Underwood, John C vs State of MO, 1865 Newton Co #13 CR 269/15

97/24

· moving a house

· reversed - evidence should have been admitted + instructions improperly given

The State of Missouri, ss.

The State of Missouri, To the Judge of the Judge of the Thirteenth Judicial Circuit in said State, **Greeting:**

WHEREAS, In the record and Proceedings in a certain cause lately pending in the Circuit Court of Newton County wherein The State of Missouri was plaintiff and John C. Underwood was defendant

in an action of Malicious Mischief manifest error hath intervened to the great damage of the said John C. Underwood as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, **COMMAND YOU,** that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the Second Monday in January next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done, and have then and there this writ.

Witness, N. C. Burch, Clerk of our said Supreme Court, at office, in the City of Jefferson, the fifteenth day of November in the year of our Lord one thousand eight hundred and sixty five.

N C Burch
Clk S. Ct

The State of Missouri }
County of Newton } I W I Morrow Clerk of the Circuit Court in and for Newton County, in obedience to the within Writ - do hereby certify that the foregoing is a true and perfect transcript of the Papers, Records & proceedings had in the above entitled cause —

Given under my hand and the seal of said court at office this 5th day of Dec 1865 —

W I Morrow clerk

Be it remembered that at a regular term of the Circuit Court held for the County of Newton, begun and held at the Court House of said County on Monday the 27th day of March A D 1865 in the town of Neosho, the County seat of said County, present John C Price Judge of the 13th Judicial Circuit in the State of Missouri, and Stephen W Wolcott Clerk of said Court — It appearing to the satisfaction of the Court that there is no Sheriff nor Coroner for the County of Newton; it is ordered by the Court that Wm M Boyd and John C Cox be appointed to act as Sheriffs of said County, to execute the process to them directed of this Court, and took the oaths prescribed by an ordinance of the Convention, the oath of office to act as Sheriffs of said County, and the oath in relation to summoning jurors; when amongst other proceedings the following were had —

Tuesday 2nd day of Spring Term
March 28th 1865

The Sheriff returned into Court the following Grand Jurors to wit George Buzzard, Alfred H Barlow, Charles Ragan, Frederic Gallemore

L B Hearrell, John Huckaby, Eli Powers James Adams J J Barlow, John Melton G W Britton, Jacob McClendon, William Parker, William Mitchell, A P Gibson, Joseph Powers, who took and subscribed the oath required by an ordinance of the Convention L B Hearrell was by the Court appointed Foreman - the said Jury were then sworn as Grand Jurors, and charged by the Court and retired to consider of their presentments.

Saturday April 1st 1865

The Grand Jury come into Court and returned by their foreman certain Bills of Indictment, which by the Court were ordered to be filed, and on motion of the Circuit attorney writs of Capias were ordered to be issued thereon - whereupon the Grand Jury having no further business, were by the Court discharged - and amongst which said indictments were the following.

The State of Missouri } ss
County of Newton } The Grand Jurors for the State of Missouri empanelled sworn and charged to enquire within and for the body of the County of Newton upon their oaths present that John C Underwood

late of Newton County heretofore to wit, on the first day of February A D 1865. at the County of Newton, State of Missouri did unlawfully and maliciously pull down a dwelling house and sever therefrom the material out of which it was made, and deface the doors and windows of the same, the dwelling house of Joseph Wood, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Missouri.

George W Randolph
Circuit Attorney

Endorsed "This a true Bill
L B Mearrell
Foreman of the Grand Jury"

Filed this 1st day of April 1865 in open Court. S W Wolcott Clerk

To the Sheriff of Newton County, Greeting

You are hereby commanded to take the body of John C Underwood if to be found in your County and him safely keep, so that you have his body before the Honorable Judge of our Circuit Court, at the Court House in the town of Neosho on the first day of the next term of said Court, which will be begun and

held on the 4th Monday in September next, then and to answer unto the State of Missouri for an indictment against him by the Grand Jury of the State of Missouri, charged and sworn to inquire in and for the body of the County of Newton for a misdemeanor, contrary to the Statute in such cases made and provided and against the peace and dignity of the State.

In testimony whereof I W I I Morrow Clerk of the Newton Circuit Court have hereto set my hand and affixed the seal of said Court at office in Neosho this 31st day of August A D 1865.

W I I Morrow Clerk

Endorsed "Issued 31st August 1865.

W I I Morrow Clerk

Executed the within by arresting the within named John C Underwood this 11th day of September 1865.

L B Hutchison Shff
of Newton County Mo.

State of Missouri
County of Newton } Know all men by these presents that we John C Underwood as principal &

as security acknowledge ourselves indebted to the State

of Missouri in the sum of two hundred and fifty dollars, to be levied of our respective goods and chattels, lands and tenements upon condition that the above bounden John C Underwood shall personally appear before the Judge of the Circuit Court, at a court to commence & be holden at the Court house in Neosho on the 4th Monday in September next, & then & there to answer a charge against him for a misdemeanor & not depart the Court without leave, then this recognizance to be void, otherwise to remain in full force. Given under our hands and seals this day of September 1863.

J C Underwood (Seal)
L B Hutchison (Seal)

Friday September 29th 1865.
The State of Missouri
vs
John C Underwood } Defendant.

Now at this day comes the State by Joseph Estes Circuit Attorney who prosecutes for the said State, as well as the Defendant in his own proper person, and said Defendant being charged on the indictment says thereof that, he is not guilty in manner

and firm as charged in said indictment, and for trial puts himself upon the country and the Circuit Attorney doth the same, and thereupon come the following Jury to wit Hiram Whelock, Ephraim H Foster, Solomon Burkhart, William Crabtree, Elisha Testerman, Peter H Hutchison, R V Keller, Henry Wade, John Owen, John B Testerman, D H Harris, and Henry Williams, who after taking the oath of loyalty prescribed by the Constitution, were sworn well and truly to try the issue joined in this cause, and upon their oath aforesaid say, "We the Jury find the defendant guilty, and assess the fine at two hundred and fifty dollars. It is therefore considered by the court that said State have and recover of and from said defendant, said sum of two hundred and fifty dollars, the fine aforesaid by the Jury aforesaid in form aforesaid, assessed together with costs by her about her prosecution expended & that execution issue therefor with a capias clause.

Saturday September 30th 1865.

The State of Missouri

vs

John C Underwood Defendant

Now at this day comes said Defendant by his attorney and files herein his motion for a new trial in this cause, and said motion coming on to be heard, and the same being seen and fully understood by the Court, is by the Court overruled; whereupon said defendant files herein his motion in arrest of judgment in this cause — which said motion is in the words & figures following to wit

"The State of Missouri

vs

John C Underwood

Now at this day comes the Defendant and moves the Court to arrest the judgment in this cause for the following reasons.

1st Because said indictment is bad for duplicity.

2nd Because said indictment charges three distinct and seperate offences in the same Count.

3rd Because the verdict of the Jury is informal, unintelligable and wholly insufficient to support the Judgment of the Court.

4th Because the verdict does not specify or imply of what particular crime or offence the Defendant is found guilty.

5th Because the indictment charges no offence known to the laws of this State

James F Hardin
Atty for Deft.

Tuesday October 3d A D 1865.

The State of Missouri
vs } Misdemeanor
John C Underwood Defendant

Now at this day comes on to be heard Defendants motion in arrest of Judgment in this cause, and the same being seen & fully understood by the Court, is by the Court overruled, To the overruling said motion Defendant by his attorney excepts.

~~The State of~~

October 4th 1865.

The State of Missouri
vs } misdemeanor
John C Underwood Defendant.

Now at this day comes the Defendant by his attorney and files herein his bill of exceptions in this cause — which is in the words and

figures following to wit

The State of Missouri

vs

John C Underwood } Be it remembered that at the September Term A D 1865 of the Newton Circuit Court it being the 5th day of said term the above entitled cause come on to be heard when and when the plaintiff introduced one Mr Willy as a witness in her behalf who being duly sworn testified substantially as follows, "In the winter of 1864 or possibly as late as January 1865 I loaned my wagon to Mr — one of my neighbors he said he wanted it to haul for Mr Underwood. I saw him shortly afterwards with portion of a house on the wagon hauling into town. I knew the material of the house, when I saw it on the wagon and knew it was Wood's house - did not ask this man any thing about it. In a few days after that the defendant told me he had hauled Joe Wood's house into town, that it was being destroyed where it stood, that he intended to put it up on a lot in town where no one else could claim it, and take care of it for Wood. I remarked to him that I was Woods security on

a School note, and that I did not want his property destroyed, he said that is the reason I brought it in, I want his creditors to have the benefit of it. He put the house up on the west side of the Public Square in Neosho, where it is still standing and he is now using it." The same witness upon cross examination testified substantially as follows "The house was on the 16th Section, I dont know that it was Woods land. I think he had bought it from the County, but had never paid for it, but I may be mistaken. Wood formerly lived in the house and I think built it. Wood had had left the house some time - perhaps a year before it was torn down, dont know whether any person lived in it or not at the time it was torn down. I saw it a short time before it was hauled into town, it might have been occupied by repairing the doors and windows, but I did not think it fit for a dwelling house without such repairs. This house is the same that I spoke of in in my direct examination"

The above was all the evidence given on the part of the State.

The Defendant then offered

to prove by a competent witness. That Joseph Wood had left the neighbourhood about a year and a half before the house was removed to town. That when he went away he left his wife and family in the house. That several months before the house was removed, Woods wife and family left the house and left the witness living in it, and that Woods wife when she left told witness to do whatever she thought best with the house. That she (witness) continued to live in the house for some months and then left it and told defendant to move it into town."

To the introduction of this testimony the plaintiff by her attorney objected on the ground of incompetency of such testimony, which objection was by the Court sustained, and said testimony rejected, to which ruling of the Court the defendant then and there excepted.

The above was all the evidence given or offered to be given in the above entitled cause.

The court then on motion of the plaintiff by her attorney gave the following instructions,

"1st The court instructs the jury that if they believe from the evidence that the defendant pulled down and removed the dwelling house of Joseph Wood without authority, that such act of pulling down and removing said house is of itself sufficient proof in the absence of any rebutting testimony, to show that said house was pulled down and removed maliciously and willfully.
2nd That if the Jury find the defendant guilty, they will assess as a punishment imprisonment in the County Jail not exceeding one year, or a fine of not more than five hundred dollars and not less than one dollar, or by both such fine and imprisonment"

To the giving of which said instructions the defendant then and there excepted.

The defendant then moved the Court to instruct the Jury as follows.
1st The Court instructs the Jury that unless they believe from the evidence that the defendant willfully and maliciously pulled down a dwelling house, or severed therefrom the material out of which the same was made, or

defaced the doors or windows thereof as charged in the indictment the property of Joseph Wood within one year next preceeding the finding of the indictment in this cause in Newton County State of Missouri, they will find the defendant not guilty.

2nd The Court instructs the Jury that malice is that mind or desire to do a person a positive injury regardless of any benefit to the party doing such injury.

3rd The Court instructs the Jury that unless they find the house was the property of Joseph Wood and was a dwelling house, they will find the defendant not guilty.

4th The court instructs the Jury that a house built upon land, is presumed to at once to become a part of the realty, and in order to prove property in the house in Joseph Wood, the State must prove title in the land in said Wood

5th When a party proves title by possession only, his title fails with his possession, and the Jury are instructed, that if they believe from the evidence that Joseph Wood was out of possession at the time the house was pulled down

severed or injured, or that he was not in possession when either of these acts were done, then they will find defendant not guilty.

6th. The Jury are instructed that unless they believe from the evidence that the house pulled down was a dwelling house at the time the same was pulled down, they will find defendant not guilty.

7th. The Jury are instructed that if there is a reasonable doubt upon the whole case of the guilt of the defendant they will acquit him."

Which said instructions were all by the court refused, to which ruling of the Court and refusing of said instructions the defendant then and there excepted.

Whereupon the Jury retired for deliberation, after which they returned into court the following verdict "We of the Jury find the defendant guilty, and assess the fine at $250.00

Henry Williams
Foreman"

And afterwards to wit at the September term of said Court A D 1865 it being

the 6th day of said term, the defendant moved the court for a new trial in this cause, which said motion was in the following words and figures to wit
"The State of Missouri
vs
John C Underwood } Now at this day comes the defendant and moves the court to set aside the judgment and verdict in this cause and grant him a new trial in this cause for the following reasons to wit.
1st Because the court erred in refusing to admit the testimony offered on the part of the defendant.
2nd Because the court erred in giving the instructions asked by plaintiff
3rd Because the court erred in refusing the instructions asked by the defendant
4th Because the verdict is contrary to the evidence.
5th Because the fine assessed by the Jury is excessive

James H Hardin
Atty for Deft.—

Which said motion was then and there taken up and argued by consent of parties, and the same was by

the Court overruled, to which ruling of the Court the defendant then and there excepted. The defendant then and there to wit on the same day, by leave of the Court filed his motion in arrest of the Judgment in this cause, which said motion is in the following words and figures to wit.

"The State of Missouri
vs
John A Underwood

Now at this day comes the defendant and moves the Court to arrest the judgment in this cause for the following reasons

1st. Because said indictment is bad for duplicity.

2nd Because said indictment charges three distinct and seperate offences in the same count

3rd. Because the verdict of the Jury is informal, unintelligable, and wholly insufficient to support the judgment of the Court.

4th. Because the Verdict does not specify or imply of what particular crime or offence the defendant is found guilty

3rd. Because the indictment charges no offence known to the laws of this State.

James H Hardin
Atty for Deft

which said motion coming on to be heard to wit on the 8th day of said term of said Court, the same was by the Court overruled, to which ruling of the Court the defendant then and there excepted — all of which said several exceptions in this his bill of exceptions mentioned, he prays the Court may be signed, sealed and made a part of the record in this cause, which is accordingly done.

John C Price (Seal)
Circuit Judge.

Bill of Costs

Clerk. Indictment 75. 1 Capias 150.	$2.25
Filing Bond 50 2 Subpoenas 35 ea.	.75
1 Spec joined 35. Swearing & entering Jury 35.	.70
Taking & entering Verdict.	35
Filing & entering Motion for new trial.	40.
Motion in arrest of Judgment	35
Entry overruling motion	35
Filing bill of exceptions	05
Entering the same	35
Swearing 2 Witnesses	10
Amt over	$3.40

Amt Brot over		3.40
Transcript 3000 words @ 15c per hundred		6.00
Certificate & Seal		75
Postage 12 Rev Stamp 5.		17
Bill of costs		1.00
		$10.42
Circuit attorney Joseph Estes.	5.00	5.00
Sheriff Hutchison. 1 arrest & Bond	$2.25	
Summoning 2 Witnesses	1.50	
Summoning Jury	1.00	
Calling Jury	35	
" 2 Witnesses	10.	
Trial	1.50	6.70
12 Jurors $1.50 each.		$18.00
		$40.12

State of Missouri
County of Newton }

I W S Morrow clerk of the Circuit Court in and for the County of Newton in the State of Missouri do hereby Certify that the foregoing is a true and full copy of the record, papers, and proceedings had in said Court, in a cause wherein the State of Missouri was plaintiff and John C Mudgett defendant

In testimony whereof

I have hereunto set my hand and affixed the seal of said Court at office in Neosho this 5th day of December A D 1865.

W. I. I. Morrow, Clerk

The State of
Missouri
vs.
John C. Underwood

Dec. 16th 65

25 ~~17~~

The State of Missouri
D. E.
vs
John C. Underwood
P. E.

Transcript

Filed Dec. 16/65
N C Burch
Clk.

Newton, 13th Circuit.

Clk. C.C.

W. J. Morrow, fb. 92

State of Missouri
vs
John C. Underwood

Opinion of Court,

This is an indictment against the defendant for pulling down and moving a dwelling house, alleged to belong to one Joseph Wood, the evidence showed that the defendant pulled down the house and moved it into the town of Crooks & there put it up and was using it, that Woods family had moved out of the house some months before it was moved and, that no person was occupying it at the time, The defendant then offered to prove, that Joseph Wood had left the neighborhood about a year and a half before the house was removed, that when he went away he left his wife and family in the house, that several months before the house was moved Woods wife and family left and, left the witness living in the house and that Woods wife told the witness to do what she thought best with

the house, and that he (Witness) continued to live in the house for several months and then left it and told the defendant to move it into town.

This evidence was excluded by the Court, the error consists in excluding this evidence and in misdirecting the jury as to the law. The evidence of this witness ought to have been admitted. It certainly went very far towards disproving malice on the part of the defendant. The witness was left in possession by Woods family and the defendant might very innocently suppose that he had the right to control the house: and so far from acting maliciously he may have supposed he was doing Woods a favor by removing the house

The first instruction given on the part of the state was wrong. It is based upon the idea that if the defendant acted without authority in removing the house that his act was unreasonably malicious. This is by no means true. He may have acted

without authority and even officiously and yet with the best intentions in world, he may have been intending all the while to preserve the property for Woods benefit.

The first instruction asked by the defendant property set out the law on this subject and ought to have been given, on account of these errors the ~~case~~ judgement will be reversed and the cause remanded for further trial. The other points concerning

L Wallace

State
v
Underwood

Opinion of Court
judgement reversed
& cause remanded
Sorelan

28
6
168
7
176

Filed Jan. 18/66
Merch clk