q. Please answer my question. A. Yes.

Q. Who brought up the discussion about making a statement? A. I am pretty sure Corbett did.

Q. In other words, without being asked anything by Moffat, Corbett said, "I want to make a statement? A. In one part of his conversation that was the subject, the statement, and he was willing.

Q. But the idea of making the statement came from Corbett and not Moffat? A. That is the discussion between them. That is a voluntary statement.

MR. ZEMEL. I move that it be stricken out.

THE COURT. Strike it out.

Q. How long did it take you to type this statement? A. Oh, I should say between a half hour and an hour, as the subject went on we wrote it.

Q. It is not in question and answer form. A. It is during their conversation and with the man I made the statement whether I should put it in.

Q. Between a half hour and an hour? A. Roughly.

Q. And after the statement was made, what did you do? A. I gave it to the defendant to read and he read it.

Q. Aloud or to himself? A. He read it aloud. Any statement I take must be read aloud.

Q. And he read it aloud? A. He did.

Q. You are sure that Sergeant Moffat did not read it to him? A. Sergeant Moffat might have been looking at the statement at the same time, but the defendant read it. Any statement I take

must be read aloud so I know they understand it.

Q. But did Sergeant Moffat read it to Corbett? A. No.

Q. You are sure about that? A. I am positive that he read it himself.

Q. After the statement was finished, after Corbett had read it aloud himself, as you say, what happened next? A. Why, I went to the men's room, and then I come back.

Q. And what time was that? A. Oh, a couple of minutes after eleven. About 11:30.

Q. You started to take this statement at 11 o'clock and it took you a half hour or an hour to type it, then Corbett read it aloud, then you went to the men's room, and when you got back it was a little bit after eleven o'clock? A. Yes. It was roughly about a half hour or an hour.

ARTHUR M. SHINE, sworn in behalf of the State in rebuttal.

DIRECT EXAMINATION by Mr. Fisch.

Q. You are connected with the Newark Police Department? A. Yes.

Q. And did you witness this statement S-1 for identification? A. I did.

Q. And did you see the defendant at Headquarters at the time this statement was taken and prior thereto? A. Yes.

Q. Did you beat him up? A. No, sir.

Q. Did you see anybody beat him? A. No.

Q. Did you see anybody use any rubber hose on him? A. No.

Q. Or make any threats to him? A. No.

Q. Or force him to sign this statement? A. No.

CROSS EXAMINATION by Mr. Zemel.

Q. What time was he brought into the police department? A. About nine or 9:15 P. M.

Q. Was he brought in alone, or was somebody else brought with him? A. He was brought alone.

Q. And you saw him first about 9 or 9:15? A. About nine or 9:15.

Q. Did you stay with him continually after 9-15 or did you leave the room, too? A. No. I was in the room all that time.

Q. And when did you first go out of that room? A. Oh, around midnight.

Q. And you saw Sergeant Moffat there? A. Yes.

Q. And you saw him get a statement from Corbett? A. Why, he questioned Corbett and Detective Cosgrove typed the statement.

Q. And how long did this typing take? A. About a half hour or three-quarters of an hour.

Q. What time did he start typing? A. Around eleven o'clock.

Q. He did not start taking the statement before eleven? A. No. About eleven. Around eleven.

Q. You are sure it could not have been around ten o'clock? A. No.

Q. Tell us what happened in that room between 9:15 and eleven o'clock. A. Why, Moffat was questioning Corbett, sitting there talking to him.

Q. And while he was questioning him was Cosgrove in the room? A. Yes.

Q. He did not take that down, though, did he? A. No.

Q. When did he start to take notes down? A. Why, about eleven o'clock.

Q. Do you know why he did not typewrite any-

thing before eleven? A. We had asked Corbett to give us a statement and let ust know what he was doing in the neighborhood there, and he said that he would.

Q. When you say "We" you mean you and Sergeant Moffat? A. And the rest of them.

Q. And he said, "I will give you a statement." A. He said, "Come clean and let us know everything."

Q. And what did he say? A. Then Sergeant Moffat asked him what he was doing in the neighborhood.

Q. No, you said to him, "Come clean and let un know everything." A. I did not say it. He said he would come clean and let us know.

Q. Did anybody ask him to make a statement, Sergeant? A. Moffat did.

Q. What words did Sergeant Moffat use when he asked him to make a statement? A. He got answering the questions and Sergeant Moffat said, "Will you give us a statement or make a statement," and he said he would.

Q. Did he immediately agree to make a statement or did it require some coaxing? A. No. He voluntarily made a statement.

Q. And that voluntary offer of a statement came about eleven o'clock? A. About around eleven o'clock.

Q. It did not come ten or fifteen minutes after nine o'clock, did it? A. No.

Q. And during the two hours between nine and eleven, what was the conversation in that room? A. As to what he was doing in the neighborhood, if he had any conversation with Ruder and what it was.

Q. And although Cosgrove was there, it was not taken down? A. No.

REDIRECT EXAMINATION by Mr. Fisch.

Q. Is Cosgrove a stenographer or just one of these one-finger typists? A. He picks away at it.

MR. D'ALOIA. May I ask that you instruct the jury that all this testimony beginning with the testimony of Chief Brex, all the testimony of Sergeant Moffat in rebuttal, and all the testimony of Shine and Anderson, together with every reference made to that statement or conversations had with Corbett, that none of that testimony is binding upon the defendant Fiumara.

THE COURT. I so instruct the jury.

MR. FISCH. I want to recall the witness Ruder for the purpose of contradicting some of the testimony. I do not want to hold up the trial. It is practically at issue—

THE COURT. Is it not inconsistent with Ruder's testimony?

MR. FISCH. Yes, your Honor.

THE COURT.. He gave a different version, as I recall.

MR. FISCH. I offer S-1 for identification.

MR. ZEMEL. I object.

THE COURT. What is the ground?

MR. ZEMEL. It has not been shown that this statement is a proper one for admission.

THE COURT. It is a very indefinite ground. For what reason.

MR. ZEMEL. Why, in order that the statement may be admitted it must be shown to the Court that the statement was absolutely voluntary on the part of the defendant who is charged with making the statement.

THE COURT. Now, that is the ground. Have I got it correctly?

MR. ZEMEL. Yes, sir.

THE COURT. Do you want to make an argument?

MR. ZEMEL. I do not want to go into an extensive argument. I do not think the statement is admissible.

THE COURT. I will overrule it and admit the statement.

Counsel for defendant Corbett prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

MR. D'ALOIA. May I ask your Honor to instruct the jury that it is not binding in any shape or form upon Fiumara.

THE COURT. The jury is so instructed.

(Statement marked Exhibit S-1.)

STATE RESTS.

MR. ZEMEL. I want to make a motion, your Honor, to direct a verdict of acquittal for the defendant Corbett. In order to save time, I want to assign the same grounds I made this morning and I consider your Honor will consider it as made on those grounds, and I want to urge this additional ground. The indictment charges the defendant Corbett and the other that they did conspire, confederate, and agree and confederate together to cheat and defraud Harry McCabe and so on down. There is not a word about cheating in there. We

all know what the cheating means. There is not a word about defrauding. I say the most they can show an intent to extort and that is not the basis of the indictment.

THE COURUT. Motion denied.

MR. D'ALOIA. I ask for the direction of a verdict in behalf of the defendant Fiumara. Take all the witnesses for the state——

THE COURT. I will ask the jury to step into my room a few minutes while I hear this argument.

(The jury retires.)

THE COURT. I think I will hear the State first. Now, what evidence is there, Mr. Prosecutor, against the defendant Fiumara?

MR. FISCH. Why, the evidence against the defendant Fiumara consists of the testimony of Mr. Ruder that Fiumara was present in the automobile at the time that a conversation was had between Ruder and the defendant Corbett, in which the defendant Corbett said, "We want $75 a week for protection, and if we do not get it, we are going to steal your trucks."

THE COURT. Yes. I remember one other piece of evidence, and that is that he was found in the same automobile when the others were arrested.

MR. FISCH. Yes, sir.

THE COURT. And nothing else.

MR. FISCH. And nothing else. That he was present when the demand was made for this money and when the threat was made if they did not get it they were going to take the trucks, and the testimony of Mr. Ruder was quite specific.

THE COURT. And the further testimony that at the time the automobile came back the second time there were three men in it, but Fiumara was not identified as one of them.

MR. FISCH. Fiumara was not identified as one of the men who was in the automobile standing a short distance from McCabe and Ruder's place of business, but the testimony also is that truck was followed and when the defendants were arrested, that the same occupants who had been the occupants of the car all the time that that truck was followed were the occupants who came out of the car when they were arrested, and the testimony is that those occupants were Fiumara, Cristifulli and Corbett.

THE COURT. I agree with you except in one particular. This was a car.

MR. FISCH. Yes, a Cadillac touring car.

THE COURT. Now, as I recall the testimony, there was no evidence that these people were kept continually in sight.

MR. FISCH. I would not say that, your Honor. I would not say that there was evidence they were kept continually in sight.

THE COURT. Well, I am pretty sure they were not kept in sight, because you remember the witness describing how they turned the corner and then disappeared.

MR. FISCH. Yes, sir.

THE COURT. So it rests really upon that testimony to wit, that they were all present together at the time that this threat was made and this request for $75 was

made, and that they were again together at the time they were all arrested in the same car which they were occupying at the time the threat and proposition was made.

MR. D'ALOIA. Plus this additional fact that there is a great deal of doubt whether Fiumara was there at the time the alleged threat was made. He said he was there alone. Fiumara was not in the car that day on New York avenue. That evidence is also now to be considered by the Court. Now, I say there is not anything to connect Fiumara. His mere presence there—his not having said a word—does not in any way spell out the word agreement that the Court says must be proven beyond a reasonable doubt.

THE COURT. Of course, the language testified to was "We" want $75.

MR. D'ALOIA. That may be true, but if the State had been able to produce one of the alleged conspirators to testify positively on the State's case we had gone there.

THE COURT. You mean three men drove up in an automobile and one says, "we want to be hired at $75 a week and if we do not get hired your trucks will be stolen."

MR. D'ALOIA. Why, this conversation happened away from the automobile. Now, Ruder's testimony was confused as to the use of the pronoun. Your Honor will recall the difficulty we had with Ruder to try to pin him down to something that was definite.

THE COURT. Well, of course, if Fiumara was not in hearing of Ruder it

would not be binding.

MR. FISCH. The testimony is the conversation took place alongside of the automobile.

THE COURT. I think that is a matter for the jury to decide.

MR. FISCH. The State is going to deny that that statement is true.

MR. D'ALOIA. Here is the statement the State wants to use to convict somebody, and here is what it contains in the last line. Fiumara did not know that I was trying to get money from McCabe and is in no way connected with this case.

THE COURT. The State is not bound by it.

MR. D'ALOIA. Now, it has not been proven to anybody's satisfaction that Fiumara heard what this man said to Ruder.

THE COURT. The jury has got to infer. If they do infer that he did not hear, why of course, he is not bound. I will deny your motion and give you an exception.

Let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

(The jury returns into Court.)

Mr. Zemel sums up in behalf of the defendant Corbett.

Mr. D'Aloia sums up in behalf of the defendant Fiumara.

Mr. Fisch sums up in behalf of the State.

FLANNAGAN, *J.*

Gentlemen of the Jury. Inasmuch as it is now 4:42, I will not delay you by commenting upon the evidence, but I will confine myself to charging you upon the law applicable to the case, only referring to the evidence to such extent as is necessary with what I may find necessary to say to you upon the law.

I am requested to charge you as follows by the defendant Corbett:

"1. Under the indictment in this case the only offense of which the defendant Harold Corbett can be convicted is conspiracy and unless you find that he actually did conspire to cheat and defraud Messrs. Ruder and McCabe, you will render a verdict of "not guilty" as to him even though the evidence may indicate that he may have committed some other offense." I so charge you.

A further request: "In order to constitue the crime of conspiracy there must be unity of design and purpose and the mere fact that the defendant Harold Corbett acted illegally is not sufficient to convict him of conspiracy." I so charge you.

Another request: "The burden of proof in this case is upon the State to prove the defendant Harold Corbett guilty beyond a reasonable doubt and if there is any reasonable doubt in your mind as to any one or more elements of the offense charged having been committed by him, your verdict will be one of acquittal." I so charge you gentlemen.

Now, gentlemen, the Court is the sole judge of the law and has the right to express to the jury his comments and opinions on the facts, but such opinions on the facts do no bind the jury, who are the sole judges of the facts. The jury m[illegible] follow their own recollection as to what the evi-

dence is or is not where it fails to coincide with the expressions of the Court, and must decide the case not only on such evidence as may be referred to by the judge, but upon all the evidence in the case.

The defendant is presumed to be innocent and unless the crime charged is proved against him beyond a reasonable doubt is entitled to an acquittal. The burden of so proving defendant guilty rests upon the State and never shifts. All that applies, gentlemen, to each of the defendants separately.

Now, I have used the expression reasonable doubt and said to you the defendant must be proved guilty beyond a reasonable doubt. Reasonable doubt is not a mere possible doubt. It is that state of the case, which after an entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. That, gentlemen, is stated in a negative way. To state the same matter in an affirmative way. If, after an entire comparison and consideration of all the evidence you find you can say you feel an abiding conviction to a moral certainty of the truth of the charge, you are then satisfied beyond a reasonable doubt within the meaning of the law as they are used by those words. That is the meaning of those words.

Now, gentlemen, these defendants come before you under an indictment found by the Grand Inquest of our County, which indictment, of course, has no evidential value. It is a mere charge, and that indictment charges these defendants with conspiracy.

A conspiracy is a combination of persons to

effect a criminal object or a lawful object by criminal means. There must be two or more persons involved, or there can be no criminal conspiracy, for one cannot conspire with himself alone. Now, no formal agreement is necessary. It is not necessary that they come together in a formal way and agree upon something. It is sufficient if the minds of the alleged conspirators meet understandingly to bring about an intelligent and deliberate agreement to do the act specified in the indictment. Nor is it necessary to prove the conspiracy by direct evidence. It may be inferred from the circumstances; in fact, from the nature of the case proof of a conspiracy must generally be circumstantial, and it is seldom that any one act taken by itself standing alone can be seen as tending to prove a conspiracy, but when taken in connection with other acts its tendency to prove the facts may be more clearly discerned. Now, it is not controlling whether the defendants succeeded or failed in the attainment of the object of their agreement. The crime is complete when the agreement is reached and an attempt by them to carry it into effect is made by doing an overt act specified in the indictment in fulfilment thereof.

Now, gentlemen, the case as to each of these defendants stands on its own bottom; that is to say, each defendant must be proved guilty under the charge of the Court. Where persons enter into a conspiracy and you are satisfied that a conspiracy has been entered into by them, then from that time on the actions and declarations of such persons in pursuance of that conspiracy and in pursuance of that agreement in carrying out the object of that conspiracy are permissible in evidence, and the action of one is binding upon all, but when the conspiracy is complete or comes to

naught for any reason after that time the declarations and acts of one conspirator are not binding on the other.

Now, in this case, gentlemen, we have an alleged confession or an alleged admission or confession made after the conspiracy was consummated or came to naught, rather. An admission or confession by one of the defendants thus made while binding on the defendant who made it is not binding on any other one. As I have already stated to you, it is only acts and declarations done and made in pursuance to and in consummation of the agreement that are binding on other conspirators and that only when the conspiracy is established and before it is complete or comes to naught.

Now, as I said before, gentlemen, it is not necessary that a conspirary be shown—for a conspiracy to be shown, I mean to say, that the State produce evidence of the conspirators coming together and saying we will agree to do so and so and so. That is not necessary. Of course, in some instances, as referred to by Judge D'Aloia, there are cases where one of the conspirators may turn State's evidence and testify that they actually got together and conspired, but that is not an essential. Conspiracy may be inferred from all the evidence if the evidence justifies it, and the rule is well settled that the conspiracy may be inferred from acts done in pursuance thereof and often can be proven in no other way.

Now, then, another subject that comes up. One of these defendants, the defendant Fiumara, failed to take the stand and testify. Now, a defendant cannot be compelled to take the stand either by the Court, nor can he be called to the stand by the Prosecutor. If he takes the stand he must do so of his own volition, and he cannot be called

to the stand by the Court or by the Prosecutor. He has the right not to take the stand, but if he fails to take the stand under some circumstances certain inferences may be drawn against him. Now, if he fails to take the stand in a case where there is evidence of the existence of certain things which he of his own knowledge could deny and he fails to take the stand and deny those things, then the jury is justified in drawing the inference if they see fit that the reason he did not take the stand and deny those things is that he could not do so. Now, in this particular case there was certain testimony that Fiumara was present in an automobile at a time when a certain conversation was had, according to the testimony of one of the State's witnesses, to wit, Ruder. The circumstances of that conversation were such that it may be— I know not, but it may be that you will draw the inference or come to the conclusion beyond a reasonable doubt that Fiumara was in a position to hear that conversation. Now, if you do come to that and you do conclude that he was in a position to hear that conversation and, by the way, that conversation to which I referred was the one in which Ruder said or testified that somebody said to him that he wanted to be employed at $75 a week to protect Ruder's trucks from being stolen and that if he was not so employed they would be stolen. Now, as I say, if you conclude from all the evidence that Fiumara was present and heard that conversation, then you may ask yourselves the question, why didn't he get upon the stand and say that he was not there or say that if he was there he did not hear any such thing, or say that if he was there and did hear such a thing that he refuted it. You may ask yourselves why he did not do that, and you would be justified in con-

cluding if you saw fit that the reason he did not do it was that he could not. Another thing, Sergeant Moffat testified as follows: "Question: Let's see. He—" and the testimony was referring to Fiumara—" said he was cruising in that neighborhood with Corbett and Crisifulli? Answer: Yes. Question. He said he had not talked to McCabe or Ruder. Answer: Yes. Question: And he said to you that he was in that neighborhood for a little consideration money to protect property? Answer: He was in company with Corbett and Crisifulli for that purpose. Now, gentlemen, if you are satisfied that that testimony is true and that he did say that to Sergeant Moffat, then you may ask yourselves the question why didn't he go on the stand and deny that he made any such statement to Sergeant Moffat, and you will be justified in concluding, if you see fit, that the reason he did not go on the stand and deny that he made any statement was that he could not do it.

Now, gentlemen, I think that covers the law applicable to this case and you will take this case upon all of the testimony, not only such as has been referred to by the Court, but all of it, and if you come to the conclusion upon all of the testimony that the defendants or either of them are— if the defendants are guilty, I should say, you will so find them. Otherwise you will find them not guilty, and as I said to you, gentlemen, each man's case stands on its own bottom and, furthermore, in conclusion, if you find in any respect the Court in referring to this evidence has stated it in any manner which does not coincide with your own recollection you will follow your own recollection and disregard the recollection of the Court and the statements made. So, gentlemen, you may retire and enter upon your deliberations.

Exceptions to Charge.

(Mr. D'Aloia approached the bench and asked the Court in an undertone to charge the jury that they can bring in a verdict under this indictment of guilty as to one defendant and not guilty as to the other.)

Of course, gentlemen, I think I made it clear to you that each man's case stands on its own bottom and you must consider each man's case on its own merits and you must decide each one on its own merits, and I think I have made that clear already, considering, of course, all the testimony under the charge of the Court so far as it may be applicable.

(The jury retires.)

Counsel for defendant Corbett prays an exception to the Court's failure to charge the defendant Corbett's fourth request to charge.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Counsel for defendant Corbett prays a general exception to the charge of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Counsel for defendant Fiumara prays a general exception to the charge of the Court.

Exceptions to Charge.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Counsel for defendant Fiumara also prays a special exception to the Court's refusal to specify in so many words that their verdict might be that one of the defendants be guilty and the other acquitted.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Defendant Corbett's Requests to Charge.

I. Under the indictment in this case the only offense of which the defendant Harold Corbett can be convicted is conspiracy and unless you find that he actually did conspire to cheat and defraud Messrs. Ruder and McCabe, you will render a verdict of "not guilty" as to him even though the evidence may indicate that he may have committed some other offense.

2. In order to constitute the crime of conspiracy there must be unity of design and purpose and the mere fact that the defendant Harold Corbett acted illegally is not sufficient to convict him of conspiracy.

3. The burden of proof in this case is upon the State to prove the defendant Harold Corbett guilty beyond a reasonable doubt and if there is any reasonable doubt in your mind as to any one or more elements of the offense charged having been committed by him, your verdict will be one of acquittal.

4. Reasonable doubt implies more than a mere preponderance of evidence and requires, among other things, an abiding conviction in your minds of guilt. By an abiding conviction of guilt it is meant that there is no wavering of your mind on this question. If one moment you are inclined to think him guilty and the next you are inclined to think him not guilty, and if your mind wavers back and forth between innocence and guilt, so long as your mind does not so waver there cannot be said to be an abiding conviction and if you have no abiding conviction of guilt your verdict will be one of acquittal.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

Wednesday, April 1, 1931.

STATE OF NEW JERSEY, *vs.* HAROLD CORBETT and ERNEST FIUMARA	On Indictment No. 33 Dec. T. 1930 for Conspiracy

Before Hon. Dallas Flannagan, Judge.

Simon L. Fisch, First Assistant Prosecutor of the Pleas, for the State.

Joseph Zemel for defendant Harold Corbett.

MR. ZEMEL. This is an application, your Honor, to set aside the verdict of the jury entered in the matter of State against Corbett and Fiumara, on the ground among others that the verdict is irregular, contrary to law, and on the further ground that the jury were improperly communicated with during their deliberation. For the purpose of the motion, so the record will appear as I would like it to appear, I would like to have Mr. Cashill sworn in this matter and examined.

THOMAS H. CASHILL, sworn in behalf of the defendants.

DIRECT EXAMINATION by Mr. Zemel.

Q. Mr. Cashill, you are the deputy clerk in this court? A. I am.

Q. And you acted as deputy clerk during the trial of the issue in this court in the case of State against Corbett and Fiumara? A. I did.

Q. And after the jury were continuing their deliberations you remained in the courtroom? A. I did.

Q. Did you receive any instructions from the Court about the jury? A. I did.

Q. And after the jury retired to deliberate, did you receive any communications from the jury? A. I did.

Q. And what was that communication? A. That was a note that was sent down.

Q. May I see the note? A. I have not got it now.

Q. As a result of receiving this note, what did you do? A. I telephoned to the Judge.

Q. And did you read the note to the Judge? A. I did.

Q. And did you receive any instructions from the Court? A. I did.

Q. And what instructions did you receive? A. I received instructions to notify the jury that the Court had left and the lawyers had left and the stenographer had left.

Q. And as a result of those instructions what did you do? A. I told one of the Court officers to communicate that fact to the jury.

Q. Was anything thereupon written by you about your instructions upon this slip of paper? A. I wrote on the back my instructions, yes.

Thomas H. Cashill, Direct.

Q. And do you know whether the Court officer did deliver that paper back to the jury with your instructions on it? A. He did not deliver the paper. He delivered the instructions. I kept the paper.

Q. Who was that court officer? A. Officer Miller.

Q. Is he in court here today? A. Yes.

Q. You did not say anything to the jury? A. I did not, no.

Q. And what time did this happen? A. I think it was 6:20. I had the time on the note. When I get it I can give you the correct time. I think it was 6:20.

Q. And how long did the entire proceedings take to call up the judge and speak to the jury again? A. About ten minutes.

Q. Is the note here? A. Yes. I have the note.

(Note offered in evidence and marked Exhibit D-1—4/1/31.)

THE COURT. You had been previously instructed by the Court that the Court would remain open and the Clerk would receive the verdict.

WITNESS. Yes, sir.

THE COURT. Which side of the note did you write on?

WITNESS. In red pencil on the back I wrote.

THE COURT. You wrote your instructions to the officer.

WITNESS. I did.

CROSS EXAMINATION by Mr. Fisch.

Q. In other words, the note you received said, "Can we get a copy of the testimony?" A. Whatever is on there, true.

Q. And you put on the back of it, "Judge and lawyers and stenographer all gone", is that right? A. That is true.

CHARLES MILLER, sworn in behalf of the defendants.

DIRECT EXAMINATION by Mr. Zemel.

Q. Mr. Miller, did you receive this note from the jury in the matter of the State against Corbett and Fiumara? A. I did.

Q. And you gave that note to Mr. Cashill? A. I did.

Q. And Mr. Cashill next gave the note back to you? A. He did.

Q. And when he gave it back to you was the writing which appears here, "Judge and lawyers and stenographer all gone," was that on there? A. It was.

Q. What did you do then? A. I gave it to the foreman of the jury.

Q. What did you say to him when you gave it to him? A. Nothing.

Q. You knocked on the door? A. Knocked on the door and waited for a knock from the inside and opened the door.

Q. You gave this to the foreman? A. Yes.

Q. What did he say? A. He said he wanted something and I said, "Put it in writing," and that was the result.

CROSS EXAMINATION by Mr. Fisch.

Q. You were one of the officers who were sworn to take charge of the jury in the case, weren't you? A. Yes.

Q. And did you remain in charge of them during all of their deliberations? A. I did.

Q. Did anybody interfere with their delibera-

tions during all the time they were deliberating? A. No.

Q. And when you received the note in question from the foreman of the jury, what time was it? A. Around about 7:15 P. M.

Q. And was the Judge gone? A. He was.

Q. And were the lawyers gone? A. There was nobody in the courtroom but the two defendants and I think Mr. Zemel.

Q. And was the stenographer gone? A. He was gone.

THE COURT. You say Mr. Zemel was in the courtroom?

WITNESS. I believe he was, and the two defendants.

THE COURT. Well, why did you say the lawyers were gone? Mr. Zemel was a lawyer.

WITNESS. Well, he may not have been here when the note came down, but I came down before and I seen him, but at the time I got the note I am not sure he was in the courtroom, but I think he was.

THE COURT. At the time you got the note?

WITNESS. Yes, sir; in fact, I think he was here when the jury came in with the verdict.

THE COURT. I am not talking about that. I am talking about the time you received the note from Mr. Cashill and went up to the jury.

WITNESS. Oh, at that time there was nobody in the courtroom. The courtroom was absolutely empty at that time.

THE COURT. And did you say you handed the note in to the foreman?

WITNESS. Knocked at the door and re-

ceived a knock from the inside and opened the door and handed the note to the foreman without looking at the writing and waited for the decision whatever it would be.

REDIRECT EXAMINATION by Mr. Zemel.

Q. This note contains the notation 6:20 P. M. Do you think that is the time this thing occurred? A. My imagination is 7:15. I do not know what the time was. The incident was about a month or so ago and I did not put the time down. I know it was 8:15 the jury agreed and I imagine it was an hour after the note was received they agreed.

JOSEPH ZEMEL, sworn.

WITNESS. On the day that this matter was tried the Court concluded his charge to the jury at about five o'clock. Thereupon I went home and had supper and after eating supper came back here at about six o'clock, or a few minutes after, and I remained here until about a quarter to seven, at which time I again went away. When I say I remained here, I mean I was in the courtroom for a short time and I was out in the corridors or downstairs for a short time.

CROSS EXAMINATION by Mr. Fisch.

Q. You did not remain in the courtroom all the time? A. I did not remain in the courtroom all the time.

Q. And you do not know whether you were in the courtroom when this note came from the jury? A. I do not know just what time it came, except what I have heard.

TESTIMONY CLOSED.

MR. ZEMEL. I move to set aside the verdict in this case on the ground, first, that as the testimony shows, the jury was communicated with and we urge that it was contrary to law. As I understand the law, no person is to communicate with a jury regardless of whether it is on matters relevant to the issue or not. It may not have anything to do with the trial, but pending the time the jury is in its deliberations no person has a right to talk to the jury. I also want to move on two other grounds. The first ground is that there was no evidence in this case to convict these defendants of the charges contained in the indictment. There was evidence in this case that the defendants both in that automobile went to the place of business of Ruder & McCabe and when they got there, as I recall it, Corbett said to Ruder, "We want $75 a week," or some sum a week, as protection money. As I recall it, there was no other evidence in the case of a conspiracy, nor was there any evidence that these people conspired together. Now, then, possibly from the fact that they had been there together we may guess there was a conspiracy, but the law requires evidence, and there was not a line of evidence of any conspiracy, and the third ground is that assuming there was a conspiracy, there was absolutely no evidence that it was a conspiracy to cheat and defraud as set forth in the indictment.

THE COURT. Are you through with your motion?

MR. ZEMEL. Yes.

THE COURT. I think that the evidence before the jury was sufficient to show a conspiracy to do a wrongful act. That evidence having been introduced, that proof having been offered and the verdict having been rendered upon it, your motion should be denied and it is denied. You may have an exception.

Let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Exhibit D-1.

(*Front*)

(Ex. D 1 4/1/31)
H. G. C.

Can we get copy of testimony?

6.20 P. M.

(*Reverse side*)

Corbett &
Fiumara

Judge & Lawyers & stenographer all gone.

Exhibit S-1.

DEPARTMENT OF PUBLIC SAFETY
POLICE DIVISION

(Ex. S 1)
H. G. C.

Newark, N. J. October 9th, 1930.

VOLUNTARY STATEMENT OF:

	Harold Corbett,
Residence	190 Elm Street, City.
Occupation	Chauffeur.
Age	25

Statement made to: Sgt. Moffatt, Dets. Anderson, Cosgrove and Shine. I hereby voluntarily state that on Friday or Saturday on October 3rd or 4th I met Daniel Ruder at Ferry and Wilson Ave., at about two or three P. M. Ruder was in his machine and I called for him to stop. At this time I was alone in a Cadillac Touring Car belonging to a man named Anthony Martin, address unknown. I walked over to his car and I told him how about getting on his payroll. I asked him how about getting about $75.00 or $100.00 dollars a week. I knew he was selling beer and the money was to be for protecting his trucks. Ruder told me that he would have to see his partner Mr. McCabe. He said he would let me know and he pulled away.

About 4.00 this P. M. October 8th I was on New York Ave., about 102 or 103 to pick up John Crisifulli who lives at this address. I was in the Cadillac car accompanied by Ernest Fiumara (Hooks). When Crisifulli got in the car I drove down New York Avenue to Adams tSreet and left on Adams to Elm Street, Down Elm and to Lang Street, right on Lang to Walnut Street. At this corner I turned the car around and drove back

Exhibit S-1.

Lang Street and up Elm to Pulaski, right on Pulaski to Lafayette. As he turned into Lafayette St., between Merchant and Lang Sts., I noticed McCabe driving toward me in his car. McCabe waved his hand to me as though he wanted me to stop. I stopped the car and I walked over to his car alone and called Skinny Crisifulli over to me. I asked McCabe for some money and I told him I was talking to his partner Ruder. He said he was busy and that his wife was sick and he would have a talk with his partner meaning Ruder. McCabe then asked me if I knew anything about his beer kegs that were stolen from his garage on New York Ave., I told him I knew nothing about the kegs and that I would look around and try and find them and if I found them I would let him know. He said he would see me in a couple of days and he drove away. Crisifulli, Fiumara and myself then drove around down neck and we were riding up Ferry Street near Jackson when a squad of detectives from Police Headquarters stopped us and searched us and brought us to Police Headquarters. I have made this statement and it is the truth. Crisifulli and Fiumara did not know that I was trying to get money from McCabe and are in no way connected with this case.

Witnesses:— Signed:— Harold Corbett

Sergt. W. T. Moffatt
Det. Fred Anderson
" Joseph P. Cosgrove
" Arthur M. Shine.

Stenographer's Certificate.

ESSEX COUNTY COURT OF
GENERAL QUARTER SESSIONS.

STATE OF NEW JERSEY, *vs.* HAROLD CORBETT and ERNEST FIUMARA,	On Indictment No. 33, Dec. T., 1930, for Conspiracy.

I, HAROLD T. COOK, an official stenographer of the Essex County Court of General Quarter Sessions, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by myself at the trial of the above mentioned case, which trial was held before the Honorable Dallas Flannagan, Presiding Judge of the Essex County Court of General Quarter Sessions, and a jury, on Tuesday, March 10, 1931, at Newark, N. J.

HAROLD T. COOK

Dated
April 10, 1931.

Court's Certification of Record.

ESSEX COUNTY COURT OF
GENERAL QUARTER SESSIONS.

STATE OF NEW JERSEY, *vs.* HAROLD CORBETT and ERNEST FIUMARA,	On Indictment No. 33, Dec. T., 1930. for Conspiracy.

I, DALLAS FLANNAGAN, Presiding Judge of the Essex County Court of General Quarter Sessions and the judge who presided over the aforesaid cause, certify that the above printed book contains the entire record of the proceedings had upon the trial of the said cause, and that the same is returned by the plaintiff in error therein with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

DALLAS FLANNAGAN,
Judge.

Dated

April 21st, 1931.

Assignments of Error.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* —*vs*— HAROLD CORBETT and ERNEST FIUMARA, *Plaintiffs-in-Error.*	In Error. Assignments of Error.

Afterwards, to wit, on the return day of the writ of error, before the Justices of the Supreme Court of Judicature, come the said Harold Corbett and Ernest Fiumara, by Joseph Zemel and J. Victor D'Aloia, their respective attorneys and say that in the record and proceedings aforesaid and also in the matters recited and contained in said bill of exceptions and also in giving the judgment aforesaid, there is manifest error in this, to wit:—

1. That the said Court, before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously permitted the witness, Daniel Ruder, to be asked and answer the following questions:

"Q. Now, did anything happen to any of your trucks on that day? A. The next morning.

MR. D'ALOIA. That is objected to.

MR. FISCH. I think it is perfectly proper to show the circumstances.

THE COURT. I will allow it.

MR. D'ALOIA. No. If something happened to the trucks, we cannot be held responsible for that. A lot of things may

happen to this man's trucks. He may have trouble with the labor union.

THE COURT. Well, it depends on what was done.

MR. D'ALOIA. I know, but the general question, "Did something happen to the trucks". Suppose one of the men in his employ was dissatisfied and did something with the trucks. There might have been a thousand people who might have done something to his trucks that day.

THE COURT. Is this the very same day?

MR. FISCH. The following morning.

THE COURT. I will allow it.

Defendant's counsel pray an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q. What, if anything, happened to your trucks the following morning? A. Two trucks were taken out of the garage.

Q. Was there anything in them? A. Empty beer barrels.

Q. And were they subsequently recovered? A. No.

Q. Never recovered? A. No.

Q. Now, you say they were taken out. What do you mean by that? A. Stolen.

MR. D'ALOIA. That is all objected to under the original objection.

THE COURT. Well, I will overrule the objection and give you an exception except to that part of the witness' statement that

they were stolen. I will strike that out, and what happened to the trucks, did they disappear or what?

Let the exception be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

2. That the said Court, before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously permitted the witness, Harry McCabe, to testify as follows:

"Q. Now, on the day before this occurrence when these men were arrested and you had this conversation what, if anything, happened to any of your trucks?

MR. D'ALOIA. That is objected to.

THE COURT. Now, when you—you saw the truck come up and drive—the Cadillac drive up alongside of your car.

WITNESS. Yes, sir.

THE COURT. And then you saw them again.

WITNESS. Yes, sir.

THE COURT. And two of the men come over and began to talk to you?

WITNESS. Yes, sir.

THE COURT. Now, could you recognize the third man in that Cadillac?

WITNESS. No, I couldn't. At Headquarters I only picked out two men.

Q. Now, what, if anything, happened to any of your trucks on the day before this 8th of October?

MR. D'ALOIA. That is objected to.

THE COURT. Well, this is the same event?

MR. FISCH. Yes, your Honor.

THE COURT. I will allow it.

Counsel for defendant Fiumara prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q. You may answer the question. A. Our truck was stolen and another truck from the same garage was stolen on that morning.

Q. Your truck, what was the contents of it? A. Empty beer barrels.

Q. Did you subsequently recover the truck?

A. We recovered the truck.

Q. Where? A. Down on Wilson Avenue."

3. That the said Court, before whom &c., at and upon the trial of the said issue so joined between the State here of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously denied a motion made in behalf of the defendant, Ernest Fiumara, for a direction of a verdict of acquittal, at the close of the State's case.

4. That the said Court, before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously denied a motion made in behalf of the defendant, Harold Corbett, for a direction of a verdict of acquittal, at the close of the State's case.

5. That the said Court, before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said

Harold Corbett and Ernest Fiumara, erroneously permitted the prosecutor to cross-examine the defendant, Harold Corbett, as follows:

"Q. You knew when this statement was being signed, or signed, you knew at that time, didn't you, that Fiumara and Crisifulli had been arrested with you and that you had all been charged with the commission of the same offense.

MR. ZEMEL. I object.

MR. D'ALOIA. That is objected to.

MR. ZEMEL. I sat here patiently and permitted counsel to go on and he repeats the same question.

THE COURT. The only question is whether you knew what charges were made. He just wants to know if he knew they were charged with some crime when he made this statement to the effect that they were not there.

Counsel for defendant Corbett prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

6. That the said Court, before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously admitted in rebuttal a signed typewritten statement obtained by the police from the defendant, Harold Corbett.

7. That the said Court, before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold

Corbett and Ernest Fiumara, erroneously denied a motion made in behalf of the defendant, Ernest Fiumara, for a direction of a verdict of acquittal, upon the whole case.

8. That the said Court, before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously denied a motion made in behalf of the defendant, Harold Corbett, for a direction of a verdict of acquittal, upon the whole case.

9. That the said Court before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously charged the jury as follows:—

> "A conspiracy is a combination of persons to effect a criminal object or a lawful object by criminal means. There must be two or more persons involved, or there can be no criminal conspiracy, for one cannot conspire with himself alone. Now, no formal agreement is necessary. It is not necessary that they come together in a formal way and agree upon something. It is sufficient if the minds of the alleged conspirators meet understandingly to bring about an intelligent and deliberate agreement to do the act specified in the indictment. Nor is it necessary to prove the conspiracy by direct evidence. It may be inferred from the circumstances; in fact, from the nature of the case proof of a conspiracy must generally be circumstantial, and it is seldom that any one act taken by itself standing alone can be seen as tending to prove a conspiracy, but when taken in connection with other acts its tendency to prove the facts may

be more clearly discerned. Now, it is not controlling whether the defendants succeeded or failed in the attainment of the object of their agreement. The crime is complete when the agreement is reached and an attempt by them to carry it into effect is made by doing an overt act specified in the indictment in fulfilment thereof."

10. That the said Court before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously charged the jury as follows:

"Now, gentlemen, the case as to each of these defendants stands on its own bottom; that is to say, each defendant must be proved guilty under the charge of the Court."

11. That the said Court before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously charged the jury as follows:

"Now, as I said before, gentlemen, it is not necessary that a conspiracy be shown—for a conspiracy to be shown, I mean to say, that the State produce evidence of the conspirators coming together and saying we will agree to do so and so and so. That is not necessary."

12. That the said Court before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously charged the jury as follows:—

"* * * * * Now, in this particular case there was certain testimony that Fiumara was present in an automobile at a time when a certain conversation was had, according to the

testimony of one of the State's witnesses, to wit, Ruder. The circumstances of that conversation were such that it may be—I know not, but it may be that you will draw the inference or come to the conclusion beyond a reasonable doubt that Fiumara was in a position to hear that conversation. Now, if you do come to that and you do conclude that he was in a position to hear that conversation and, by the way, that conversation to which I referred was the one in which Ruder said or testified that somebody said to him that he wanted to be employed at $75 a week to protect Ruder's trucks from being stolen and that if he was not so employed they would be stolen. Now, as I say, if you conclude from all the evidence that Fiumara was present and heard that conversation, then you ask yourselves the question, why didn't he get upon the stand and say that he was not there or say that if he was there he did not hear any such thing, or say that if he was there and did hear such a thing that he refuted it. You may ask youselves why he did not do that, and you would be justified in concluding if you saw fit that the reason he did not do it was that he could not. * * * * *"

13. That the said Court before whom &c., at and upon the trial of that said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously charged the jury as follows:—

"* * * * * and if you come to the conclusion upon all of the testimony that the defendants or either of them are—if the defendants are guilty, I should say, you will so find them. Otherwise you will find them not guilty, and as I said to you, gentlemen, each man's case stands on its own bottom * * * * * *."

Assignments of Error.

14. That the said Court before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously refused to charge, as specifically requested, as follows:

> "The indictment in this case charges 3 men named therein with conspiracy, but only 2 of them are on trial; as to them, your verdict can be, if you so find, "guilty" as to one defendant and "not guilty" as to the other defendant."

15. That the said Court before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously charged, instead of the above specific request, as follows:

> "Of course, gentlemen, I think I made it clear to you that each man's case stands on it's own bottom and you must consider each man's case on its own merits, and I think I have made that clear already, considering of course, all the testimony under the charge of the Court so far as it may be applicable."

16. That the said Court before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously declined to charge the jury, as requested, as follows:

> "Reasonable doubt implies more than a mere preponderance of evidence and requires, among other things, an abiding conviction in your minds of guilt. By an abiding conviction of guilt it is meant that there is no wavering of your mind on this question. If one moment you are inclined to think him guilty and the next you are inclined to think him not guilty, and if your mind wavers back and forth be-

tween innocence and guilt, so long as your mind does so waver there cannot be said to be an abiding conviction and if you have no abiding conviction of guilt your verdict will be one of acquittal."

17. That the said Court before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously and illegally permitted the jury trying the said issue, to be communicated with, during their deliberation, contrary to law.

18. That the said Court before whom &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Harold Corbett and Ernest Fiumara, erroneously gave instructions to the jury while the said jury were deliberating, in the absence of and without notice to the defendants or their counsel, contrary to law.

Wherefore, the said Ernest Fiumara and Harold Corbett pray that the said judgment and sentences may be reversed and annulled and altogether held for nothing, and that they may be restored to all which they have lost by occasion thereof.

J. VICTOR D'ALOIA,
Of Counsel for Plaintiff-in-Error, Ernest Fiumara.

JOSEPH ZEMEL,
Of Counsel for Plaintiff-in-Error, Harold Corbett.

Service of a copy of the within Assignments of Error is hereby acknowledged this 20th day of April, 1931.

JOSEPH L. SMITH.

NEW JERSEY SUPREME COURT.

Specification of Causes for Reversal.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* —*vs*— HAROLD CORBETT and ERNEST FIUMARA, *Plaintiffs-in-Error.*	In Error. Specification of Causes for Reversal.

And now comes the said Harold Corbett and Ernest Fiumara, by Joseph Zemel and J. Victor D'Aloia, their respective attorneys, and say that in the record and proceedings aforesaid and also in the matters recited and contained in the said writ of exceptions and also in giving the verdict and judgment aforesaid, there is manifest error, and the said Harold Corbett and Ernest Fiumara say that said judgment should be reversed and assigns the following reasons or causes:

1. Because the Trial Court permitted the witness, Daniel Ruder, to be asked and answer the following questions:

> "Q. Now, did anything happen to any of your trucks on that day? A. The next morning.
>
> MR. D'ALOIA. That is objected to.
>
> MR. FISCH. I think it is perfectly proper to show the circumstances.
>
> THE COURT. I will allow it.
>
> MR. D'ALOIA. No. If something happened to the trucks, we cannot be held responsible for that. A lot of things may happen to this man's trucks. He may have trouble with the labor union.

THE COURT. Well, it depends on what was done.

MR. D'ALOIA. I know, but the general question, "Did something happen to the trucks". Suppose one of the men in his employ was dissatisfied and did something with the trucks. There might have been a thousand people who might have done something to his trucks that day.

THE COURT. Is this the very same day?

MR. FISCH. The following morning.

THE COURT. I will allow it.

Defendants' counsel pray an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q. What, if anything, happened to your trucks the following morning? A. Two trucks were taken out of the garage.

Q. Was there anything in them? A. Empty beer barrels.

Q. And were they subsequently recovered? A. No.

Q. Never recovered? A. No.

Q. Now, you say they were taken out. What do you mean by that? A. Stolen.

MR. D'ALOIA. That is all objected to under that original objection.

THE COURT. Well, I will overrule the objection and give you an exception except to that part of the witness' statement that they were stolen. I will strike that out, and what happened to the trucks, did they

disappear or what?

Let the exception be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

2. Because the Trial Court permitted the witness, Harry McCabe, to testify as follows:

"Q. Now, on the day before this occurrence when these men were arrested and you had this conversation what, if anything, happened to any of your trucks?

MR. D'ALOIA. That is objected to.

THE COURT. Now, when you—you saw the truck come up and drive—the Cadillac drive up alongside of your car.

WITNESS. Yes, sir.

THE COURT. And then you saw them again.

WITNESS. Yes, sir.

THE COURT. And two of the men come over and began to talk to you?

WITNESS. Yes, sir.

THE COURT. Now, could you recognize the third man in that Cadillac?

WITNESS. No, I couldn't. At Headquarters I only picked out two men.

Q. Now, what, if anything, happened to any of your trucks on the day before this 8th of October?

MR. D'ALOIA. That is objected to.

THE COURT. Well, this is the same event?

MR. FISCH. Yes, your Honor.

THE COURT. I will allow it.

Counsel for defendant Fiumara prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q. You may answer the question. A. Our truck was stolen and another truck from the same garage was stolen on that morning.

Q. Your truck, what was the contents of it? A. Empty beer barrels.

Q. Did you subsequently recover the truck? A. We recovered the truck.

Q. Where? A. Down on Wilson Avenue."

3. Because the Trial Court denied a motion made in behalf of the defendant, Ernest Fiumara, for a direction of a verdict of acquittal at the close of the State's case.

4. Because the Trial Court denied a motion made in behalf of the defendant, Harold Corbett, for a direction of a verdict of acquittal at the close of the State's case.

5. Because the Trial Court permitted the prosecutor to cross-examine the defendant, Harold Corbett, as follows:—

"Q. You knew when this statement was being signed, or signed, you knew at that time, didn't you, that Fiumara and Crisifulli had been arrested with you and that you had all been charged with the commission of the same offense.

MR. ZEMEL. I object.

MR. D'ALOIA. That is objected to.

MR. ZEMEL. I sat here patiently and permitted counsel to go on and he repeats the same question.

THE COURT. The only question is whether you knew what charges were made. He just wants to know if he knew they were charged with some crime when he made this statement to the effect that they were not there.

Counsel for defendant Corbett prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

6. Because the Trial Court improperly admitted in rebuttal a signed typewritten statement obtained by the police from the defendant, Harold Corbett.

7. That the Trial Court denied a motion made in behalf of the defendant, Ernest Fiumara, for a direction of a verdict of acquittal, upon the whole case.

8. Because the Trial Court denied a motion made in behalf of the defendant, Harold Corbett, for a direction of a verdict of acquittal, upon the whole case.

9. Because the Trial Court improperly charged the jury as follows:

"A conspiracy is a combination of persons to effect a criminal object or a lawful object by criminal means. There must be two or more persons involved, or there can be no criminal conspiracy, for one cannot conspire with himself alone. Now, no formal agreement is necessary. It is not necessary that they come together in a formal way and agree upon something. It is sufficient if the minds of the alleged conspirators meet under-

standingly to bring about an intelligent and deliberate agreement to do the act specified in the indictment. Nor is it necessary to prove the conspiracy by direct evidence. It may be inferred from the circumstances; in fact, from the nature of the case proof of a conspiracy must generally be circumstantial, and it is seldom that any one act taken by itself standing alone can be seen as tending to prove a conspiracy, but when taken in connection with other acts its tendency to prove the facts may be more clearly discerned. Now, it is not controlling whether the defendants succeeded or failed in the attainment of the object of their agreement. The crime is complete when the agreement is reached and an attempt by them to carry it into effect is made by doing an overt act specified in the indictment in fulfilment thereof."

10. Because the Trial Court improperly charged the jury as follows:

"Now, gentlemen, the case as to each of these defendants stands on its own bottom; that is to say, each defendant must be proved guilty under the charge of the Court."

11. Because the Trial Court improperly charged the jury as follows:

"Now, as I said before, gentlemen, it is not necessary that a conspiracy be shown—for a conspiracy to be shown, I mean to say, that the State produce evidence of the conspirators coming together and saying we will agree to do so and so and so. That is not necessary."

12. Because the Trial Court improperly charged the jury as follows:

"* * * * * Now, in this particular case there was certain testimony that Fiumara was pres-

ent in an automobile at a time when a certain conversation was had, according to the testimony of one of the State's witnesses, to wit, Ruder. The circumstances of that conversation were such that it may be—I know not, but it may be that you will draw the inference or come to the conclusion beyond a reasonable doubt that Fiumara was in a position to hear that conversation. Now, if you do come to that and you do conclude that he was in a position to hear that conversation and, by the way, that conversation to which I referred was the one in which Ruder said or testified that somebody said to him that he wanted to be employed at $75 a week to protect Ruder's trucks from being stolen and that if he was not so employed they would be stolen. Now, as I say, if you conclude from all the evidence that Fiumara was present and heard that conversation, then you ask yourselves the question, why didn't he get upon the stand and say that he was not there or say that if he was there he did not hear any such thing, or say that if he was there and did hear such a thing that he refuted it. You may ask yourselves why he did not do that, and you would be justified in concluding if you saw fit that the reason he did not do it was that he could not. * * *"

13. Because the Trial Court improperly charged the jury as follows:

"* * * * * and if you come to the conclusion upon all of the testimony that the defendants or either of them are—if the defendants are guilty, I should say, you will so find them. Otherwise you will find them not guilty, and

as I said to you gentlemen, each man's case stands on its own bottom * * * * *."

14. Because the Trial Court refused to charge, as specifically requested, as follows:

"The indictment in this case charges 3 men named therein with conspiracy, but only 2 of them are on trial; as to them, your verdict can be, if you so find, "guilty" as to one defendant and "not guilty" as to the other defendant."

15. Because the Trial Court improperly charged instead of the above specific requests, as follows:

"Of course, gentlemen, I think I made it clear to you that each man's case stands on its own bottom and you must consider each man's case on its own merits and you must decide each one on its own merits, and I think I have made that clear already, considering, of course, all the testimony under the charge of the Court so far as it may be applicable."

16. Because the Trial Court refused to charge the jury as follows:

"Reasonable doubt implies more than a mere preponderance of evidence and requires, among other things, an abiding conviction in your minds of guilt. By an abiding conviction of guilt it is meant that there is no wavering of your mind on this question. If one moment you are inclined to think him guilty and the next you are inclined to think him not guilty, and if your mind wavers back and forth between innocence and guilt, so long as your mind does so waver there cannot be said to be an abiding conviction and if you have no abiding conviction of guilt your verdict will be one of acquittal."

Specification of Causes for Reversal.

17. Because the Trial Court erroneously and illegally permitted the jury trying the said issue, to be communicated with, during their deliberation, contrary to law.

18. Because the Trial Court erroneously gave instructions to the jury while the said jury were deliberating, in the absence of and without notice to the defendants or their counsel, contrary to law.

19. Because the verdict was against the weight of the evidence and contrary to law.

Wherefore, because the aforesaid reasons or some of them constitute error prejudicial to the said Harold Corbett and Ernest Fiumara, the plaintiffs-in-error, and they pray that the said judgment and sentence be reversed and annulled and altogether held for nothing, and that they may be restored to all things which they have lost by occassion thereof.

J. VICTOR D'ALOIA,
Of Counsel for Plaintiff-in-Error, Ernest Fiumara.

JOSEPH ZEMEL,
Of Counsel for Plaintiff-in-Error, Harold Corbett.

Service of a copy of the within Specification of Causes for Reversal is hereby acknowledged this 20 day of April 1931.

JOSEPH L. SMITH,
Prosecutor of the Pleas.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, *Defendant in Error,* *v.* ERNEST FIUMARA, *Plaintiff in Error.*	ON WRIT OF ERROR *BRIEF FOR THE STATE.*

STATEMENT OF FACTS.

The plaintiff in error, Ernest Fiumara, hereinafter referred to as the defendant, together with Harold Corbett, was tried on March 10, 1930, in the Essex Court of Quarter Sessions, before the Honorable Dallas Flannagan and a jury, and convicted of a conspiracy to obtain money by threatening to steal and by stealing. Both defendants were found guilty, and the defendant Harold Corbett was sentenced to 18 months in the penitentiary; and the defendant Ernest Fiumara was sentenced to two years in the State prison. A writ of error was taken to the New Jersey Supreme Court, May Term, 1931, by both defendants, and the judgment of the trial court was affirmed.

The present writ is taken by the defendant Ernest Fiumara, only.

The Supreme Court in affirming the judgment of the trial court handed down the following opinion:

> "PER CURIAM
>
> "The plaintiffs in error were convicted upon an indictment charging that they, together with one John Crisifulli, conspired

to cheat and defraud Harry McCabe and Daniel Ruder, partners, of their moneys, goods and chattels, by threatening to steal certain trucks belonging to the firm unless they were paid the sum of seventy-five dollars, and, in execution of the conspiracy, stealing certain trucks belonging to McCabe and Ruder after the members of the firm had refused to make the payment demanded of them. The trial of the indictment was moved against Corbett and Fiumara, the third of the alleged conspirators—namely, Crisifulli— not being present at the trial and apparently not within the jurisdiction of the court. At the conclusion of the testimony the jury returned a verdict of guilty against Corbett, and also against Fiumara, and they have sued out the present writ of error to review the conviction entered upon the verdict.

"The first ground upon which we are asked to set aside this conviction is that the court erred in permitting the complaining witnesses, McCabe and Ruder, to testify to the theft of their property. The contention is that this testimony was immaterial and illegal because there was no proof that the defendants, or either of them, were in any way connected with the larceny of the trucks, and that this occurrence was not made the basis for the charge in the indictment against the defendants. Our examination of the case leads us to the conclusion that this contention is without merit. There was evidence that the conspirators were guilty of the larceny of the trucks. As to the contention thatt he larceny was not made

the basis of the charge in the indictment, it is enough to say in disposing of it that the indictment *charged a conspiracy to steal the trucks* unless the demand of the conspirators that McCabe and Ruder should pay them seventy-five dollars was complied with, and, further, that, because of the failure to comply with the demand, the trucks, goods and chattels belonging to the firm, were stolen and carried away. We conclude, therefore, that the plaintiffs in error can take nothing by this ground of reversal.

"The next contention is that the court improperly admitted in evidence a written confession made by Corbett to certain members of the police force. The pith of the contention is that the trial court erroneously permitted testimony relating to the making of the alleged confession to be submitted in the presence and hearing of the jury. Apparently the theory upon which this ground for reversal is based is that it is legal error for the court to admit evidence relating to the question of whether or not a confession is voluntary to be taken in the presence of the jury. That, in our opinion, is a matter within the discretion of the court, unless objection be made by defendants' counsel to such a procedure. But, assuming that the course followed was legally objectionable, that fact would not justify a reversal of these convitcions. The trial court, after hearing the testimony, reached the conclusion that the confession was voluntary, and it is not contended before us on the argument of this writ of error that the court was not justified in

so concluding. Accepting the finding of the court that the confession was voluntary as justified by the proofs offered on that phase of the case, clearly the plaintiffs in error suffered no harm or injury by the jury's hearing the testimony with relation to its voluntary character.

"The next ground for reversal is directed at an instruction in a part of the charge to the jury. The excerpt which is relied on as erroneous by counsel for the plaintiffs in error was that 'No formal agreement is necessary to constitute a conspiracy.' But immediately following that statement the court charged, 'It is not necessary that they come together in a formal way and agree upon something. It is sufficient if the minds of the alleged conspirators meet understandingly to bring about an intelligent and deliberate agreement to do the act specified in the indictment.' Read all together, we think this is a correct statement of the law with relation to what is required to constitute a criminal conspiracy.

"It is next said that the court committed harmful error in giving instructions to the jury in the absence of the defendants and their counsel after the court's charge had been delivered and the jury had retired for the purpose of considering the question of the guilt or innocence of the plaintiffs in error. What occurred was this: After the jury had retired to deliberate, the trial judge instructed the deputy clerk to receive the verdict, and then left the court room. Sometime after that the officer who had been sworn to take charge of the jury was

handed a note from the foreman, which read as follows: 'Can't we get a copy of the testimony?' He delivered this note to the deputy clerk who was to receive the verdict, and the clerk thereupon indorsed on the note that the judge and lawyers and stenographer were all gone, and gave it to the officer, with instructions to hand it to the foreman, and this was done. Why counsel consider that by this occurrence the trial court gave instructions to the jury in the absence of the defendants and their counsel and without notice to them we are unable to perceive, even after having read their brief on that point. The mere statement of the clerk to the jury that the judge had left the court house, and also the lawyers in the case, and the stenographer, was not a judicial instruction by the court, or even by the clerk, to the jury.

"The next ground for reversal is that the verdict was against the weight of the evidence. Our examination of the proofs submitted leads us to the conclusion that this contention is not justified.

"It is next argued that the court erred in refusing to direct a verdict of acquittal in the case of Fiumara. What has already been said with relation to the last preceding point disposes also of this contention.

"Lastly, it is argued that the trial court erroneously refused to charge the following request submitted on behalf of the defendants: 'As to the two defendants who are on trial, your verdict can be, if you so find, guilty as to one defendant and

not guilty as to the other defendant.' The court had already charged the jury that the case of each of these defendants stood on its own bottom; that is, that each defendant must be proven guilty under the charge of the court. Moreover, in response to the request submitted, the court delivered the following instruction to the jury: 'Of course, gentlemen, I think I made it clear to you that each man's case stands on its own bottom, and you must consider each man's case on its own merits and you must decide each one on its own merits, and I think I have made that clear already.' It seems to us that this instruction was a compliance in effect with the request, although the words used by counsel were not quoted by the court.

"On the whole case, we conclude that the judgment under review should be affirmed."

STATEMENT OF FACTS.

The two defendants, together with one Crisifulli, were engaged in what is known in common parlance as "Rasketeering." Their "racket" or scheme, in the present instance, was to attempt to obtain "protection" money from certain merchants by compelling them to put defendants' names on their payroll, under threats of violance and other harm.

The defendant, Corbett, was by trade a truck driver. On the date in question, the 6th day of October, 1930, three men, including the defendants Corbett and Fiumara, drove in a Cadillac touring car to the place of business of Daniel Ruder, complaining witness, who, with the witness, McCabe, operated a trucking business. Ruder was called out and told by Corbett that

they, the defendants, wanted to be put on the payroll at $75 a week or else the trucks of Ruder and McCabe would be stolen (P. 10, Line 40, to P. 11, Line 32.) The words used by Corbett were:

> "Put us to work for $75 a week to protect the trucks," (P. 18, Line 25).
> "We want to get on the payroll." (P. 21, Line 29.)

Ruder told them he would talk the matter over with his partner; *on that some day Ruder reported the matter to the police.*

The next morning two of the trucks of Ruder and McCabe, with empty barrels therein, were stolen. Subsequently the trucks, less the barrels, were found in the meadows of Newark.

On the 8th of October, the same Cadillac drove to the witness' place of business and stopped a short distance from it. As Ruder saw it, he reported to the police. At that moment, the Cadillac started and McCabe, the other partner, followed it while Ruder waited for the detectives. At that time, there were again *three* persons in the car. After following the three in a criss-cross course over numerous streets of Newark, the two cars met each other (Approaching from opposite directions.) Some one from the Cadillac told McCabe that they wished to talk to him. Accordingly, McCabe stopped. Crisifulli and Corbett came over from the Cadillac to McCabe. The third party remained in the Cadillac. Then McCabe testified,

> "Q And he stayed in the car, did he?
> "A Yes.
> "Q And when they came over to your car, what conversation, if any, was had with you?

"A Why, Crisifulli said to me, 'Did you talk to Ruder yet, or did he mention anything about that $75 for protecting your trucks?' I said 'Yes, we had a conversation about it, but I said that Mr. Ruder at that time was sick and he did not have much time to talk the thing over, and so we let it drop, and he said *'I heard you lost a couple of trucks with empties.'* He said, *'Now I think if we were on the payroll I think we could get those back for you,'* and so Corbett said, 'when we protect your trucks and one thing and another.'

"Q What is that?

"A Corbett said, *'We could protect your trucks if we were on the payroll and nobody would steal them.'* That is about all that was said.

"Q What, if anything, was said with regard to any other truckmen paying?

"A He said there were other truckmen on the payroll.

"Q What is that?

"A He said they were on the payroll of other truckmen.

"Q Did he say what for?

"A Protecting trucks."

Shortly thereafter, McCabe and two detectives stopped the Cadillac and arrested the three men in it; these were: Fiumara, Corbett, and Crisifulli.

Oscar Leuddeke, one of the detectives who followed and overtook the Cadillac, testified that from

the time he first saw the car, which was five or six minutes after leaving Ruder's place of business, until he with the other detectives, arrested the defendants, the same three persons occupied the Cadillac (P. 34, L. 40). This clearly refutes Corbett's story that they picked up Fiumara long after leaving Ruder's place of business.

Corbett told Sergeant Moffat of the Newark Police Department that they, Corbett, Fiumara and Crisifulli, had gone to Ruder and McCabe to get 'protection' money.

Fiumara, being questioned by Moffat, said he had accompanied the other two 'to get some consideration money.' (P. 39, L. 15, etc.)

> "We are trying to get on the payroll for six bits." (P. 42, L. 25).

Fiumara did not testify, altho Moffat testified that Fiumara admitted to him that he was "in on it." (Page 43, Line 40).

Corbett testified that he was merely trying to get a position as a truck driver, and that Ruder offered to pay him $50 per week, but he asked for $75 a week. This is flatly contradictory to Fiumara's admission to Moffat, which is not denied, that $75 a week was demanded for the three, at the rate of $25 per week for each man.

Had Corbett merely asked for a position, what reason would Ruder have had to immediately report the matter to the police? It is not even suggested that Ruder bore any ill feeling towards Corbett.

Corbett's testimony was an attempt to cover Fiumara. He stated that when he drove to Ruder's place on the 8th of October he was *alone* in the car (Page 50, Line 40). Both Ruder and McCabe testified there were three in the car.

"False in one, false in all' may not be a necessary conclusion, but is a proper inference.

The attempt to "take the fall" for Fiumara is again evident in his, Corbett's statement to the police, wherein he stated:

> "Crisifulli and Fiumara did not know that I was trying to get money from McCabe and are not in no way connected with this case."

(Page 107, Line 25). This is contrary to Fiumara's statement to Moffat, and impossible in view of fact that he, *Corbett, and Crisifulli approached McCabe together* to demand the $75 per week.

(Deputy Chief Brex of the Newark Police Department testified that Corbett admitted to him that unless the $75 per week was paid, he, Corbett, intended to take the trucks.) (Page 65, Line 36). (Page 68, Line 38).

ARGUMENT.

POINT I.

It is argued that the court erred in permitting the complaining witness, Ruder, to testify as to the theft of two of their trucks. This point was not argued by the defendant Fiumara in his brief before the Supreme Court, but was argued by defendant Corbett.

Witness Ruder was allowed to testify over objection that two of their trucks were stolen on the morning following the afternoon when the defendants threatened that "they would take the trucks", (Page 11, Line 29) unles sthey were put on the payroll at $75 a week to "protect the trucks" of the complaining witness.

Counsel for the defendant argues that this was error in as much as it related to a collateral crime. If the purpose of the testimony, and its effect, had been merely to prove the commission of an independant crime, in order to infer that the defendants were likely to have committed the crime in question, such evidence would have been inadmissibe. It is difficult, however, to think of circumstances more closely related than the stealing of the trucks immediately following the threat to steal them. The indictment charges that the defendants conspired to obtain money from McCabe and Ruder by *threatening to steal* and *by stealing* the chattels of McCabe and Ruder.

The overt act charged and proved was that on October 6, 1930, the defendants *threatened to steal* McCabe and Ruder's trucks unless they were put on the payroll.

There was also evidence that this threat was renewed on the 8th of October with the assertion that the trucks of the firm *would not have been stolen* had the defendants been granted their demand. In view of the State's contention, that the means to be used by the defendants in executing their plan was to threaten to steal, *and to steal*, the trucks, it was entirely relevant to show that thet rucks were in fact stolen.

The rule of admission of evidence of so-called collateral crime is clearly and succinctly given by Wharton in his work on Criminal Evidence. On page 1661, paragraph 885, he says:

> "Circumstances showing the commission of other crimes than the crimes charged are relevant where they are so connected that evidence of one cannot be given without it proves the other; and such circumstances are also relevant whether the

> crime incidentally shown is of the same or a different character from the one on trial."

On page 1773, paragraph 920, he continues:

> "The well settled rule, that evidence of collateral crimes cannot be introduced on the trial of the homicide charge is subject to an exception where the collateral crime procedes, or is contemporaneous with, or a part of, the charge on trial, and the circumstances surrounding the collateral crime are essential to proof of or to explain the crime charged."

The theft of the trucks, while it may incidentally show a separate crime, was contemporeaneous with the execution of the conspiracy and a part of it. It was, therefore, clearly admissible.

The stealing of the trucks were not collateral facts; they were part of the conspiracy as alleged in the indictment, and the indictment gave full information of this fact to the defendants, so that their claim of surprise can be of no avil. The statement made in *State vs. Parks, 59 N. J. L. 573*, and in *State v. Sprague, 46 N. J. L. 419*, quoted by defendant, are not relavent to the question, as in both of these cases the question asked referred to matters entirely outside the issue. In the case at bar, the stealing of the trucks was not an extraneous matter, being a part and parcel of the conspiracy charge.

POINT II.

Under this point counsel argues and states that it was error to permit the prosecutor to ask "this defendant", referring to defendant Fiumara, whether he knew about the arrest of the other alleged conspirators.

The qeustion was as follows:

> "You knew when this statement was being signed or signed, you knew at that time, didn't you, that Fiumara and Crisifulli had been arrested with you and that you had all been charged with the commission of the same offense?"

We submit that counsel is mistaken in the facts, because no such questions were asked of this defendant, Fiumara. The question made the basis of this point was asked of the defendant Corbett. The matter is covered by the second point in the opinion of our Supreme Court.

It is respectfully submitted that the defendant Fiumara was not in any way injured by the question asked of the defendant Corbett. The matter was not argued by defendant Fiumara before the Supreme Court, and the confession concerning which the question was asked was given by the defendant Corbett and not Fiumara, and it is not even claimed that the confession of Corbett was allowed to be used or was used against the defendant Fiumara. In fact, the court charged the jury that the confession made by one defendant is not binding on the other. (P. 91, L. 10).

POINT III.

It is argued that the motion for a direction of a verdict of guilty made on behalf of defendant Fiumara should have been granted.

THE DEFENDANT, FIUMARA, DID NOT TESTIFY.

It is an elementary rule 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.

State v. Bocadoro, 105 N. J. L. 352.

Ruder testified that on the 6th of October, the first occasion when he was called by Corbett to the automobile, Corbett and Fiumara were seated together, and Corbett threatened that

> "*They* would take the trucks."

(Page 11, Line 29); that Corbett said,

> "Put *us* to work for $75 a week to protect the trucks," (Page 18, Line 25) and, "*We* want to get put on the payroll." (Italics Ours.)

Fiumara was again with Corbett and Crisifulli on the second occasion, October 8th, when they renewed the threats to McCabe. (Page 29, Line 2).

Most important of all, there was in evidence the admission of Fiumara made to Sergeant Moffat, that he, Fiumara, was with Corbett and Crisifulli,

> "Doing business for some consideration money." (P. 39, Line 15, etc.)

The following excerpt from Sergeant Moffat's testimony unequivocally puts Fiumara in the conspiracy.

> "Q Well what was the next question put to him?
>
> "A As I recall, I asked him what he was doing down there.
>
> "Q And what did he say?
> "A Talking to McCabe and Ruder.
>
> "Q Well, he just told you he had not talked with them.

"A I mean they were talking with Ruder and McCabe, Corbett and Crisifulli.

"Q But he did not know what was said.

"A I asked him what was the talk about and he said, '*We* are trying to get on the payroll for six bits.' (Page 42, line 15-17) (Italics ours.)

and then, Moffatt was asked,

"Q Did he (Fiumara) admit that he was *in on it?*

"A 'Yes' "

(Italics ours.)

Counsel for Fiumara relies on Corbett's statement that on October 6th, the first occasion when he went to Ruder he was alone, and there was nobody in the car. This is flatly contradicted by Ruder who said that when he spoke with Corbett there were three men in the car, *including Fiumara.*

There was, therefore, ample evidence which, undenied and uncontradicted by Fiumara, would not only justify an inference, but would lead to the conclusion that Fiumara was in the unlawful combination.

It was not error to deny the motion for direction of verdict.

POINT IV.

At the conclusion of the court's charge, counsel for Fiumara *"approached the court and asked the court in an undertone to charge the jury that they can bring in a verdict under the indictment of guilty as to one defendant and not guilty as to the other."* (Page 94, Line 1-10.)

The request to charge was made orally and after the court's charge.

Although the court had already charged to the same effect, in response to counsel's request, he reiterated the instruction as follows:

> "Of course, gentlemen, I think I made it clear to you that each man's case stands on its own bottom and you must consider each man's case on its own merits and you must decide each on on its own merits, and I think I have made that clear already, considering, of course, all the testimony under the charge of the Court so far as it may be applicable."

The court's charge fairly and substantially covered the point, and the court was under no obligation to adopt the form of words in which the requested charge is framed.

State vs. Brune, 2 N. J. Misc. Rep. 274.
State vs. Gardner, 55 N. J. L. 17, page 25.
State vs. Harris, 100 N. J. L., 184.
State v. Haines, 92 N. J. L., 642.

It cannot be denied by counsel for Fiumara that the request was not in proper form and it was not presented at the proper time. For, the rule is, that the request should be made at or before the close of the evidence and before the argument.

State vs. Littman, 86 N. J. L., 453. (P. 459.)

Where the request is not seasonably presented, the judgment will not be reversed when it appears that the trial judge correctly charged the pertinent legal proposition embodied in the request.

State vs. Littman, Supra.

It is submitted that the so-called request was not presented properly, but the court, disregard-

ing the irregularity, charged the jury substantially and fairly as requested.

No error was shown on this point.

We submit, therefore, thatt he judgment should be affirmed as against Fiumara.

POINT V.

The circumstances which are made the basis of this point are briefly as follows:

The jury had retired for deliberation. The court and attorneys for the defense and the prosecutor had left the court room; and a deputy clerk had been left in charge by the Court in order to receive the verdict. The jury handed a note to a court officer bearing the writing, "Can we get copy of testimony?" (Exhibit D-1, p. 105). The court officer handed the note to the deputy clerk who communicated with the court by telephone, and following the court's instructions wrote on the note, "Judge and lawyers and stenographers all gone," which was given to the jury.

The proceedings were not irregular, nor were they injurious to the defendants.

The cases cited by counsel are not controlling of our situation. They are discussed below;

In the case of *State vs. Duval, 4 Misc. 719,* (affirmed 103 N. J. L. 715) the jury asked for instructions as follows:

> "1. Kindly explain what constitutes larceny,
>
> "2. Was it necessary for the defendant to have carried the goods off the premises of Hahn & Company to have committed the offense."

These questions were communicated to the court by telephone, who dictated the *instructions* to the clerk over the telephone, and the clerk in turn gave them to the jury. While the instructions over the telephone may have been correct, it is evident that counsel for the defendant in the Duval case were deprived of their right to make further requests for instructions on their part. For this reason the Supreme Could held that the irregularity in the procedure was prejudicial to the defendant and the judgment was reversed. It will be further noted that in the Duval case, the clerk himself communicated with the jury. Thus, the three essential elements of the Duval case are lacking in the case at bar, in that:

1. It was not the clerk but a sworn officer who communicated with the jury.
2. The court did not give any *instructions*.
3. No prejudicial error or manifest wrong or injury is claimed to have been suffered by the defendants.

In the case of *State v. Weisman,* 5 *Misc.* 625, cited by counsel, the same error was committed as in the Duval case. While only the single word "Yes" was used by the court, as it was in response to the question "May the jury convict two of the defendants and acquit the third?" It was in fact an instruction, given in the absence of defendants and depriving them of an opportunity to make further request.

IT IS SUBMITTED THAT IN THE CASE TA BAR NO ERROR WAS COMMITTED BECAUSE NO INSTRUCTIONS WERE GIVEN IN THE ABSENCE OF DEFENDANTS OR THEIR COUNSEL.

Counsel for defendant makes a feeble claim of his client having possibly suffered wrong or injury. He says, (page 8 of Brief of Mr. Zemel) that the jury, being informed that counsel were not in the court room may have inferred their lack of interest in their clients' cause and hence, their clients' guilt.

This is pure speculation, and how it shows "manifest wrong or injury" is inconceivable. Counsel says that the statement that the lawyers had gone (from the court *room*) was misinformation in that he, Mr. Zemel, was in the Court *House*. The distinction is self-apparent and needs no further comment. Mr. Zemel does not even contend that the clerk knew he was in the Court *House*.

It is well established that an alleged irregularity must be accompanied with manifest wrong and injury in order to constitute a ground for reversal. This rule is applicable to alleged communications with the jury, even in capital cases.

In *State vs. Cucuel*, 31 *N. J. L.* 249, the defendant had been convicted of murder in the first degree. At the conclusion of the trial the jury was placed in charge of sworn officers to keep them secluded during their deliberations.

During the several days of deliberation, one or more of the jurors were permitted by the Court to visit their homes, accompanied by one of the constables. Chief Justice Beasley, after reviewing the history and the reason of the rule, that the jury must remain secluded during deliberations, says: (P. 257)

> "The divergence of the jury or the officers of the Court from the line of duty, is susceptible of such an infinity of degrees, the principle would seem to be the most mischievous imaginable which should

> establish, as an inevitable result and as a rule of law, that on account of any such divergence whatever, the defendant should be entitled to a new trial. For it is to be remembered, also, that not only are the degrees of dereliction of duty infinite, but the variety of circumstances attending each dereliction of duty is likewise infinite; so that no two derelictions, in general character the same, will be even approximately of equivalent enormity."

He then states: (P. 258.)

> "I cannot but thing that among legal phenomena, few are more strange than that this question has been one on which courts have been much divided—for it would certainly seem, that the rule that the misconduct of any member of the jury or any one of the officers in charge of them, in violation of the order of the Court as to their seclusion, should *per se*, and without reference to the effect of such misconduct on the verdict rendered, have the effect of a mistrial, would be utterly impracticable. It is perhaps not rash to say that no verdict was ever rendered which would stand this test."

In the Cucuel case i twas also claimed and shown that one or two of the jurors, having separated themselves from the rest, heard certain remarks about the trial from strangers. We quote from the opinion of Chief Justice Beasley on this point: (P. 262.)

> "Next it is objected that on two several occasions expressions of opinion were uttered by strangers to the trial, in the hearing of the jurors or some of them, touching the merits of the case.

"It appears that during the trial one of the jurors in charge of the constable went into an oyster saloon. When they entered a single man was present—two men came ina fterwards—a few words passed touching the trial, between one of these persons and the woman who kept the saloon. She said she had heard Dr. Quinby's testimony given in court, and she did not think it was much in favor of Counsel. That if they would leave it to a jury of women they would soon hang him. The juror and the constable both say they heard the remark, and at the suggestions of the latter they immediately left the place. They were not in it more than five minutes.

"The other occurrence referred to was the expression of a wish that the defendant might be hung, made in the dining-room in the presence of the jury, by a man who was in liquor.

"The twelve jurors have been examined, and it appears that these are the only intimations of an opinion on the part of strangers which reached them out of the courtroom.

"It would be an excessive refinement to suspect that declarations, such as these, could have created the least possible bias in the mind of any member of the jury. The weakest intellect could not have been affected by them. In our anxiety to protect the prisoner we are not to abandon the sure footing of common sense. I think every man of ordinary intelligence and experience must feel, to a moral certainty, that from these occurrence the de-

> fendant could have received no detriment. That the constable was not justified in permitting the juror to go into a place of public resort is nothing to the purpose; undoubtedly he was culpable and deserved censure, if not punishment, at the hands of the Court. *But this official misconduct, as we have seen, in order to vitiate the verdict, must be such as, in the light of the circumstances of the case, to warrant* the belief that the fairness and propriety of the trial have been impaired. This result is entirely negatived in the present instance."

Counsel for Corbett would have this court accept the rule that the most infinitesimal irregularity during the deliberation of the jury would constitute an absolute ground for reversal. Such is not the law. A communication with the jury, or any other alleged irregularity, will not justify a reversal unless by the alleged error the defendant suffered *manifest* wrong and injury.

No such wrong and injury being shown in the case at bar, we submit that no reversible error was shown under this point.

POINT VI.

Under this point it is argued by defendants that the verdict was against the weight of the evidence; their contention being:

1. That no conspiracy or mutual agreemen was shown;

2. That there was no evidence to show that the $75 a week demanded by the defendants was for anything other than the perfectly innocent and lawful employment of protecting the trucks of Ruder and McCabe from possible "hijackers."

We have covered the evidence at some length, and it is deemed unnecessary to repeat any part of it. The case was replete with evidence showing that these three men, Corbett, Fiumara, and Crisifulli acted in concert, and that what they wanted was not an honest employment for $75 a week for the three, for they even now don't pretend that they were willing to work for $25 a week. What they wanted was, in everyday English, a "shakedown" of $75 a week for "protection money," or "consideration money."

They threatened that they would steal the trucks unless put on the payroll, (P. 11, Line 11, Line 29). After the trucks were stolen, they had a audacity to tell McCabe.

> "Now, I think, if *we* were on the payroll I think we could get those back for you."

In considering these matters, we cannot throw comomn sense to the winds and quibble over the lexicographic meaning of words and phrases such as "protection money," "consideration money," "put on the payroll," etc.

Taking all the circumstances comprehensively, no one can escape the conclusion that there was a prearranged plan to obtain $75 a week by means of threats.

It is next argued that assuming that these three men did conspire to obtain money from their victims by threatening to steal their trucks, such a scheme does not constitute a conspiracy to cheat and defraud.

Bovier's Law Dictionary defines "Defraud" thus:

> "To defraud is to *withhold from another that which is justly due to him, or to deprive him of a* right by deception *or artifice.*"

The word "artifice," according to Funk & Wagnall's, mean:

"Trickery, strategy, stratagem, maneuver."

It is thus clear that the meaning of "to defraud" is not confined to "to deceive", and includes the withholding, without deception or false pretense, from another that which is justly due him; and the depriving of another, of a right by artifice,—a trategy, a maneuvre, a *scheme.*

This distinction between "defrauding" and "deceiving" or "falsely pretending" is easily recognized in our statute defining conspiracy. For, section 37 first mnetions conspiracy "To cheat and defraud any person of any property by any means which are in themselves criminal," and then mentions conspiracy "to obtain money by false pretenses." The indictment in the case at bar charges a conspiracy to cheat and defraud by means of threatening to steal and by means of stealing the trucks, which means are in themselves criminal.

It is submitted, therefore, that the evidence justified the indictment, not only in substances, but literally as well.

It is further submitted that the evidence amply justified the verdict.

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

The State of New Jersey, *Deendant-in-Error,* *vs.* Ernest Fiumara, *Plaintiff-in-Error.*	*On Appeal.*

BRIEF IN BEHALF OF PLAINTIFF-IN-ERROR.

Statement of Facts.

The plaintiff-in-error, hereinafter referred to as the defendant, was convicted upon an indictment charging that he, together with Harold Corbett and John Crisifulli, conspired to cheat and defraud Harry McCabe and Daniel Ruder, partners, of their moneys, goods and chattels by threatening to steal, take and carry away, and by stealing, taking and carrying away the moneys, goods and chattels of the said firm of McCabe and Ruder.

The trial of the indictment was moved against Harold Corbett and Ernest Fiumara, John Crisifulli not being within the jurisdiction of the Court. This conviction was reviewed in our Supreme Court and there affirmed. Upon the affirmance of this conviction this writ of error is prosecuted.

POINT ONE.

The Trial Court erred in permitting the complaining witnesses to testify as to the theft of their property (Case page 12).

(Under this point will be argued Assignments of Error 1 and 2 and Specifications of Causes for Reversal 1 and 2.)

In the case of *Temperance Hall* v. *Giles*, 33 N. J. L. 260, Justice Depue, speaking for the Supreme Court, says:

> "It is not easy to draw the line, and define, with accuracy, where probability ceases and speculation begins. The rule is everywhere stated, in general terms, *that the evidence must be confined to the issue.* This rule excludes all evidence of collateral facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. 1 Greenleaf's Ev. para. 52.
>
> It is not practicable to lay down any principle by which a judge should be governed in determining whether any class of facts offered to be proved, comes short of the requisite of affording a reasonable presumption as to the matter in issue, but the inclination of the cases is to *exclude all proof of facts which are res inter alios acta,* unless their probative force, as presumptions, clearly appears, *for the obvious reason that the other party cannot be prepared to meet such proof* by counter proof, as to the truth of the facts offered."

The reasoning of this case is particularly adapted to the case at bar. The indictment charged the defendant with conspiracy to cheat and defraud. There was no allegation in the indictment about the theft of the beer barrels and it is difficult to see how the defendant could

have been expected to be prepared to answer such an allegation.

Chief Justice Garrison, speaking for the Supreme Court in *State* v. *Meyer*, 59 N. J. L. 310, said:

> "To the general rule that upon the trial of a person for one offense proof of his guilt of other offenses is irrelevant. There are, it is true, some exceptions in which the defendant's Guilt of the extraneous crime tends to prove against him some particular element of the crime for which he is being tried. Scienter may thus be proved, so, in appropriate cases, may opportunity, motive, preparation, concealment or escape. Where, however, the proof can go no further than to show a propensity to commit the offense in question, it is not relevant. *The general presumption of innocence cannot be broken down by thus showing the likelihood of* the defendant's guilt of the particular offense. Clark *v.* State, 18 Vroom, 556; State *v.* Raymond, 24 *Id.* 260."

The present case does not come within the rule as laid down, nor was evidence of the theft part of the *res gestae*, nor is there any attempt to prove the theft nor by whom the alleged theft was committed.

Guilt of the defendant was not proved nor was the crime of like nature. If *guilt* of other offenses may not be introduced, it is only logical that facts not connected with the defendant should not be admitted. There is no connection between the defendant and the evidence admitted and there is no apparent reason for its admission except to show that the defendant was likely to have committed the crime charged.

The rule under discussion being more honored in the exception than in the observance, in order

to show that the evidence in question falls within the general rule, if at all, and not within any of the numerous exceptions, it is necessary for the guidance of the Court to go into a somewhat lengthy comparison of the cases which most closely parallel the present state of facts.

In *State* v. *Parks*, 59 N. J. L. 573, at page 576, a series of questions was allowed with reference to a charge made against a Police Captain at a time not named. The Court said that:

> "The allowance of these questions was clearly wrong, in our opinion, and constitutes a second error in these proceedings."

In the case of *State* v. *Sprague*, 64 N. J. L. 419, at page 426, on an indictment for assault with an intent to ravish, a witness was called to testify as to his good reputation. Upon cross examination, he was asked as follows:

> "Q Have you not heard of 30 or 40 women being insulted there by young men?"

This was objected to on the part of the defense but it was allowed and an exception taken and he was permitted to say in answer:

> "A I have heard of their being insulted there."

It was held that:

> "This question and answer had no connection whatever with the defendant, nor was it at all material to the subject of his reputation. It was error to admit this evidence, and the fact elicited must have been prejudicial to the defendant."
>
> "The fact that other women had been insulted at the place was irrelevant in this case under the most commonplace law. * * * It was clearly error and harmful to the defendant."

The evidence in question was not admissible as part of the *res gestae.* The offense charged was conspiracy to cheat and defraud as well as two overt acts. Clearly, a larceny committed by some third person could not be part of the conspiracy, nor could it be part of either of the overt acts, as alleged, nor could this evidence have been admitted to affect the defendant's credibility in that point in the case.

After a comparison of the cases, the cases of *State* v. *Parks, supra, State* v. *Sprague, supra,* most closely approach the present state of fact. In the former case, evidence of an extraneous crime was introduced but there was no proof that the defendant was in any way connected with the facts adduced. In the later case, there was no proof that the defendant had taken any part in the matters admitted in evidence. In each case, the particular admission was held harmful error. In the present case, the evidence shows that the defendant, Fiumara, went to the place of business of the complaining witnesses on October 6, 1930; that the beer barrels were stolen on October 7th. There is no proof that he was ever at the place at any other time, either before or after. There is no allegation in the indictment that the defendant stole the beer barrels. There is no proof that this defendant did steal them, or that he had any part in or knowledge of the theft, if such there was. The evidence was wholly of an extraneous crime which had no connection with the crime charged, and of which the defendant had no warning or opportunity to prepare to meet.

The defendant submits, therefore, that inasmuch as this evidence was not admissible within the exceptions to the rule, or as part of the *res*

gestae, or to affect the defendant's credibility, or for the purpose of showing a propensity to commit crime, it was not admissible at all and its admission was clearly harmful error to the defendant and admitted for no apparent reason other than to show likelihood of the defendant to have committed the crime charged.

> "On error, reversal is required if it appears that the illegal evidence *may* have been harmful. *Ruckman* v. *Bergholz*, 8 Vroom 437." (Italics supplied.) "*State* v. *Ryan*, 60 N. J. L. 552."

POINT TWO.

The Trial Court erred in permitting the Prosecutor to ask this defendant whether he knew about the arrest of the other alleged conspirators.

(Under this point will be argued Assignments of Error 5 and 6 and Specifications of Causes for Reversal 5 and 6):

How this evidence was admissible is certainly not an easy question to answer. It certainly was irrelevant and immaterial.

The Trial Court took testimony about the making of the alleged confession in the presence of the jury and permitted the jury to hear the testimony upon its admissibility. This was manifest error as the admissibility of an alleged confession is always a preliminary question for the Trial Court and this defendant, by virtue of Section 136 of the Criminal Procedure Act, is entitled to a reversal for this error.

In 16 Corpus Juris, page 735, it is said:

> "The court should determine, prior to permitting the confession to go to the jury, whether it was or was not voluntary."

citing in the foot-note:

"*State* v. *Young*, 67 N. J. L. 223."
"*Roesel* v. *State*, 62 N. J. L. 216."

On page 926 of the same text it is said:

> "Whether a confession offered in evidence was free and voluntary is a question relating to the admissibility of evidence and as such is generally a question for the court in the first instance, particularly where the circumstances under which it was obtained are such as to reasonably indicate whether it was or was not voluntary."

POINT THREE.

The motion for a direction of a verdict of acquittal, made in behalf of defendant, Ernest Fiumara, should have been granted.

(Under this point will be argued Assignment of Error 7 and Specification of Causes for Reversal 7):

This motion was heard by the Trial Court in the absence of the jury. The Trial Court (Case, p. 84, l. 18) interrogated the Prosecutor and put this question to him:

> "Now, what evidence is there, Mr. Prosecutor, against the defendant Fiumara?"

The sum and substance of the Prosecutor's answer to the Trial Court (Case, pp. 84-85-86-87) is that the only evidence against Fiumara was that he was present in an automobile at a time when a conversation was had between the complaining witness, Daniel Ruder and the other defendant, Harold Corbett, and further that two days later when the three defendants were arrested, Fiumara was also taken into custody. There was no evidence that the defendant Fiu-

mara had overheard the conversation between Ruder and the defendant Corbett. It positively appeared that he had not participated in any conversation and at that stage of the case the defendant, Harold Corbett, had testified that when he, Corbett, spoke to Ruder, asking for a job, *Fiumara was not with him.* At the conclusion of the argument of the motion after it had been properly contended that there was no proof that the defendant, Fiumara, had overheard what the defendant Corbett and Ruder were saying, the Court answered this contention as follows (Case, p. 87, l. 20):

> "Mr. D'Aloia: Now, it has not been proven to anybody's satisfaction that Fiumara heard what this man said to Ruder.
>
> The Court: The jury has to infer. If they do infer that he did not hear, why of course, he is not bound. I will deny your motion and give you an exception."

This conclusion of the Trial Court was erroneous because it was incumbent upon the State to prove that Fiumara not only had heard the conversation but that he was a party to it *and assented to it.* Upon this far-fetched inference, the case was allowed to go to the jury and the Trial Court in charging the jury, upon this phase of the case (Case, p. 92, l. 15) said as follows:

> "Now, in this particular case there was certain testimony that Fiumara was present in an automobile at a time when a certain conversation was had, according to the testimony of one of the State's witnesses, to wit, Ruder. The circumstances of that conversation were such that it may be—I know not, but it may be that you will draw the inference or come to the conclusion beyond a reasonable doubt that Fiumara was in a position to hear that conversation. Now,

> if you do come to that and you do conclude that he was in a position to hear that conversation and, by the way, that conversation to which I referred was the one in which Ruder said or testified that somebody said to him that he wanted to be employed at $75 a week to protect Ruder's trucks from being stolen and that if he was not so employed they would be stolen. Now, as I say, if you conclude from all the evidence that Fiumara was present and heard that conversation, then you may ask yourselves the question, why didn't he get upon the stand and say that he was not there or say that if he was there he did not hear any such thing, or say that if he was there and did hear such a thing that he refuted it."

The complaining witness, Ruder, had testified that the defendant, Fiumara, had never said anything to him (Case, p. 19, l. 10). The other complaining witness, Harry McCabe, had positively testified that Fiumara had never spoken to him on the 6th, 7th or 8th days of October, 1930, at any time (Case, p. 32, l. 20).

The defendant, Harold Corbett, had positively testified that Fiumara never had any agreement with him to get some money out of Ruder and McCabe and had positively testified that at the time Corbett was taken into custody, Fiumara had just gotten into Corbett's automobile (Case p. 50, ll. 1-15), and he had further testified that he spoke to the complaining witness, Ruder, outside of his automobile. The testimony appears on page 50, line 27, as follows:

> "Q And did you go into Ruder's place? A I got out and he was coming out of the office. He was going away. He had his hat and coat on.
>
> Q Did you go in the place? A In the office?
>
> Q Yes. A No, I didn't.

Q Where did you speak to him? A Right alongside of the office.

Q And who was with you? A I was alone.

Q Nobody with you at all? A No, not at that time. Nobody was with me.

The Court: Now, when you were in the Cadillac car, who was with you?

Witness: Nobody.

The Court: You were all alone?

Witness: I was all alone.

Q And you say there was nobody with you at that time? At what time was there somebody with you? A I was never there with anybody, but I passed there.

Q With whom? A With Crisifulli. I went to pick Crisifulli up at his house. He was sick.

Q Who else? A Nobody else.

Q Was Fiumara? A No, sir.

Q Wasn't Fiumara with you when you were arrested? A Yes, but I picked him up at Wilson avenue and Lafayette street."

The mere presence of Fiumara at or near the place where the complaining witness Ruder spoke to the defendant, Corbett, is not sufficient to establish beyond a reasonable doubt his guilt of the charge laid in the indictment. To constitute him a party to the criminal act he must be not only present upon the scene, but an actual participant. The fact that he was present and possibly overheard the conversation between the complaining witness, Ruder, and the defendant, Corbett, is not, in itself, sufficient evidence that he was a participant, or an aider or an abettor.

"*State* v. *Fox*, 70 N. J. L. 353."

"16 *C. J.* 137," Section 131.

The motion for a direction of a verdict should have been granted.

POINT FOUR.

The Trial Court erred in refusing to charge as requested.

(Under this point will be argued Assignment of Error 14 and Specification of Causes for Reversal 14.)

At the conclusion of the Trial Court's charge and before the jury had left the box, counsel for this defendant requested that the jury be instructed as follows:

> "The indictment in this case charges 3 men named therein with conspiracy, but only 2 of them are on trial; as to them, your verdict can be, if you so find, 'guilty' as to one defendant and 'not guilty' as to the other defendant" (Case, p. 94, l. 1).

This specific request was made because of the confusion which counsel felt might arise in the minds of the jury by reason of what the Court had said in its charge on the subject. In one part of the charge (Case, page 90, ll. 29 to 32), the Trial Court had instructed the jury as follows:

> "Now, gentlemen, the case as to each of these defendants stands on its own bottom; that is to say, each defendant must be proved guilty under the charge of the Court."

Whatever this means, it did not convey to the jury what was set forth in the request to charge. In another part of the charge (Case, p. 93, ll. 28-32), touching upon the same subject, the Trial Court had charged as follows:

> "* * * if you come to the conclusion upon all of the testimony that the defendants or either of them are—if the defendants are guilty, I should say, you will so find them. Otherwise you will find them not guilty, and as I said to you, gentlemen, each man's case stands on its own bottom * * *."

Counsel was justified in assuming that the jury would not be able to clearly understand the quaint expression "each man's case stands on its own bottom" and framed the request so that it was simple, direct and easy to understand.

The Trial Court erroneously refused to charge as requested and practically repeated what had already been stated in the charge in almost the same language, as follows:

> "Of course, gentlemen, I think I made it clear to you that each man's case stands on its own bottom and you must consider each man's case on its own merits and you must decide each one on its own merits, and I think I have made that clear already, considering, of course, all the testimony under the charge of the Court so far as it may be applicable" (Case, p. 94, l. 11).

This language does not embody the request made by counsel. It instructs the jury as to how they might determine the guilt or innocence of each defendant, but does not inform them as to what verdict they might bring in. The object of the specific request was to inform the jury that, if they so found, they could bring in a verdict, under the indictment, of "guilty" as to one defendant and "not guilty" as to the other.

Counsel deemed it important in view of the definition of the crime which the Court had correctly given to the jury (Case, p. 89, l. 39, to p. 90, l. 7):

> "A conspiracy is a combination of persons to effect a criminal object or a lawful object by criminal means. There must be two or more persons involved, or there can be no criminal conspiracy, for one cannot conspire with himself alone."

Where a request to charge calls for the application of a correct legal principle, is applicable

and clearly material to the defendant's case, he is entitled to have it distinctly charged in such way as not to leave room for misapprehension or mistake by jury.

"*Roe* v. *State*," 45 N. J. L. 49.

"*State* v. *De Geralmo*," 83 N. J. L. 135.

The Trial Court erred in not charging the jury as requested.

POINT FIVE.

Because the Trial Court erroneously and illegally permitted the jury trying the said issue to be communicated with, during their deliberation, contrary to law.

Because the Trial Court erroneously gave instructions to the jury while the said jury were deliberating, in the absence of and without notice to the defendants or their counsel, contrary to law.

(Under this point will be considered Assignments of Error 17 and 18 and Specifications of Causes for Reversal 17 and 18:)

After the jury retired to deliberate, the Court instructed the deputy clerk that the Court would remain open and the clerk would receive the verdict (Case, p. 99, l. 28). Thereafter, at about 6:20 P. M. (the jury having retired about 5 P. M.) the officer who was sworn to take charge of the jury received a note from the jury (Case, p. 105), saying:

"Can we get copy of the testimony?"

This note was delivered by him to the deputy clerk who thereupon communicated with the judge by telephone to whom he read the note and by whom he was instructed over the tele-

phone (Case, p. 98, l. 32) to notify the jury that the Court had left and the lawyers had left and the stenographer had left and thereupon the deputy clerk told one of the court officers to communicate that fact to the jury by giving him the note upon which that message had been written (Case, p. 100, l. 15). He thereupon gave the note to the foreman of the jury. At the time of this occurrence the attorney for one of the defendants was in the Court House although not in the court room. The defendant urges and argues as a matter of law that this entire procedure was grossly irregular and that it was so harmful to the defendant as to require a reversal.

It needs no citation of authority to prove that no instruction should be given to juries except in the presence of the accused or his counsel; and that from the time the jury retire to deliberate there should be no communications with them about the case except to inquire whether they have agreed.

In the case of *State* v. *Duvel*, 4 Misc. 719, affirmed 103 N. J. L. 715, after the jury had retired, the communication was received by the clerk requesting instructions. The clerk thereupon communicated with the judge by telephone and the judge directed him to write the answers on paper and deliver them to the jury. The Supreme Court said, on page 720:

> "We think that this procedure was so irregular and so likely to be prejudicial to a defendant, and so charged with possibilities of harm and abuse as to require a reversal.
>
> All the authorities seem to require and insist upon judicial acts of this character being done and performed in open court. State *v.* Doty, 32 N. J. L. 403; Davis *v.*

Township of Delaware, 41 *Id.* 55; Folkner *v.* Hopkins, 2 N. J. Adv. R. 1857; State *v.* Simon, 3 N. J. Adv. R. 522.

There is one case in this court to which our attention has been directed, Cutler *v.* Ellis, 1 N. J. Mis. R. 228. This was a civil action, and the court found that although the action was 'informal and irregular' yet 'that ought not to result in setting aside the verdict, when, as appears clearly, the lawful rights of the plaintiffs were not prejudiced thereby.''

''That the instructions given may have been proper and legally correct, and that they were correctly transmitted by the clerk to the jury, is beside the question, although it is urged that the defendant below suffered no harm. That is impossible for us to say. It may or may not be so. For instance, while the instructions brought forth by the questions may have been correctly given, yet the request therefor, if made in open court, may have called for requests upon the part of the defendant below, for further instructions, suggested or provoked by the questions propounded by the jury and the instructions given in obedience to the request, and where the action of the trial court, was as here, the defendant below had no such opportunity.

''For this reason, therefore, the judgment below is reversed.''

In the case of *State* v. *Weisman*, 5 Misc. 625, a similar situation arose. In that case the Court dictated one word, ''yes,'' over the telephone, which word was written upon paper and returned to the jury. At the time of the occurrence, the defendant's counsel was in an adjoining room.

The Supreme Court held this to be reversible error and said:

''We think this case is controlled by the case of State *v.* Duvel, 4 Misc. 719, where it

> was held by this court that a procedure of this character was so irregular and so likely to be prejudicial to a defendant and so charged with possibilities of harm and abuse as to require a reversal."

As an indication of the length to which the Court will go in guarding against any irregularities, we may cite the case of *Conti* v. *Alea*, 9 N. J. Advance Reports, 297, not officially reported, wherein the Supreme Court set aside a verdict in a civil case where the clerk of the Court refused to receive a verdict and the Court thereupon gave the jury additional instructions.

It has been the policy of our Courts to guard and preserve the proper conduct of juries. The wisdom of this policy could not be better illustrated than by this very case. There is no way of telling what effect was produced upon the jury by the information given them on this note. The note told the jury that the judge and lawyers and stenographer were all gone. As a matter of fact the lawyer for one of the defendants was in the Court House at the time. From this misinformation given the jury, they may have taken the view that the defendants' attorneys had so little confidence and faith in their case that they were not sufficiently interested to wait for the verdict, and from this they may have inferred the guilt of the defendants.

Of course, we do not know what they inferred or what they thought, but clearly this communication had some effect upon them and we therefore submit that it was harmful error.

POINT SIX.

The Trial Court erred in refusing to direct a verdict in favor of the defendant and that the verdict was against the weight of the evidence and contrary to law.

(Under this point will be argued Assignments of Error 3, 4 and 8 and Specifications of Causes for Reversal 3, 4, 8 and 19):

We submit that the defendant could not be convicted of any crime not charged in the indictment. The indictment charges first, that the defendant conspired, together with two other defendants, on October 6, 1930, to cheat and defraud the complaining witnesses, by threatening to steal and by stealing the property of the complaining witnesses.

A careful study of the evidence fails to disclose even a scintilla of evidence of the conspiracy alleged. The State's first witness, one Ruder, testified that the defendant, together with Corbett came to him on October 6th and that Corbett said he wanted to go to work for him (Case, p. 10, l. 35). He wanted seventy-five dollars a week to protect the trucks (Case, p. 10, l. 40). He did not say who would steal the trucks (Case, p. 11, l. 28), although he contradicts himself on this point in answer to a leading question by the Prosecutor. He then testified over the objection of the defendant that his trucks were stolen the following day and that while he recovered the trucks, the beer containers contained therein were never recovered. He further testified that an automobile came to his place of business on October 8, 1930, and that he notified police headquarters. On cross examination the witness Ruder testified (Case, p.

17) that Corbett came to him on October 6, 1930, and said that he wanted to work for seventy-five dollars a week and that the witness told Corbett he did not need him (Case, p. 17, l. 21). Upon examination by the Court the witness changed his testimony and tells us (Case, p. 17, l. 36), that "they" wanted seventy-five dollars a week to protect the trucks. He further testified that on October 6, 1930, Corbett did the talking and said that he wanted seventy-five dollars a week to protect the trucks. He further testified on page 19 that the defendant Fiumara did not say a word (Case, p. 19, l. 10).

Taking now the entire case of the State we fail to find one word about conspiracy. We find absolutely no threats or anything in the nature of cheating and defrauding. The only thing testified to against the defendants is that the defendant Corbett wanted to be employed in protecting the trucks of the complaining witnesses and wanted to be paid for his services.

On what theory this could have been called a cheat, it is impossible to understand. The words "cheating" and "defrauding" imply a deception or false pretenses and mere threats do not constitute cheating or defrauding.

Bouvier's Law Dictionary defines the word "defraud" as follows:

> "To defraud is to withhold from another that which is justly due to him or to deprive him of a right by deception or artifice: to cheat, to wrong another by fraud."

Webster's New International Dictionary, 1926, defines the word "cheat" as follows:

> "* * * The obtaining of property from another by an intentional act or distortion of the truth; * * *"

The same authority also gives as synonyms for the word "cheat" the words:

> "Trick * * * fool, outwit, * * * mislead, delude and deceive." Continuing: "Cheat, defraud, swindle, dupe, agree in the idea of fraudulent dealings. Cheat usually implies a certain degree of cunning or trickery as to cheat at cards or in examination. Defraud implies the taking or withholding by fraudulent means of something to which one has a right; as: 'Thou shalt not cheat thy neighbor, neither rob him.' " (Lev. XIX 13.)

From these authorities we see that even if the defendant did threaten to steal the property of the complaining witnesses unless he, the defendant, was paid money by the complaining witnesses, there would still be no evidence of a conspiracy to cheat and defraud.

We therefore urge and argue as a matter of law that there being no evidence of a conspiracy to cheat and defraud the Court should have directed a verdict for the defendant.

In conclusion, we submit, that for the reasons above set forth the conviction of the defendant, Ernest Fiumara, should be reversed.

J. VICTOR D'ALOIA,
Attorney for Plaintiff-in-Error.