Dilinenty, James vs State of Missouri 1853 St. Louis Co. 323/7

562/4

The State of Missouri. SS.

At a term of the Saint Louis Criminal Court begun and held at the City of Saint Louis, within and for the County of Saint Louis, on the first Monday of September, being the sixth day of said month in the year of our Lord, one thousand eight hundred and fifty two, were present the Honorable James B. Colt, Judge, David Bayles, Esquire, Marshal of the County of St Louis, James R. Lackland, Esquire, Circuit Attorney, and Richard J. Howard, Clerk of said Court.

The Marshal returns here into Court the special venire to him directed, with a panel of Grand Jurors thereon endorsed who being called come as follows, to-wit; William S. Allen (who is by the Court appointed foreman.) John H. Lightner, Peter Pellizaro, Robert Clarkson, John Kerns, Abner Squire, Samuel B. Pilkington, James O'Neill, John Cort John, Peter Thomas, James S. Thomas, Reuben Musick, Bryan Cross, Washington Ross, Edward Warren, John Sparks, Stephen Ridgley and George M. Moore eighteen good and lawful men who being duly empanneled and sworn and having received their charge from the Court retire to consider of their presentments.

Grand Jury

and afterwards to-wit: on

Saturday 25th September 1852.

The Grand Jurors return to the bar and deliver the following indictment as a true bill, to-wit:

Indictment. State of Missouri } SS.
Saint Louis County } Saint Louis Criminal Court September Term 1852

The Grand Jurors of the State of Missouri, within and for the body of the County of Saint Louis, now here in Court duly empannelled sworn and charged, upon their oath present — That James Dillehunty late of in Saint Louis County aforesaid, on the first day of September in the year of our Lord one thousand eight hundred and fifty two at in Saint Louis County aforesaid, with force and arms not having the fear of God before his eyes but being moved and seduced by the instigations of the devil in and upon one Edward Maher in the peace of the state then and there being feloniously wilfully and of his malice aforethought did make an assault and that the said James Dillehunty with a certain knife of the value of ten cents which he the said James Dillehunty in his right hand then and there had and held the said Edward Maher in and upon the left side of the breast near

2. the left nipple of the said Edward Maher, then and there feloniously (2.)
wilfully and of his malice aforethought did strike thrust and stab giving
to him the said Edward Maher then and there with the knife
aforesaid in and upon the left side of the breast near the left
nipple of him the said Edward Maher one mortal wound of the
breadth of six inches and of the depth of four inches of which said
mortal wound the said Edward Maher then and there did lang=
=uish and languishing did ~~then~~ and there ~~did~~ and afterwards
at the County aforesaid on the day and year aforesaid the said
Edward Maher of said mortal wound died and so the Grand Jurors
aforesaid upon their oath aforesaid do say that the said James
Dillehunty the said Edward Maher in manner and form aforesaid
feloniously and of his malice aforethought did kill and murder, against
the peace and dignity of the State. J. R. Lackland Cir Atty.

Endorsed "A true bill Wm. S. Allen, Foreman"

Thereupon the following capias was
issued, to wit:
County of Saint Louis. SS.

The State of Missouri,

Capias To the Marshal of St Louis County, Greeting;

We command you to take John Dillehunty if he be found in your bail=
=wick, and him safely keep, so that you have his body before the
Honorable Judge of the Saint Louis Criminal Court, now in session at
the City of Saint Louis, within and for the County of Saint Louis, forth=
=with, to answer an indictment found against him by the Grand Inquest
of the State of Missouri, for the body of the County of Saint Louis, for
Murder in the 2nd degree contrary to the form of the Statute in such
case made and provided, and against the peace and dignity of the State;
and have you then there this writ, with your return thereon, how you
execute the same (SEAL) Witness, Richard J. Howard, Clerk of our said
Court, with the seal thereof hereto affixed, at office in the City of St Louis
this 25th day of September in the year of our Lord eighteen hundred and
fifty two. R. J. Howard Clerk.

Marshal's Return "Executed this writ in Saint Louis County and have the within named
"defendant in jail Sept 30th 1852. David Bayles Marshal"

And afterwards the following proceedings were had to-wit:

3

Friday 8th October 1852.

Arraignment } Now at this day the said defendant being brought into Court and having had hearing of the said indictment says he is not guilty as therein charged, and for his trial puts himself upon the Country, and the Circuit Attorney doth the like; And the said defendant being without Counsel and unable to employ any, the Court appoints Thos C. Reynolds and Wesley Rogers Esquires, to defend him in this behalf.

Thursday 21st October 1852.

Continuance } This cause is continued on account of the absence of a material Witness for the State.

Thursday 9th December 1852.

do } By consent of parties this cause is continued till the next term of this Court.

Thursday 13th January 1853.

Trial. Now at this day comes the Circuit Attorney who prosecutes for the State, and the said defendant being brought into Court, thereupon come a Jury To-wit; John M. Platt, Jas McManus, Zachry T. Wolfolk, M. Becker, Michael Buckley, Adam Road, E. A. Johnston, R. G. Moss, John H. Rolf, Frederick Frank, John Falls and William Gerkhardt, twelve good and lawful men who being duly elected tried and sworn the traverse between the parties aforesaid well and truly to try, after hearing all the evidence in the cause and the arguments of Counsel, retire to consider of their verdict.

Friday 14th January 1853.

Verdict Now again come the parties as aforesaid, and the Jurors aforesaid appear in Court, and upon their oath aforesaid say they find the said Defendant Guilty as charged in the indictment, and assess his punishment at impris=sonment in the Penitentiary for the term of Ten years; thereupon the said defendant files a motion for a new trial herein.

Saturday 12th February 1853.

The Defendant's motion for a new trial being submitted to the Court, but the Court not being fully advised what judgment to render in the premises, takes time to consider thereof.

Saturday 19th February 1853.

Motion for a new trial Overruled } The Court here being fully advised what judgment to render on the defendant's motion for a new trial, therefore it is considered by the Court that said motion be overruled; thereupon the said defendant by his Attorney files a motion in arrest of judgment, and submits the same to

the Court, but the Court not being fully advised of and concerning the premises, takes time to consider thereof.

Saturday 26th February 1853.

Motion in Arrest Overruled

Now at this day comes the said defendant in custody of the Marshal, and the Court here being now fully advised what judgment to render on his motion in arrest of judgment, therefore it is considered by the Court that said motion be overruled: and that the said defendant for his offence of Murder in the second degree aforesaid, and in pursuance of the verdict rendered against him,

Sentence

be confined in the Penitentiary of this State for the term of Ten years, that he pay the costs of this prosecution, and committed till this sentence be complied with; thereupon the said defendant

Appeal

files his Bill of Exceptions, and prays an Appeal to the Supreme Court from the judgment herein rendered, and the Court here being of opinion that there is probable cause for said Appeal, grants the same, and orders that it operate as a stay of the proceedings herein.

Bill of Exceptions

The Bill of Exceptions filed herein is as follows, to wit;

Be it remembered that at the January term of the St Louis Criminal Court, A.D. 1853, the above cause came on for trial and the following was the testimony produced by the state in support of the indictment. the defendant having offered no testimony,

Philip Gobbelmann, wagon maker, I was doing business in the early part of June on the corner 15th & Morgan Street, at the shop of Conrad Knaust — They started to come up Morgan Street prisoner & deceased came up Morgan street together arm in arm, the shop I was in was on the north side of the street, Morgan Street, the men were on the south of the street, Mr Vintons house is right opposite the shop, — when I first saw the men they were about opposite Dr Cogans house, — thinks it was in July or August — they walked pretty straight they looked like they were drunk — I was standing at the time in our shop under the window, when they got near the corner they stopped at the 2nd post of Mr Vintons fence, the dec'd leaned against the fence, he leaned against the post for support (the 2nd post) the defendant took him by the arm, and wanted to take him along, — neither of them spoke, — the defendant took him by the arm, and the deceased would not go along, took by both hands and pulled him along — the deceased jerked his arm away and lay back still against the fence, I did not hear any thing

said by either. I could have heard if either had spoken, then the defendant took hold of the deceased again by the arm and pulled him and succeeded in pulling him from the fence, he pulled him about a step from the fence; the deceased pulled back and lay against the fence loosening his hold from the prisoner. the prisoner after this didn't do any thing further but went out, went off a few steps and came back again, while the prisoner was going away the deceased was still laying against the fence, the deceased wouldn't go along with him; the prisoner then took hold of the deceased by the coat and pulled him along, he pulled him from the fence about a step, the man who was killed then ran after the prisoner and knocked him with his fist, the prisoner ran back a few steps, the deceased hit the prisoner with his fist, the deceased hit the prisoner about 3 times somewheres about the breast, the prisoner always ran back, and did not strike with his fist, the deceased then drew a knife, he pulled the knife out of his pocket, it was open it was a long knife, when he drew the knife he was about three steps from the prisoner, the prisoner when the deceased first drew his knife was retreating backwards, he was on the side walk, he was very near the curb, the deceased struck the prisoner on the neck, the prisoner then pulled his knife out of his pocket - it was open it was a small knife, the dead man always jumped at the prisoner, and the prisoner jumped at him the deceased too, the second blow was struck by the prisoner - there were three or four blows struck, - they fought with the knives about a minute not quite. after that they were done with their knives the dead man went around the corner, and the live man went up Morgan street he went around the corner about 10 steps, he fell off the pavement on the street, he said God damn his soul, he fell there about two minutes on the street and died immediately, - The street was about 20 or 25 feet wide, fine weather, it was about 4 or 5 o'clock in the afternoon, the dead man kicked at the prisoner when they were on the sidewalk, the deceased was about the same size of the prisoner, this was in St Louis County, the deft was struck about 3 or 4 times I only saw the prisoner cut in two places, one place in the neck and the other on the fingers. I didn't hear either of the parties speak during the whole time they were fighting - the prisoner pulled the

deceased along three times before they commenced fighting, he pulled him along as if to get him to go along. the prisoner was on the outside, (6) they were not fighting, they were walking arm in arm, they walked pretty straight but from one side to another, they staggered a foot or two, the dead man was the drunker of the two. The prisoner after the deceased had struck him and before the knife was drawn might easily have avoided fighting there was nothing to prevent his so doing.

X.

I am certain nothing was said by either one of the men while this fighting was going on, the defendant seemed to want the deceased to go home. I dont know where he lived, he was not mad when he took hold of him, but seemed merely to want him to go on. I thought he was trying to take him home, as soon as the deceased commenced striking at the defendant, he commenced backing out from him, and had taken his hands off of him before he struck, he still continued to back off from him until he was stabbed in the neck by the deceased, he had then backed to the curb stone, when the deceased man pulled out his knife the defendant was about 2 steps from him he was going back and he went back about 3 steps more before he was cut in the neck, the deceased raised his hand up jumped at the defendant and stabbed him in the neck, the defendant was also cut in the face, do not know whether this was done before or after the defendant pulled out his knife, the first time that the deceased struck at the defendant he cut him in the neck, I think he struck twice with his knife before the defendant commenced to pull out his knife after the deceased pulled out his knife the defendant could not have gotten away from if he had tryed, he could not have turned around and ran away without being cut by him the defendant did not go back any more after he pulled out his knife he was then standing on the Curb stone, at the edge of the side walk, the left Backed out about 3 steps more after the deceased struck him, I think the defendant was not so drunk as not to be able to run. he showed no disposition to do any thing to the deceased until he was cut in the neck with the knife. I saw nothing but the handle of the knife that the defendant had it seemed much smaller than the one the deceased was cutting him with. I never saw the Deceased

7 before and did not know him,
Re examination, How many times did Dft strike at the deceased after he got out his knife, objected to by the Counsel for the prisoner, and objection overruled by the Court. to which ruling the Counsel for the prisoner did then and there except. Ans. they struck 2 or 3 times apiece after this and the Decease gave the last lick and cut the Dft on the finger. After the deceased had drawn his knife and raised his arm at the defendant, he the defendant could still have gotten away from the deceased without fighting with him

Dr. James Cogan Being produced and sworn on the part of the State deposes and says that — I was not present during any part of the difficulty, the fight was all over, I saw a man lying in the street and was dead, I saw where he had been wounded in the breast, a large knife was laying down at his side near his right hand, I picked it up when at this time the defendant came up and observed that he must have fallen upon it and killed himself I told him that could not be as the blade was too narrow Dft called the deceased Ned, I also heard some of the crowd that collected around call him Edward Maher. (here the Counsel objected to the witness stating what the defendant was called by the persons after he was dead. obj. overruled by the Court and exception then and there taken by dft's Counsel;) I went to my office which was a few doors from where he lay, the defendant went with me and asked me to dress his wounds, while there the officer came after him, he had been cut in the neck or shoulder, and had a slight wound on the cheek that also seemed to be cut with a knife I told the officer his wounds were not dangerous, The officer took him off and I saw no more of him

Cross examination

I never saw the deceased before that time, he was then dead, I did not know his name, he was then dead, the fight was all over before I came in sight do not know how long he had been dead before I came up, the Defendant was drunk staggered as he walk — yet he stepped quite strong. I think too drunk to run without falling, do not know how drunk he was at the time the difficulty took place this this must have been shortly after as his face was yet bleeding, heard

8. the Dft. call the deceased call nothing else but Ned I saw (8) but one wound on the deceased and that was in his breast I supposed he came to his death from that.

Dr. William McMurray. Being produced and sworn on the part of the State deposes and says. I was called upon to attend the post mortem examination. I found the deceased and the prisoner both in the same room where they had been conveyed by Capt Coggins, the deceased was stabbed in the region of the heart, with a sharp instrument that seemed to be a large knife, the stroke that produced the wound must have been given with great force. and severed one of the ribs as completely as if it had been sawed in two. the knife must have been very large and strong, it was quite evident that his death was caused from the wound

Cross examined.

I never saw the deceased before I was called to make the post mortem examination did not know what his name was. I also dressed the wounds on the defendant. found one on on his neck one on his face and one on his finger – the wound on his neck was in a dangerous place but the wounds were all superficial

Hannah English. Being produced and sworn upon his oath deposes and says that, I was the Coroner of St Louis County last June. was called upon to hold the inquest over the dead body of a man that had been killed by a stab in the breast, the defendant was in the same room with the deceased. 2 large knives were produced at the time the defendant said one of them was his it was a large jack knife but not quite so large as the one which was said to belong to the deceased. I have both of the knives in my possession now, have not them in Court with me but forgot them when I came.

This was all the testimony in the cause

The Court then on its own motion and at the instance of the prosecution instructed the Jury as follows

Instruction given by } Malice in the law is either express or implied. Express malice is where one with a sedate and deliberate mind

9.

The Court

and formed design doth kill another.

Implied malice is where any kills another, without any, or considerable provocation.

If the Jury believe from the evidence that the Deft killed the dec^d and did so kill without deliberation, and not in lawful defence of his person nor in the heat of passion you will find the Deft Guilty of Murder in the 2^d Degree

And if you so find the Deft Guilty you will affix the punishment to imprisonment in the penitentiary for a term not less than ten years.

Without you believe from the evidence, that the defendant stabbed the Dec^d in the lawful defence of his person when there was reasonable cause to apprehend a design upon the part of the Dec^d to commit a fellony or to do the Deft great personally injury and there was immediate danger of such design being accomplished or that the act was done upon a sudden & sufficient provocation you will find the Deft guilty.

If you entertain a reasonable doubt as to the guilt of the Deft you ought to acquit.

To the granting of which instructions defendant at the time excepted. The defendant also prayed the following instructions which were excluded by the Court.

Refused asked by Deft.

If the jury believe from the evidence in this case that the deceased and the defendant were coming up the street together without any ill will on the part of the defendant towards the deceased, and after the defendant had solicited the Deceased to go further, and that thereupon the deceased commenced striking kicking and drawing a dangerous weapon and did use or attempt to use said weapon against the Defendant for the purpose of taking his life or committing great bodily harm and he had reason to apprehend such design you must acquit.

Refused

If the jury believe from the evidence in this cause that the Deceased attempted to take the life or commit a felony upon the Defendant by drawing a dangerous weapon, with intent to kill or wound him or did wound him with a dangerous weapon and the Defendant stepped back to decline the affrays in good faith before he took the life of the deceased you must acquit

Refused, asked by Defendant.

The Jury must disregard all hearsay evidence, Therefore unless the Jury believe from the evidence that the Deceased man's name was Edward Maher you must acquit the defendant on this ground.

Rejected

You must reject the testimony of the witness as to what the crowd said to be the name of the deceased after his death

Rejected

You must find from the evidence in the cause that the name of the Deceased was Edward Maher before you can convict the Defendant as there is no evidence that his name was such as is alleged in the indictment, you must acquit.

to the excluding of which the defendant at the time excepted,

The Jury having retired returned to the Court with the following verdict

Verdict } State vs. James Dellehunty } We the jury find the defendant guilty as charged in the indictment, and ases the punishment in the Penitentiary to Ten years imprisonment J.M. Platt foreman

And afterwards to wit on the 14th day of January the Defendant moved the Court to set aside the verdict and grant him a new trial, as follows. State of Mo vs. James Dellehunty } Crim. Court. Jan Term 1852 Murder 2d degree.

Now at this day comes the defendant by his Atty and moves the Court to set aside the verdict and grant him a new trial for the following reasons, to-wit;

Mo for a new trial }

1st Because the Court refused to grant the instructions asked by the defendant,

2d because the Court gave improper instructions to the Jury.

3d Because the Court permitted improper testimony to go to the Jury.

4th Because the verdict of the Jury was against the Law and the evidence of the case. Cline & Thompson Attys for Deft.

which the Court on the 19th day of February overruled;

to the overruling of which by the Court the defendant did then and there except, And afterwards to wit on the 19th day of February the defendant moved the Court to arrest the judgment as following

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Mo in Arrest

State of Mo. vs. James Dillehunter

In Crim Court Jan T 1853.
Murder 2d Degree.

Now at this day comes the Deft by his Attys and moves the Court to grant the judgment because the verdict is insufficient in point of Law to support the same. Chase & Thompson Attys for Deft.
which was overruled by the Court, to which opinion of the Court the defendant did then and there except,
All which is prayed as not being preserved to be now preserved as part and parcel of the proceedings and record in the cause, all which is accordingly done, and this bill signed & sealed this 26 February 1853

S. B. Cole (seal)

State of Missouri
County of St Louis } ss.

I, Richard S. Conrad, Clerk of the St Louis Criminal Court, in and for said County, certify the foregoing to be a full and complete transcript of the Record and proceedings in said cause as the same remains in my Office.

Witness my hand and the seal of said Court at the City of St Louis this 5th day of March A.D. 1853.

R. S. Conrad Clerk

(H) 70

March T. 1853

State of Missouri Res.

vs. Murder 2d Degree

James Dillihunty Appt.

Appeal from St Louis Criminal Court.

Filed 10th March 1853
Wm. S. Glanville
Clerk.

Transcript $4.60
Certificate 50
$5.10

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(12)

State
v
Dillehantz

In the Supreme Court
March Term 1853

Now at this day comes the appellant and files assigns the following additionall errors to wit

1st the Court erred in permitting improper testimony to go to the jury

2 because the Court erred in permitting the state to reexamine a witness upon matters that should have been stated in chief

Chris & Thompson
attys for Dft

70

State

&

Dillihantz

assignment of

additional errors

Filed April 2nd 1853

Wm. S. Glanville

Clerk

Clin & Thompson

(16)

State
v
Dillehunty

Supreme Court
March Term 1853

Now at this day comes and assigns the following errors.

1 The Court of its own motion erroneous instructions to the jury.

2 The Court refused to give legal and proper instructions asked for the Defendant

3 The verdict is against the evidence.

4 The verdict is unsupported by legal and proper evidence

5 Because the Court refused to grant Defendant a new trial for the reasons set out in the motion for a new trial.

6 Because the Court erred in refusing to sustain the motion to arrest the judgment

7 Because the verdict of the jury in the cause is insufficient and void and no legal judgment ~~could~~ can be rendered thereupon—

8 Because the jury returned a general verdict of guilty against Defendant under an indictment for murder without stating the offence or degree of offence of which they found him guilty as required by law

Cline & Thompson
attys for Deft

State of Missouri

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James Dellihanter

Assignment of errors

Filed 2nd April 1853
W. S. Glanville
Clerk.

Chin & Thompson atty
for Dft

State of Missouri
vs
James Dillehanter } In the Supreme Court

Statement of the Case

Appellant was indicted at the term of the Criminal Court of St Louis County for Murder in the 2d degree in killing Edward Maher. And on the trial of said charge at the January term 1853 of said Court was found guilty in manner as charged in said indictment without any specification of the degree of offence.

On the trial of said cause the facts appeared as follows.

The appellant and deceased were seen walking up Morgan Street between 14th & 15th Streets on the South side. They seemed to be in a good humor and were walking arm in arm. They were both intoxicated but the deceased seemed to be more so than the appellant. When they arrived within 16 or 18 feet from the South East Corner of Morgan & 15th Streets the deceased stopped and leaned back against a post that was standing on the inside of the side walk. The appellant took him by the arm and tried to get him to go along. He then took him by both arms and pulled him 2 or 3 steps away from the post. The deceased jerked away from Dillehanter and again leaned against the post: Dillehanter went on a few steps and then returned to where the deceased was standing and seemed to be anxious to get him to go home. And took hold

of his Coat and pulled him along about a Step. when he Commenced to pursue Dillehanter and Struck him 3 times about the breast with his fist and Kicked at him once or twice he Dillehanter retreating all this time when the deceased pulled out a large Knife from his pocket opened it and Stabbed the Defendant in the neck while he was yet walking backwards to get away from the deceased. after the appellant had been Stabbed in the neck and had went backwards from the deceased as far as the Curbstone. he pulled out a Knife from his own pocket and made a Stab at the deceased about the time or immediately after the Deceased had made his Second Stab at him. Dillehanter went back 2 or 3 Steps after he had been Stabbed in the neck before he Stabbed with his Knife at the deceased after this each one made Several licks at an other with his Knife. which lasted about a minute. and the deceased went around the Corner of the Street and Dillehanter went up Morgan. The appellant was cut in 3 places one on the neck, one on the face and one on the fingers; nothing was said by either while they were engaged in the difficulty. as the Deceased went around the Corner he uttered an oath against the appellant which was the first thing said from the time they were first seen coming up the Street together. the deceased went about 10 Steps fell off of the Pavement and died instantly after a Crowd had been Collected the appellant Returned and said he

must have fallen on his knife which was found lying near his right hand and called him Ned. after the fight was all over and the deceased was dead some persons in the crowd said his name was Ed Baker. the deceased and the appellant were both put into a farniture Carr and taken to the City Hall. where a large jack knife was found on the person of the Appellant. Similar to the one found with the deceased. At the post mortem examination but one wound was found on the body of the deceased which caused his death. And had been made with a large knife as one of the ribs was entirely severed by the lick. The Appellant offered no evidence but asked the Court to instruct the jury as follows to wit

1 – If the jury beleive from the evidence in this cause that the deceased and the ~~Appellant~~ Defendant were coming up the street together without any ill will on the part of the ~~Appellant~~ Defendant towards the deceased. And after the ~~Appellant~~ Defendant had solicited the deceased to go further and that thereupon the deceased commenced striking. kicking and drawing a dangerous weapon and did use or attempt to use said weapon against the ~~Appellant~~ Defendant for the purpose of taking his life or committing great bodily harm, and he had reason to apprehend such design you must acquit.

2 – If the jury beleive from the evidence in this cause that the deceased attempted to take the life or commit a felony upon the ~~Appellant~~ Defendant

by drawing a dangerous weapon with intent to kill or wound him. or did wound him with a dangerous weapon. And the defendant stepped back to decline the assault in good faith before he took the life of the deceased you must acquit.

3 – The jury must disregard all hearsay evidence therefore unless the jury believe from the evidence that the deceased man's name was Edward Maher you must acquit the defendant on this ground.

4 – You must reject the testimony of the witness as to what the crowd said to be the name of the deceased after he was dead.

5 – You must find from the evidence in the cause that the name of this deceased was Edward Maher before you can convict the defendant; as there is no evidence that his name was such as alleged in the indictment you must acquit.

All of which were overruled by the Court to which the defendant did then and there except and the Court gave upon its own motion the following instructions to wit:

1 – Malice in the law is either express or implied. Express malice is when one with a sedate and deliberate mind and formed design doth kill another.

2 Implied malice is when one kills another without any or considerable provocation.

If the jury believe from the evidence that the defendant killed the dec^d and did so kill without deliberation. & not in lawful defence of his person nor in the

heat of passion you will find the Dft guilty of Murder in the 2d degree.

And if you so find the Dft guilty you will assess the punishment to imprisonment in the Penitentiary for a term not less than ten years.

Without you believe from the evidence that the defendant stabbed the Decd in the lawful defence of his person when there was reasonable cause to apprehend a design upon the part of the Decd to commit a felony or to do the Dft great personal injury and there was immediate danger of such design being accomplished or that the act was done upon a sudden and sufficient provocation you will find the defendant guilty.

If you entertain a reasonable doubt of the guilt of the defendant you ought to acquit.

To the giving of which the Dft did then and there except, whereupon the jury retired and returned in to Court the following verdict to wit

We the jury find the defendant guilty as charged in the indictment and assess the punishment in the Penitentiary for ten years imprisonment.

The appellant then filed his motion for a new trial which was overruled by the Court to the overruling of which the appellant excepted after which the ~~appellant~~ filed his motion in arrest of judgment which was overruled by the Court which overruling was also excepted to at the the time

Appellant then moved the Court to grant him an appeal to the Supreme Court and a Stay of proceedings during its pendency which was accordingly done.

Cline & Thompson
Attys for Appellant

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State of Missouri
vs
James Dillehanter

Statement of Case

Filed 5th April 1853
Wm. S. Glenville
Clerk.

Oliver & Thompson
attys for Appellant

The State

vs

Dillihunty

The defendant was indicted for the murder of Edward Maher. At the trial a question arose as to the name of the person slain. No witness was examined who knew him. A physician was examined who saw the body lying in the street soon after the affray and he testified that he did not know the deceased or his name, that the defendant called him Ned and some persons in the crowd that collected around ~~some persons~~ called him Edward Maher. There were instructions asked by the defendants counsel in relation to the question whether the name of the deceased was that ~~mentioned~~ stated in the indictment and although those instructions in the form in which they were asked may have been properly refused yet they served to call the attention of the Court to the question of fact which the defendant wished submitted to the jury in relation to the name of the person slain. But the instructions given by the Court directed a conviction upon a state of facts which ~~that~~ excluded all question in relation to the name, so that that question was to be taken as settled by the Court. The instructions given, speak of killing "the deceased" and stabbing "the deceased" as the acts for which the defendant was on trial which necessarily involved the ~~decision of the question~~ assumption of fact that the deceased was "Edward Maher". This was erroneous and the judgment is reversed and the cause remanded for a new trial

H R Gamble

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The State
vs
Dillihunty
Opinion
Gamble

Filed 23d May 1853
Wm. S. Glanville
Clerk.

Cline & Thompson for appellant

State } In the Supreme Court
v
Dillehanty } March Term 1858

The Defendant insists that the Court below erred

1st In permitting the state by her atty to examine a witness called by the state after he had been cross examined by the Dft upon the same matters about which he had testified in Chief there being no new matter elicited by the cross examination

2d In refusing to grant a new trial because there is no legal evidence of the Dft being guilty of any offence whatever The evidence clearly shows that he was in good and kind feeling towards the Deceased until he had been beaten, kicked and stabbed in the neck by a large knife in the hand of the Deceased, and that too after he had been — in the language of the English Law — "driven to the ditch" as he was endeavoring to back away from him during all this time his life was put in such iminent as to induce the witness for the state to believe — according to his cross examination — that after being cut in the neck, while declining the assault made upon him by the deceased, he could not have made good his escape, without again being stabbed with the large knife in the hand of the Deceased Could any one doubt for a moment who is acquainted with the Law that he had the right to defend himself by such means as were within his reach against mendious assault when the intent of the Deceased was so clearly manifested by using a dangerous weapon in such a way as most likely to produce death

3d The Defendant insists if the Court had granted the Law in a fair and unprejudiced manner to the jury and left them free to decide upon the Law and evidence involved in the case they could not have failed to render a verdict of acquittal

4th The Court below slipped out of the Cause when he attempted to define Malice and to tell the jury what it was by the Common Law. when the evidence in this Cause - if he had taken that as his true guide to the law that should be given to the jury, flatly disproves every presumption of malice on the part of the Defendant - & the jury are thereby left indirectly instructed to assess a punishment of ten years imprisonment in the Penitentiary against the Dft who is innocent - of every Charge Contained in the indictment

5. That - the state utterly failed to show by legal proof the name of the Deceased as alledged in the indictment and for that reason the verdict should have been for the Dft & that the Court erred in refusing to grant the Law upon that subject - It appeared in evidence that the ~~Decease~~ Dft called the Deceased Red, and that ~~the~~ after the difficulty was all over and a crowd had collected some persons in the Crowd said the Deceased was Ed Maher and this was the only evidence as to his name And should have been rejected as it was no part of the res gesta nor does it prove if legal that his name was Edward Maher as charged it may have been Edwin Edmund or Edgar for any thing we know See Whartons American Criminal Law 156. 157. Rob vs Howard 3 Summers 12. US vs Reen 1 McLean 429

6th That the Court erred in refusing to arrest the judgment and discharge the Dft, because the jury rendered a general verdict of guilty without specifying of what offense or degree of offence they found him guilty of. And it is impossible for the Court to know what to sentence the Dft for, or what kind of judgment to pass upon him; this error is so manifest upon the face of the proposition that it needs no argument to prove it to any one who is Conversant with the revised Statutes of this State, and has already been passed upon more than once by this Court. the Charge in this indictment includes the four degrees of manslaughter as well as murder in the 2d degree and I might-

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State

vs

Dillehanty

Argument

~~Filed 5th April 1853~~
~~W. S. Glassell~~
~~Clerk~~

Clive & Thompson
attys for appellant

(80)

The State
" James Dillihunty. } In Supreme Court. —

Points. —

The Motion in arrest of judgment came too late. — it was not made within four days after the trial. —

§ 1. — Article VII of the Act regulating practice at law Cap 136. — p 829. State Ed. Rev. Co. —

The Court was bound to overrule, the matter being coram non judice. —

The Verdict was good —
The indictment charges murder in the 2nd Degree
The verdict found the defendant guilty in manner and form as charged in the indictment, and assessed the punishment at ten years imprisonment in the peni=
=tentiary. —
This helps the verdict if there were any defect in it for the highest punishment for the inferior grade of offence manslaughter in the first

degree is five years im=
prisonment in the peniten=
tiary.-

Therefore the jury say
substantially by their verdict
guilty of murder in the
2nd degree for to this offence
only could they apply the
years imprisonment.-
The last instruction given
by the Court fairly puts
the case to the Jury.

All the instructions were
lawfully given.-

The instructions asked for
the defence were rightfully
refused.- they were sub=
stantially given in the last
instruction of the Court.

The Court having given the
same proposition in its own
instruction and in a fair
manner, was not bound
to give the same law in
the phraseology of the de=
fendant's Counsel.
It is Enough that the
Case was fairly put.
by the instructions of the
Court.

The following proposition of
law is asserted at

The verdict is not against the Evidence or the weight of Evidence or the law. –

The Evidence shows in the language of the only witness in the cause, that after the deceased and the prisoner had both drawn their knives "that the deceased jumped" "at the prisoner, and the" "prisoner jumped at the deceased"

It was a mutual combat which neither declined but which the prisoner in the language of the witness could easily have avoided.

He was a German witness and not easily understood but this was his testimony and the jury undoubtedly gave credence to it. –

The following proposition of law is asserted as gov: ferring the facts of this case

The law requires the party to have quitted the combat before a mortal wound shall have been given if in his power to retreat as far as he can with safety and at last to kill from mere urgent necessity, for the

preservation of his life or to avoid enormous bodily harm.

The evidence shows the parties were drunk. the deceased much the drunker of the two.

The name of the deceased was sufficiently proved. He was called Ned or Edward Maher at the time of the homicide by the persons standing around

The State

"

James Dillihuntz

Bonity

for State

(24)