The State of Missouri v. Burns, Joseph 1863 507/3

630/19 33/483

Voullaire (K)

Kribben & Kehr (A)

M.O. (K)

v

Burns (A)

William Wilson & Joseph Burns - w/ force & arms

came upon John Gilman - pokeoffs

- assaulted in

aid & abetting

Wilson shot J G - hand

shot in head & neck

dying declar. ok

Affirmed Bates

St Louis

1862 [illegible]

March 43

The State of Missouri }
vs } In Vacation
Joseph Burns }

In the Supreme Court of Missouri
on appeal from the St Louis Criminal
Court.

Upon inspection of the record of this
case, I Barton Bates a judge of the
Supreme Court, am of opinion that
there is so much doubt of the pro-
priety of the judgment of the Criminal
Court as to render it expedient to
take the judgment of the Supreme Court
thereon. I do therefore order that the
appeal taken in this case shall operate
as a stay of proceedings on the judgment.

Barton R. Bates
Judge of the Supreme Court
September third 1862.

In the St. Louis Criminal Court.
March Term 1862.

The State of Missouri. }ct

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 in March, being the Third day of said Month, in the year of our Lord one thousand Eight hundred and Sixty two, were present the Hon Henry a. Clover Judge; Seymour Voullaire Esq Circuit atty; Joseph S. Vastine Esq. Assistant Circuit attorney, Peter Wegman Esq. Marshal of Saint Louis County and Fred Kretschmar clerk of said Court,

The Marshal returns here into Court the venire facias to him directed, with a panel of Grand Jurors endorsed thereon, who being Called Come as follows, to wit:

Grand Jury.

Carlos S. Greely who is by the Court appointed foreman, A. L. Leroix, C. R. Hall, Bernard Hevin; C. D. Dana; A. G. Switzer; Francis Lepere; Michael Conrad; Morris J. Lippmann, William Harris, George D. Humphries; George Mehl; Kenneth Shotwell; Philip S. Lanham; James Patterson; and Henry Blakesley - Sixteen good and lawful men, who being duly empannelled and Sworn and having received their charge from the Court retire to Consider of their presentments,

Thursday March 6. 1862

Indictment.

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

State of Missouri. } S.S. St Louis Criminal Court
County of St Louis. } March Term 1862.

The Grand Jurors of the state of Missouri within and for the body of the County of St Louis, now here in Court duly empannelled, sworn and Charged upon their oath present, That William Wilson and Joseph Burns, late of Saint Louis, in the County of Saint Louis aforesaid on the Tenth day of December in the year of our Lord one thousand eight hundred and Sixty one, at Saint Louis, in the County of Saint Louis aforesaid, with force and arms in and upon one John C. Gilmore in the peace of the State then and there being, did make an assault, and that he the said William Wilson, a certain pistol then and there charged with gunpowder and one leaden bullet, which said pistol he the said William Wilson, in his right hand then and there had and held, to, against and upon the said John C. Gilmore, then and there feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought did shoot and discharge, and that the said William Wilson with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder, shot and discharged and sent forth as aforesaid, the aforesaid John C. Gilmore, in and upon the head and neck of him the said John C. Gilmore, then and there feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought, did strike, penetrate and wound, giving to the said John C. Gilmore then and there

as aforesaid, one mortal wound of the depth of three inches, of which said mortal wound he the said John C. Gilmore then and there instantly died, and That the aforesaid Joseph Burns, then and there feloniously wilfully, deliberately, premeditatedly and of his malice aforethought, was present, aiding, helping, abetting and comforting, assisting and maintaining the said William Wilson, the felony and murder aforesaid, in manner and form aforesaid to do, commit and perpetrate, and so the Jurors aforesaid upon their oaths aforesaid do say that the said William Wilson and Joseph Burns, the said John C Gilmore, then and there in manner and form aforesaid feloniously, wilfully, deliberately, premeditatedly and of their malice aforethought did Kill and murder, against the peace and dignity of the State.

And the Jurors aforesaid on their oath aforesaid, do further present that Joseph Burns and William Wilson in the County of Saint Louis aforesaid, on the tenth day of December in the year of our ~~Lord~~ eighteen hundred and Sixty one, with force and arms, in and upon one John C. Gilmore, in the peace of the State, then and there being feloniously, wilfully, deliberately, premeditatedly and of their malice aforethought did make an assault, and that he the said Joseph Burns, a certain pistol then and there Charged with gunpowder and one leaden bullet which said pistol he the said Joseph Burns, in his right hand then and there had and held, to, against and upon the said John C. Gilmore, then and there feloniously, wilfully deliberately, premeditatedly and of his malice aforethought did Shoot and discharge, and that the said Joseph Burns

with the leaden bullet aforesaid, out of the pistol afore-
said, then and there by force of the gunpowder, shot
and discharged and sent forth as aforesaid, the said John
C. Gilmore, in and upon the head and neck of him the
said John C. Gilmore, then and there feloniously wilfully
deliberately, premeditatedly and of his malice aforethought
did strike penetrate and wound giving to the said John
C. Gilmore, then and there in manner as aforesaid, one
mortal wound of the depth of three inches, of which said
mortal wound he the said John C. Gilmore, then and there
instantly died; and that the aforesaid William Burns
then and there felonowely, wilfully, deliberately, premeditatedly
and of his malice aforethought was present aiding helping
abetting and Comforting, assisting and maintaining the said
Joseph Burns the felony and murder aforesaid, in manner and
form aforesaid, to do, commit and perpetrate, and so the Jurors
aforesaid upon their oath aforesaid, do say, that the said Joseph
Burns and William Wilson, the said John C. Gilmore then
and there in manner and form aforesaid, feloniously, wilfully
deliberately, premeditatedly and of their malice aforethought, did
Kill and murder against the peace and dignity of the State.

I. P. Postine Ass't Cr atty

Endorsed:

A. True Bill.

C. I. Grely Foreman.

Wits: Dr Juminet, Bonner Stinkmeyer, Catharine I.
Gilmore, Fred Duper; John N. McAlpine.

Filed March 6. 1862

Fred Kretschmar Clerk.

Friday March 7. 1862

The State of Missouri. vs. William Wilson & Joseph Burns } On Indictment for Murder.

Severance. On motion of defendant Burns by his Counsel, the Court here doth grant a Severance herein.

Saturday March 8. 1862

The State of missouri. vs. Joseph Burns. impld } On indictment for Murder

Issue. Now Comes the Circuit attorney who prosecutes for the State and the said defendant being brought into Court and having had hearing of the said indictment says he is not Guilty as charged therein and for trial puts himself upon the Country and the Circuit attorney doth the like,

Friday March 14. 1862.

Continuance The State of Missouri. vs. Joseph Burns. Impld. } On indictment for Murder.

Continued on the affidavit of the defendant filed herein.

Wednesday July 23. 1862

Trial. The State of missouri. vs. Joseph Burns. impld } On indictment for Murder

Petit Jury.

Now again comes the Circuit attorney who prosecutes for the State and the said defendant is brought into Court in the custody of the marshal; and thereupon Come a Jury to wit:

Anson Brown; Chas. T. A. Lohman; Michael Bjod; William Zieck; Leon Chartrand; Benjamin Delisle; Casper H. Gallenbach, H. Mueller; Ernest Klueter William Adriance; G. H. Bell and William H. Jennings. — twelve good and lawful men who being duly elected tried and sworn the traverse between the parties aforesaid well and truly to try, and a true verdict render according to the law and the evidence, the trial of the Cause progressed, but the same not being concluded at the usual hour of adjournment it is ordered by the Court that further proceedings be deferred until the meeting of the Court to-morrow morning.

Thursday July 24. 1862.

The State of Missouri. } On indictment for murder.
vs.
Joseph Burns. Impld. }

Trial (Cont.)

Now again Comes the Circuit attorney who prosecutes for the State and the said defendant is brought into Court; and the jurors heretofore Sworn in this Cause also came, whereupon the

trial of the cause progressed, and being now fully concluded, the Jurors aforesaid upon their oath

Verdict. aforesaid say: they find the said defendant Guilty of murder in the first degree in manner and form as charged in the said indictment: thereupon the defendant files a motion for a new trial herein which motion being submitted to the Court and by the Court here fully understood, therefore it is considered by the Court that the said motion for a new trial be overruled, and the said defendant being demanded if he hath or knoweth anything to say why the Court here should not now proceed to pass sentence of death upon him, and having no-

Judgment. thing to say; Therefore it is considered by the Court that the said defendant Joseph Burns be taken from this Court to the place from whence he came, there to remain until Friday the fifth day of September next, thence on that day to be taken to the place of execution, and there between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of said day be hanged by the neck until he be dead: and it is further directed by the Court that the clerk of this Court make out a warrant under the seal of this Court commanding the County Marshal to carry this sentence into execution,

" " "

Friday July 25. 1862.

The State of Missouri.
vs.
Joseph Burns. imp'd'd
} on Indictment for Murder 1st degree

Appeal. Granted.

Now comes the defendant and prays an appeal to the Supreme Court from the judgment of this Court rendered against him and the Court here doth grant the same, and on motion Ten days time is given the defendant to file his bill of exceptions herein.

In vacation after July S. 1862
Monday Augst. 26. 1862

Bill of Exceptions filed.

The State of Missouri.
vs.
Joseph Burns, imp'd'd
} On Indictment for Murder 1st degree

Bill of exceptions filed by Consent of parties and leave of Court.

Bill of Exceptions

Bill of Exceptions

The State of Missouri vs. Joseph Burns. In the St Louis Criminal Court.

Be it remembered that on the fifteenth day of July, one thousand eight hundred and sixty two, this cause was duly set for trial, and called for trial, and the state by its attorney announced itself ready for trial, but the defendant not being ready the cause was laid over at his request until the twenty second day of the same month, when the case being again called for trial and both parties being ready the Court proceeded to empannel a Jury in said cause, whereupon the Marshal was ordered to proceed with the call of venire-men summoned to serve as Jurors in the Court, — which was done, The venire men being called forward and sworn according to the usual Course of the Court upon their voir dire, and examined as to their competency to try the particular case of the State vs Joseph Burns indicted as aforesaid, and their qualification as jurors therein; and divers of the venire-men were adjudged by the Court on challenge made by both the State and the defendant, to be disqualified to serve as Jurors in the Cause; some by reason of their having formed and expressed such an opinion with reference to the guilt and innocence of the defendant as biassed or prejudiced their mind; others by reason of their inability to speak or understand the English language sufficiently; and others again by reason of their entertaining Conscientious scruples on the subject of Capital punishment, so as to preclude them from rendering a verdict in the Cause.

And the State had also exercised partly its right of peremptory Challenge, and the defendant had also exercised partly his right of peremptory Challenge; So that the regular panel of venire-men was exhausted without obtaining the full panel of Jurors or more than ten persons who were duly elected to try the Case aforesaid; Whereupon the Court ordered an additional venire to be issued for the purpose of obtaining the requisite number of Jurors, the day being nearly fully occupied in the selection of ten men to serve as Jurors in said Cause; but which stated ten men were not sworn as Jurors in the said Cause but were seated in the box or seat occupied by the Jurors.

And now the Court pending the execution of the writ of venire previously issued, proceeded with its other business, Called another Case for trial and tried it, the ten venire-men already selected as fit and proper persons to try the Case of Burns forming part of the Jury in the other Case.

And after the disposition of that Case, and after Considerable time elapsed, the venire being returned, two other venire-men were duly elected to try the Case of Burns, and night had now Come, and the twelve persons who tried Burns had been selected and elected on both sides and accepted but none of them were Sworn as Jurors, and the Court was about to adjourn for the night, and it did adjourn, and discharged all Jurors until the following morning, enjoining upon the twelve Gentlemen who had been elected to try the Case of Burns but not yet Sworn as of the Jury, not to speak of the Case or to allow any person to approach them Concerning it; to hold

no Communication with any body; that they appeared to be qualified to serve as Jurors, and should do or permit nothing to disqualify themselves, and with this injunction they Could go to their homes and meet the Court in the morning when they Could be Sworn as Jurors in the Case.

And the Court adjourned until the next day at 9 o'clock, and at that hour the Court being duly opened, the twelve gentlemen appeared, and were then being Called and answering, duly sworn as jurors according to law to try the Case and render a true verdict upon the law and the evidence, and no objection whatever was taken by the Prisoner or his Counsel to this Course and no exception taken to the action of the Court in the premises until after the verdict, no Consent by the defendant being asked or given to the proceedings aforesaid.

Testimony of E. Doctor.

The State introduced Mr Doctor who testified as follows:

About the middle of July 1861. I occupied a two Story brick house on the Corner of Jefferson and Smith Streets in St Louis City and County; I was Carrying on a Grocery Store; near two o'clock in the night while asleep in the room adjoining the Store, my son a young boy sleeping with me, I was awakened by a Noise at the foot of my bed.

Defendant excepts to all this evidence as not pertinent or legal; which objection the Court OVERRULED, the defendant excepting; it being understood that all the testimony offered and to be offered

by the State Concerning any burglary or larceny, previous to the homicide is declared illegal and incompetent by the defendant; which the Court overruled and to which defendant excepted.

as I heard the noise I cried out "What do you want? immediately after which somebody said you damn son of a bitch if you dont shut your mouth we'll blow your brains out."; It seemed to be this voice would not come from the same party who stood at the foot of the bed; it must have come from another direction, As I heard the noise I cried out, "who is there?" and jumped up and lit a match, which was handy on the mantle piece; by the light of that match I saw one person whom I confronted face to face, and whom I believe to have been Wilson; he was a tall man, pale face, with black clothes on; I saw no other person at all; I had never seen Wilson before, though I believe that the voice that spoke the words mentioned must have come from some person other than wilson; I may be mistaken about this; I judge only from the sound of the voice; the voice came from within about two feet of the place where wilson stood; Whilst the match was burning the person whom I supposed to have been Wilson struck me in the face, knocking out some of my teeth; I did not fall down, but was stunned; a wooden trunk with clothing and some forty dollars in it belonging to me was gone: — after I had recovered my consciousness which was very soon thereafter; The trunk had two rope handles at each side, and must have been dragged out by one man; I judge so because it could not have

been Carried out by two men, on account of the marks over the ground where it was dragged and which I examined; I afterwards found the trunk a short distance back of the house; none of the money was taken away and the articles of clothing were scattered over the ground; immediately after the disappearance of the burglars I roused my neighbors and got one of them to fire off a pistol in the air in order to attract the police, and shortly after there was rapping of police sticks and Gilmore the deceased and policemen Bruder, Johnson and others Came up; I told them the facts and particulars, describing the men I had seen in my house; I think it was Wilson who Struck me, and according to my best belief it was Somebody else who said "Knock the damned Son of a bitch down"; though I did not see any other person but Wilson; I never saw Burns that night; I merely judge from the voice that there were two; whilst the match was burning Some body who I judge to have been Wilson's partner, from the Sound and direction of the voice, and who I judge also Stood not very far from me said "Knock the damn Son of a bitch down and immediately I was Knocked on the mouth and face and Some of my teeth Knocked out by the person standing right in front of me and who I take to be Wilson; entrance was obtained into my house by opening the Kitchen door by means of outsiders - the marks of the outsiders Could be seen on the Key; I saw the "star" on Gilmore the deceased; I also found in my room a good Size rock, which I Know was not in my room before the thieves Came in.

Defendant objected to all the above testimony which the Court overruled and to which the defendant excepted.

Testimony of Dr Jaminette

The State introduced Dr Jaminette, who testified as follows: I am a Physician I saw Gilmore shortly after he was shot and attended to him as his sole physician up to the time of his death probing and sounding his wound; I Concluded that Gilmore must die from the effects of the wound inflicted by a pistol shot, the bullet entering in the left jaw & going downward and obliquely, and the bullet lodged in the spine between the third and fourth vertebra; the wound was necessarily mortal; I became Convinced of this fact after the first probing, which was on the day of the Shooting of Gilmore; Gilmore was well attended and could not have survived; I found also a black spot on the shoulder of Gilmore such as would have been made by a blow with a blunt instrument a slung shot or rock; Gilmore died on the evening of the twenty fourth day of December 1861. in St Louis County, of the wound caused by said pistol shot; I first saw him on the tenth day of December 1861.; wounds of the Kind described are necessarily mortal, but a patient may survive as long as four weeks or more; I saw Gilmore almost daily at his house being his only attending physician; Gilmore had a wife and children with him at the same place; I Know that Gilmore had to die from the effects of that wound; I never told Gilmore that he was in danger or that he would die, nor did I ever say so to

his wife or any of his friends; I saw him about twice a day from the time he was shot till he died; he was perfectly sensible all along up to the time of his death, which was solely caused by the shot through his cheek and thence into his neck from a pistol; (The Cause of his death was admitted by the defendant.) I also held a Coroner's inquest in the absence of the Coroner over the body of Gilmore, and found the bullet as already stated between the third and fourth vertebra of the Spine; from the direction of the wound at the time Gilmore was shot, he must have been in a backward stooping position; the person who shot him must have been above him; the pistol held in a direction from upwards to downwards; some one may have been holding him from behind; his head must have been in a backward position; Gilmore died of Pyemia - which the Dr explained as being a purulent state of the blood caused by the wound which extending over the whole system necessarily and absolutely causes death.

Testimony of other State Witnesses

The State introduced witnesses who gave evidence tending to prove the following facts: That when he "Doctor" - the witness before named met the policeman, - Johnson, Gilmore and Bruder, Doctor gave a description of the party or parties who was or were supposed to have Committed the burglary and larceny, the evidence tended to show that Doctor described Wilson correctly, and that the other man was a "small chunky" man, Both Johnson and Bruder Coincide in this respect, and that Doctor also detailed to them all the particulars of the robbery

and larceny

The State also introduced testimony tending to show that Wilson and Burns, were in the habit of associating, of late, before that time, to a great extent, and that they with one Jasper lived in a small frame near the Corner of Thirteenth and Chambers Street, ~~near~~ Chambers on Thirteenth Street, with two disreputable women, in St Louis County.

Testimony for State

The State also gave evidence proving that the police officers mentioned, upon the information given to them by Doctor, proceeded to the house of Wilson and Burns aforesaid, and found two women asleep; that the said police officers woke them; that the women struck a light after getting up; that the policemen requested the women to put out the light; which the women refused to do; that the lights were afterwards put out by the policemen, and the women taken down to the station house, during the night. Jasper Came into the house; that he was arrested, and skeleton keys were found upon his person; that Gilmore the deCeased remained in the house for the purpose of waiting the Coming of the parties suspected of the Commission of the burglary and larceny in the house of Doctor; That Jasper is now in the Penitentiary, having been Convicted Some time ago on a charge of Burglary and larceny Committed the same night at the house of Gen Stanley on Washington avenue, and which Crime was at the time of his arrest unknown to the police; that until the burglary mentioned there was no Specific charge against Wilson and Burns, or either of them but that they

were Suspected; that the above named police officers were members of the metropolitan police and that Gilmore besides being such police officer was acting as Sergeant of the police and had his club and his star on the outside of his coat, on the left breast and quite visible and that each was also made on the river bank for Wilson and Burns by some of the policemen, and that Gilmore had been a policeman for a long time

Testimony for State.

The State also introduced two witnesses who gave testimony showing that on the 10th of December 1861. about seven o'clock in the morning, a shot was heard as from a pistol, by said two persons residing nearest and next to the same house mentioned being Wilson and Burns, that the report of the said shooting Came from said house of Wilson and Burns, both of whom were well known to the said two persons, and said two persons being on the side walk by their house saw that immediately after the shooting, Wilson ran out from the house, through the gate on to the pavement, and stood still for a few seconds, and looked back at the house with a smile on his face; that a few seconds afterwards and before Wilson left, Burns Came out of the same house having hold of Gilmore with his left hand by the neck from behind, holding his right arm by the elbow, and after having passed through the gate threw him down on some Curb stones that were on the side walk, and then Wilson and Burns looked at Gilmore and both started off; that Gilmore was bleeding at the time from his mouth when he was so thrust out and thrown down; that Gilmore fell down

on his Side; that he rose in a very few Seconds after-
wards; that not a word was Spoken by any of the
parties Concerned during all that time; that Gilmore
got up within two or three seconds after having been
thrown down; that Wilson and Burns ran up the Street,
Wilson in advance and burns a little behind, both
in rather a slow trot and then both ran; that Gilmore
got up and pursued them for about forty or fifty feet
Staggering when he turned around to Come back, then he
was taken care of by his friends; the first person taking
Care of him being police officer Jacobs; that Gilmore at
the time he was seen taken out of the house by Burns as
aforesaid. he Gilmore had a six barrelled Colts re-
volver in his right hand which was loaded in every
barrel and Caps on as was afterwards ascertained
and proved by officer Jacobs (the next witness) and when
found immediately after his friends took Charge of him
was Cocked on the first Ketch; that the revolver had
three Ketches, that the first Ketch was for the purpose of
preventing the hammer to rub on the Caps and to go off;
and that Gilmore so always Carried his revolver Cocked
on the first Ketch for the purpose just Stated and that
the Caps were not exploded; that said two witnesses
Knew well Burns and Wilson. having had daily trans-
actions with them; they (the witnesses) being in the family
grocery business and they recognized beyond all doubt
that morning Wilson & Burns; That as soon as the
friends of Gilmore took Charge of him they going up to
him, saw his Star on his left breast and side of his
Coat.

Testimony of Off. Jacobs.

The State introduced police officer Jacobs, who testified that the back part of the yard of his house adjoins the yard of Wilson and Burns' house; his house being on Chambers near Thirteenth Street; that on the morning of day Gilmore was shot, the 10th of December 1861.; Gilmore having left the house of Wilson and Burns Came to the upper Police Station and dismissed the policemen from their duty, and it being then about six o'clock, I and Gilmore went to the house of Wilson and Burns; We found there the policemen already mentioned at this trial; Gilmore also dismissed them and Gilmore and I remained there some time; as I lived so near, Gilmore told me to go home and get my breakfast, and to Come back when I would be through and then he would go and get his breakfast; I went home and left him alone; I had been gone hardly ten minutes when I heard a pistol fired the report Coming from the house of Wilson and Burns, it was about 7 o'clock then. I ran around Chambers Street to 13th Street; I saw Gilmore Kind of running up 13th Street towards Madison about half a block from Wilson and Burns' house; I ran after him, as I got to him he turned to me and said, "Oh Jacobs I am Shot" I did not see Wilson & Burns then; I took charge of Gilmore; he had his "Star" on the left breast outside of his Coat and his Club and had them also when I left him in the house when I went to breakfast; he was bleeding from the mouth and jaws and was wounded on the left jaw; he had a Colts revolver in his hand, I took it and examined it

Carefully it was a Six Shooter; all the Chambers of the revolver were loaded; Caps on and none exploded; it was Cocked on the first Ketch; the revolver had three Ketches; it was cocked on the first Ketch; for the purpose of preventing the Hammer from rubbing on the Caps and the revolving Chambers from revolving around and go off and Gilmore and all of us Carry our revolvers that way for the reason just stated; I went to the house of Wilson and Burns again I saw a big rock on the floor and a mark on the plaster on the wall as if the rock had struck the plaster; when Gilmore and I were in the house before that I did not see the mark on the wall nor the rock; I am also a member of the Metropolitan police.

Testimony of Johnson.

The State introduced and Sworn Saml D. Johnson, He is a policeman in the City of St Louis, on the night of the tenth of December A.D. 1861. He was on duty near the place where the burglary happened; heard the gun shot fired and saw Doctor; witness was in Company with Gilmore at the time they met Doctor; Doctor told them all the Circumstances of the case, about the burglary; He testified that Gilmore at once exclaimed "that is Wilson and Burns"; there were present officers Corcoran, Bruder. and Gilmore.

off Eagen.

John Eagen, testified on oath that some weeks after the occurrence, he arrested Wilson and Burns together at Pittsburgh in the State of Pennsylvania and brought them to Saint Louis,

Testimony of Mc Alpine.

Dying Declarations

The State introduced John H Mc. Alpine, who testified as follows:
I have Known Gilmore Eleven years; He worked for me at one time at my store as a tailor; we were well acquainted and conseidered as fuends to each other. He worked for me in 1856 and 1857 His name is John C. Gilmore; I occasionally visited him and his family; I heard of Gilmore's being wounded on the morning it happened; I saw him four or five times since the time he got wounded; I went to see him alone; nobody was ever present when I Convesed with him, I generally stayed about half an hour; his wife was away; always Dextended to him Hopes of his recovery; He said he would beliave me on any other topic but that; but that he Knew and felt that he could not recovet, but that he muet die from his injuries; He never said the Doctor had told him. he muest die, he said he should have to die from mortification, mortification is rotting etc.; he was black on his shoulders and growing black all around on both sides; I saw him last about four days before he died; He said he would die of mortification; I stayed with him at this time about three quarters of an hour, no one else was present; his wife was so far present as to Come in and go out at times; I went again in the evening at half past seven o'clock, about three or four days before he died; I asked him how he felt; he seemed more Cheerful and was in a chair; I do not Know who his physician was; he Spoke about some gentleman; I do not remember his name; he leaned back and appeared,

rather more cheerful than before; he said he did not feel very well; I told him that "I thought he would recover, and looked remarkably well; he replied that he would not recover, that he was a dead man anyhow; that he could not survive, and that he himself felt that he was mortifying; that he only regretted for his children and family; that he did not care to die himself and that he did not like to speak before his wife of his approaching death, but than he knew he must die; He informed me then how it happened; he had his full senses; I think I asked him how it happened; I think I asked him this question, "Gilmore have you any recollection how it happened? he told me that a robbery and burglary had occurred that night and that Wilson and Burns were notorious thieves and burglars, that he went to arrest them for the burglary, that in the act of doing his duty he was shot; he informed me that Wilson and Burns had both jumped upon him; that Burns had beaten him with a slung shot; that wilson had said let us kill the damned son of a bitch, when Wilson shot him; the conversation I believe ended about there; he merely made his own statement; I made no interrogations; I did not want to interrogate him, because I thought speaking might hurt him; about the time I left I saw Mrs Kelly the nurse came in; I saw mrs Gilmore and merely bid her "good evening" as I left; I never spoke to mrs Gilmore about it as far as I can remember; I did not tell her that her husband was dying or anything else; did not see him until ~~after~~ he was dead

after that time, I was in the Country; I never did tell him during his illness that he was about to die; I always cheered him; every thing I told him during the time I visited him was said with a view to impress him with the belief that he would recover; but he always expressed the idea that he would die from his injuries; I had no conversation with the Doctor nurse visitors or others; he had a large number of friends and acquaintances, none of them were there when I was there; I was present at his funeral; It was quite an extensive large funeral, between two and three hundred men were present; there were about two hundred gentlemen; the deceased was a mason in high standing; the fraternity turned out in a body to do him the last honors; he was an active member of a lodge; I never met any of those masons there; when I went to visit him; I always went there in the evening.

Defendants name was proven to be Joseph Burns as charged in indictment;

The State here closed,

The Defendant offered no evidence.

The Defendant thereupon demanded that the following instructions be given to the Jury:

Instructions Refused.

1. "A mere suspicion on the part of a police officer that Certain parties are generally believed to be Burglars and theives or the like, does

not warrant such officer to arrest, and if in the attempt to arrest any person, who is not shown to have been guilty of some felony, or respecting whose guilt there are not reasonable grounds, the killing of such officer in the attempt to resist the arrest is not murder.

2. The Jury are instructed that if they believe from the evidence that Burns was not connected with or a party to the burglary at Ernest Doctor's house, they cannot convict the defendant of murder, unless they are satisfied that the killing of Gilmore was wanton and malicious.

3. In passing upon the credit to which dying declarations should be entitled, it is proper for the Jury to weigh the evidence:

As to the mode and manner in which those declarations were elicited

Whether or not they are contradictory, or in their effect in weight against other credible testimony.

Whether they convey the full and whole truth respecting the subjects which they embrace, or whether they are partial, or dictated by prejudice or founded in an erroneous impression

4. The dying declarations of a party are subject to all the exceptions to which the testimony of witnesses under oath are subject: and if such declarations in the opinions of the Jury are contradictory either of themselves, or of other testimony touching the guilt or innocence of the prisoner, in which the Jury place credit, the Jury may disbelieve such declarations.

5. If the Jury believe that the dying declarations of Gilmore were not made in extremes, and not at a time and under circumstances when the said Gilmore was impressed with the conviction of death resulting from the illness with which he was then confined, then the Jury will discard such declarations although they believe the evidence in respect thereto to be true.

Which instructions the Court refused to give: to the refusing of which the defendant then and there excepted

The Court, then gave the following instructions

Instructions Given.

1. "The defendant Joseph Burns is charged with murder in the first degree by having wilfully, deliberately, premeditatedly and of his malice aforethought Killed John C. Gilmore by Shooting him with a pistol

By the words "wilfully" is meant intentionally, purposely, not accidentally. By the word "deliberately" is meant in cool blood, that is not in a heat of passion Caused by a lawful provocation. By the word "premeditatedly" is meant thought of beforehand any length of time however short,

Passion in law means a heated state of the blood Caused by a lawful provocation and nothing else. By the words "malice aforethought" is meant the wilful doing of an unlawful act, without just cause or lawful provocation

Wilfulness, deliberation and premeditation may be

proved directly or be inferred from the Circumstances Connected with the Killing; and malice may be established in the same way.

2. If the Jury find from the evidence that at any time before the finding of the indictment in Saint Louis County, defendant, wilfully deliberately premeditatedly and of his malice aforethought Killed John C Gilmore by shooting him with a pistol as charged in the indictment, then defendant is guilty of the Crime of murder in the first degree and so the Jury ought to find,

And if the Jury find from the evidence the defendant guilty of murder in the first degree, they will simply say so in their verdict

3. All present at the time of Committing an offence, are principals, although one only acts, if they are Confederates and engaged in a common design, of which the offence is part: So that if the Jury find from the evidence that William Wilson wilfully, deliberately, premeditatedly and of his malice aforethought Killed John C. Gilmore, by shooting him with a pistol as Charged in the indictment and that defendant Burns was feloniously present aiding and assisting in the act, and with a Knowledge of the felony to be Committed, he said Burns is equally guilty as he who Committed the act.

4. The dying declaration of a person who has been Killed, if made with regard to the Circumstances which produced his death, are to be received with the same degree of Credit as the testimony of the

deceased would be if examined under oath as a witness

The question of the Competency of the dying declarations of Gilmore, is a question to be decided by the Court and not for the Jury, and the Court has decided those dying declarations to be Competent.

5. The evidence of dying declarations is admitted to the Jury like any other evidence of witnesses Sworn in the Cause, the Competency of the testimony being for the decision of the Court, its Credibility being for the decision of the Jury who are at liberty to weigh all the Circumstances under which the declarations were made including those already proved to the Court and to give the testimony like other testemony in the Cause such Credit as upon the whole they may think it deserves, taking all the Circumstances under which the evidence appears in their Consideration

6. The question is not whether Burns Committed a burglary at the house of Ernest & C. Doctor, but the question is simply if Gilmore had a reasonable Cause to suspect Burns guilty of the burglary. This upon the question of the right to arrest

7. Gentlemen, if you believe and find from the evidence that both parties Wilson & Burns were engaged in a Common guilty purpose of resisting to death the officer endeavouring to apprehend them, both are principals the one as guilty as the other.

The Jury may ask to themselves and answer the question for themselves, did Burns intend that Wilson should Kill Gilmore, in order to prevent his Gilmore's arresting them both, if he did and he thereupon aided and assisted Wilson in any manner in Killing Gilmore by striking him, thereby preventing his Gilmore's success by resisting the attack of Wilson, or by holding him or in any other manner whatsoever, then Burns is equally Criminal with Wilson tho' the Jury may be satisfied that it was Wilson who discharged the pistol whereby Gilmores life was taken.

8. If a felony be Committed and the felon fly from Justice, it is the duty of every man to use his best endeavors to prevent an escape and in such case if fresh suit be made and if hue and Cry be levied all who join in the pursuit are in the protection of the law, being authorized by law to pursue and apprehend the malefactors, and this although there were no warrant of a justice of the peace to raise hue and cry

And a peace officer may justify an arrest on a charge of felony on a reasonable Cause of Suspicion without a warrant even if it should afterwards appear that no felony had been Committed.

Killing an officer who attempts to arrest a man will be murder though the officer had no warrant and though the man had done nothing for which he was liable to be arrested if the officer has a Charge against him for felony, and the man Knows

the individual to be an officer though the officer do not notify to him that he has such a charge.

9. If the Jury entertain a reasonable doubt of the guilt of the accused, they will acquit, the doubt to authorise an acquittal on this ground ought to be a reasonable doubt of the guilt and not the mere possibility of innocence.

To the giving of which instructions the defendant excepted.

The Jury then retired and returning again into Court in the presence of the defendant on the same day rendered the following verdict:

Verdict. "We the Jury in the Case of the State of Missouri, versus Joseph Burns find the defendant Guilty of murder in the first degree as charged in the indictment."

St Louis July 24. 1862. Wm Adriance foreman

Upon the verdict rendered in the Case on the same day when the verdict was rendered defendant filed the following motion for a new trial,

Motion for New Trial. ..... Now Comes the defendant and moves the Court to grant a new trial in said Case for the reasons following

The verdict is against the evidence,

The verdict is against the weight of evidence

It is against the law.

The Court erred in instructing the Jury.

It erred in refusing the instructions asked by defendant

It erred in admitting testimony which ought

not to have been admitted

It erred in refusing to hear testimony which it ought to have admitted.

The dying declaration of the deceased should not have been admitted.

The Jury were permitted to absent themselves before Sworn and after passed upon by both Counsel and no opportunity was offered Counsel for defendant to ascertain their qualifications

The Jury after being passed upon and before Sworn were by the Court - that is ten of them, made to try another Cause, sent home after passing on said Cause and without permission, or consent of defendant, sent abroad over night, not under the surveillance or in the presence of any officer and permitted to roam at large, nor was the defendant offered any opportunity to make his objection thereto

Kribben & Kehr atty for Deft.

Filed July 24. 1862. Fred Kretschmar Clk

Which Came up for a hearing on the same day, and which the Court then and there overruled; to which the defendant excepted,

Which were all the proceeding had in the Case.

And now defendant prays that this his bill of exceptions to the proceedings had may be Signed enrolled and made part of the record in the Cause.

P. A. Clover Seal

" "

State of Missouri.
County of St. Louis. } ss. I Fred'k Kretschmar
clerk of the Saint Louis Criminal Court within and
for said County of St Louis. Certify the foregoing to be a
true and complete transcript of the record and proceed-
ings had in the above entitled Cause of the State
of Missouri vs Joseph Burns, as fully as the same
now remains of record and on file in my office
Witness. my hand and the seal of said Court hereto
affixed at office in the City of St Louis. this
28th day of August A.D. 1862.

Fred Kretschmar clk

" " "

Index.

Grand Jury	Page	1.
Indictment.	"	2.
Severance, Issue, Continuance, Trial.	"	5
Petit Jury	"	6
Judgment. verdict.	.	7
Appeal Granted	.	8
Bill of Exceptions	"	9
Testimony of E. Doctor	.	11
" " Dr Jaminette	"	14
" " Other State Witnesses		15 to 21.
Dying declarations or Testimony of McAffine		21.
Instructions Refused and Given		23. 25.
Motion for a new trial		29.

[34]

(19) 108

St. Louis Court.

The State of Missouri.

Respondent.

vs. Transcript.

Joseph Burns.

m/ Appellant.

Appeal.

Filed September 5th 1862
Aug Meadows Clerk
S. Voultaire, Esq.
for Respondent.

Messrs Kibben & Kehr.
for Appellant.

1862 Nov 1. Asst of errors.
1863 April 11. Argued and submitted Respondents Brief filed
1863 April 20 Judgment affirmed and ordered that sentence of the Criminal Court be carried into effect on Friday 8th May 1863 Opinfiled
Dp 160

The State of Wisconsin
vs
Joseph Burns appt

IN SUPREME COURT,
Oct – TERM, 1862
State of Illinois

AND now comes the said Defendant appellant and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said appellant assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by the State
2. That said Court rejected proper and legal testimony offered by Defendant
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Defendant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. ~~That the judgment was rendered in favor of the~~ ~~S~~ ~~when it should have been rendered for the~~
10. That said Court overruled the motion for a new trial, made by Defendant.
11. That the Court allowed persons to act as Jurors in said cause who were incompetent.
12. That the Court allowed the persons summoned as Jurors in the case to separate without consent of Defendant & against law.
13. That the Jury who tried the cause were not qualified.

Ruben Pea

And now come the ..... and for joinder in error say, that there is no error in the record and proceedings of said .....
..... in said cause, as assigned by said .....

No. 332

Supreme Ct of State of Missouri. Oct. 62

The State of Missouri pls

vs

Joseph Burns app

Assignment of Errors

Filed November 1st 1862

Alb. Mead
Clerk

Kribben & Kehr
for app.

The State of Missouri
Joseph Blunt. } Supreme Court
March Term 1863.

1. The defendant having been put upon his trial under a charge of Murder, and nine Jurors having been selected and accepted, both on the part of the State & himself - it was error on the part of the Court to permit the men so passed upon and accepted, to separate unconditionally in order to await the filling up of the panel on the following day. Graham & Waterman on New Trials Vol. I p. 62. & note. Virginia Cases Vol I Commonwealth v McCauley P. 271 & 288 et seq. 1 Conn. Rep. 401.

2 Every principle laid down in the above cited authorities respecting jurors sworn, applies with redoubled force to men sworn on their voir dire before being sworn in chief. The object of the law in keeping confined Separate, jurors in Capital cases, being solely to keep them free from outside influences, the very fact of their being accepted & ~~sworn~~ selected as jurors being in, will calculated to ~~avoid~~ prevent the objects sought to be attained by ~~limiting~~ their separation.

3. In a capital case it matters not whether the defendant chose to take advantage of the error of the Court in this respect by excepting to the panel on the following day when the jury were finally sworn. The whole system of criminal jurisprudence and practice supports this assumption.

---

4. The Court should have granted the several instructions asked by defendant Concerning dying declarations. 1 Greenleaf Ev. p. 156 et. seq. Starkey v the People 17 Ill. Rep. 17.

---

5. The third instruction asked for by the defendant in words following:

"A mere suspicion on the part of a police officer that certain parties are generally believed to be burglars, thieves or the like does not warrant such officer to arrest, and if in the attempt to arrest any person who is not shown to have been guilty of some felony, or respecting whose guilt there are not reasonable grounds the killing of such officer in the attempt to resist such arrest is not murder"

should have been granted, and the granting by the Court of the instruction contradictory of the principle stated above was error, and vitiates the verdict. the instructions given on that point being calculated to mislead the jury by assuming fact.

6. There must, under all circumstances, be reasonable ground on the part of the officer ~~making~~ attempting the arrest of a person, that that person had been guilty of a particular felony in order to constitute the homicide committed in attempting to resist such arrest murder. A mere general evil report that the party sought to be arrested was a notoriously bad character not warranting a forcible arrest.

=

In reference to the first point raised as to separation of the jury, the appellant cites the following additional cases:

Pfeffer v. the Commonwealth 3 Harris Pa. Reports 468

Cochran v. the State 7 Humphreys 544

Hines v. the State 8 ib 599.

McLain v. the State 10 Yerger 241

McCann v. the State 9 Sm. & Mars. 465

Bowles v. the State 13 ib 398

Cornelius v. the State 7 Eng. Ark. 782.

Imp. Court

Burns

v

The state

—

Brief of appellant

Kribben & Kiber.

Filed April 11. 1863

A. W. Mead

Clerk

4

[38]

State of Missouri } Supreme Court.
vs
Joseph Burns

Respondent's Brief

The only point that can be raised, is whether the Judge erred in dismissing on one occasion, upon the adjournment of the Court, such persons as had been examined and accepted to serve as jurors, until the succeeding morning at the meeting of the Court; and permitting said persons with others, to be sworn as jurors in another case and try the same

1st. Said persons as accepted, were not as yet jurors in the case.

2d. Defendant at any time before they were sworn, could have excused them to the number of his peremptory challenges.

On the 1st proposition.
A Juror is a citizen, duly qualified, legally summoned, empannelled, charged and sworn to try one or more issues of facts submitted to him and his co-jurors, and to give a judgment respecting the same.

These persons so accepted, had not been charged, nor sworn to try the case — therefore, there was no necessity to keep them together &c.

vide — Wharton Crim Law 293
11 Leigh 714 Tool v Com
1 Burr's trial 382.
5 Grattan 681 Espy's case
8 Hump. 599 Hines v State
2 Leigh 750 Martin's case
1 Chitty R. 406. 419 &c. Rex v. Wolfstal
1 Bailey 651 State v Mc. Kee
1 Dev & Bat. 509 &c. State v Miller
2 Mills Const. R. 155 (margin) State v Burkett et al
Wharton Crim law 1012 &c
1 Conn 401 State v Babcock & authority therein

On the 2d. proposition

vide. Wharton Crim law 971
5 Leigh 715 Hendricks' case
2 Chandler (Wis) 181 State v Cameron
7 Blackf 608 Morris v State
7 Blackf 593 Munly v State
4 Ohio 350 Hooker v State & authorities therein
6 Blackf 307 Beauchamp v State
3 Georgia 459 Williams v State

Seymour Scollard
Circ. Atty for State

Supreme Court

State of Mo
vs
Joseph Burns

Respd's brief

S. Foullaire
Cirt. Atty for state.

Filed Apr. 11. 1863
A. W. Mead
Cr

Appeal from St Louis Criminal Court

State of Mo
v
Joseph Burns

Respt S. Vaulane for Respt
Appt C. Kribben for Appt

The defendant and one Wilson were indicted at the March Term 1862 of the St Louis criminal court for the murder of John C Gilmore, a police officer of the City of St Louis - A severance being had the defendant was tried at the July term following, and convicted of murder in the first degree, and sentenced to be executed. From this judgment he appeals to this court - For the purposes of this case it is unnecessary to give more than a mere outline of the testimony, as the main ground relied upon for a reversal has no reference to the evidence - ~~About the middle~~ In December 1861, and about 2 O'clock at night a burglary was committed upon the premises of a man by the name of Doctor, at the corner of Jefferson and Ninth streets in St Louis, Doctor, being aroused by the noise, encountered one of the burglars who knocked him down, and who afterwards proved to

le Wilson. Deceased states that
on the Man accompanied Wilson
as he distinctly heard him say
"You damn son of a bitch if
You dont Shut ~~You Shut~~ Your
mouth we will blow Your brains
out He did not see him so as
to be able to recognize him —
Shortly after the disappearance of
the Burglars he roused some of his
Neighbors and got one of them
to fire off a pistol to attract the
attention of the police — The deceased
in company with Braden and
Johnson also policeman Scott came
up, and deceased informed them of
what had transpired describing
the men as near as he could do
so and giving in detail the
particulars of the robbery — Gilmore
immediately said "that is Wilson
and Burns" and about six oclock
of the same morning in company
with policeman Jacobs went to the
house of Wilson and Burns to
arrest them they living together
with two disreputable Women on

Chambers Street Near 13th —
Not finding them at home Gilmore
told Jacobs, who resided near by,
to go and get his breakfast and
return. Jacobs did so and
returned in about ten Minutes
while away he heard the report of
a pistol and immediately ran
down Chambers Street to 13th when
he saw deceased running up 13th
towards Madison Street and as he
approached him deceased said
"Oh Jacobs I am shot" — deceased had
his "star" on the left breast outside
of his Coat — deceased was wounded
in the left jaw and was bleeding
from the Mouth and jaw — deceased
had a colts revolver — Witness Examined
it and found all the chambers loaded
with Unexploded Caps on them —
Two other Witnesses testified that
about Seven Oclock on the Morning
of the 10th of December they heard the
report of a pistol which came from
the House of Wilson and Burns both
of whom were well known to Witness
and immediately afterwards Wilson

ran out of the house and through the gate to the pavement - stood still for a few seconds looking back at the house with a smile on his face. Burns then came out of the house having hold of deceased with his left hand around his neck from behind, and holding deceased's right arm by the elbow and after passing through the gate through deceased down on some cobble stones lying upon the side walk, and then Wilson and Burns stabbed deceased who was bleeding from the mouth nose and ran up the street for about fifty feet and commenced staggering and was then taken care of by Jacks and some other friends - Gilmore died on the 24th of December from the wounds received and during his confinement expressed a fear that his wounds were mortal, and that he must die - on the shoulder of deceased was also found a black spot indicating that he had received a blow from a blunt shot, or other

that instrument — Wilson and Burns was afterwards arrested in the State of Pennsylvania and brought to St Louis —

The main ground of error relied upon by the prisoner, counsel relates to the empanneling of the jury —

It seems from the bill of Exceptions that the regular panel was Exhausted without being able to obtain more than ten who were competent to serve as jurors, whereupon the Court ordered a venire to issue for an additional number, and while the officer was engaged in Executing the writ, the Court proceeded with other business, and tried another case on the same day, the ten veniremen selected as aforesaid forming a part of the jury. Upon the conclusion of the case, the writ of venire was returned and two additional jurors selected making the panel complete, and the usual time of adjournment having arrived the Court discharged the jurors until the following morning with the usual injunction

not to speak to any person about the case, nor to allow any person to approach them concerning it —
They had not yet been sworn or empannelled, nor was any objection to this course made by the Prisoner or his Counsel —

It is contended by the prisoner's Counsel that in permitting them thus to separate the Court below committed an error which vitiates the verdict —

Being desirous of giving the defendant the full benefit of this objection, we have examined with much care all the authorities cited by his Counsel, but have been unable to find a single case which supports the objection —
In Peiffer vs The Commonwealth of Penna the verdict was set aside because the jury separated after they had been sworn and empannelled —
C J Gibson in delivering the opinion of the Court said " A juror is charged with a prisoner as soon as he has

3 Harris 468

V. 10 Geo 241

looked upon him and taken the oath; for he cannot be withdrawn — the trial has commenced, and the prisoner stands before him as one of his judges."

The cases cited in 7 & 8 Humphrey also refer to the conduct of the jury after being sworn and charged —

In McLain vs The State V the separation took place not only after the jury were sworn but after hearing a part of the evidence —

In McCann vs The State 9 Sm. & Marsh 465 the judgment was reversed because the jury for a portion of the time during the trial, and after their retirement, were not under the care and charge of a sworn officer of the court —

In Boles vs The State 13 Sm & Marsh 398 the verdict was set aside because persons not of the jury were permitted to visit and mingle with the jury after the cause had been submitted to them and they had retired to consider of their verdict —

In Cornelius vs The State 7 Eng (Ark) 782 some of the jurors after the

commencement of the trial can be seen walking in the street —

These cases cited by the learned Counsel for the prisoner relate to misconduct of the jury after being sworn and empanelled, and in some of them after hearing a portion of the evidence. They therefore furnish no authority in favor of the ground taken by the prisoner, for in the case at bar neither of the Gentlemen had been sworn, and were still subject to challenge. In fact they were not yet jurors, and not therefore in the Custody of any officer of the Court. Though selected by both State and prisoner, they were not clothed with the power and authority of a jury but were still subject to be set aside, excused, or challenged —

Whatton in his Treatise on Criminal Law p 273 says until the jury are sworn it is not necessary that they should be kept together and cites numerous cases in which it has been

So ruled - In Epes case 5 Grattan 671 the prisoner was convicted of Murder in the first degree - Seven days were consumed in making up the panel, and the jurymen were not committed to the keeping of the Sheriff in the interval between the time of their selection, and the time they were sworn - held by the General Court of Virginia that there was no necessity for delivering the jurymen who had been or should be sworn into the custody of the Marshal, until the whole number had been empannelled and sworn - The same doctrine was held in Todd, case 11 Leigh 714 and by C J Marshall in Burr, case, and is fully supported by numerous other cases both in England and this country -

We are of opinion

We are therefore of the opinion that the separation of the jurymen in this case, after being sworn and empannelled, furnishes no ground for a new trial -

We have carefully examined the instructions given by the Court and with the exception of one or two, they are such as are usually given in cases of [redacted] homicide, and have been time and again approved by this Court. The appellant asks several instructions which were refused some of which were very properly refused, while others which were unobjectionable were substantially given in the instructions framed by the Court. In the argument particular complaint is made because the appellants 5th instruction was refused. The instruction is as follows

"If the jury believe that the dying declarations of Gilmore were not made in extremis and not at a time and under circumstances when the said Gilmore was impressed with the conviction of death resulting from the illness with which he was then confined then the jury will discard such declarations although they believe the evidence in respect thereto

" to be true))

This instruction was very properly refused, for it left it to the jury to pass upon the admissibility of the declarations, a question solely for the consideration of the court and not for the jury - As stated by Greenleaf in his work on Evidence (Vol 1 p 213) it is placed on the same ground with the preliminary proof of documents and of the competency of witnesses, which is always addressed to the court - This court however will look at the preliminary proof to ascertain if the declarations were properly admitted - One of the witnesses who visited him frequently during his illness told him he thought he would recover - deceased ~~replied~~ stated in reply that he would not recover - that he was a dead man any hour - that he could not survive and that he felt that he was mortifying - that he only regretted it on account of his children and family, and that he did not like to speak of his

V before

wife of his approaching death —
It has also shown that he was
entitled the slightest hope of a
pardon, but labored under a
settled conviction that his death
was near at hand —
It is difficult to imagine a
stronger case than this for the
admission of dying declarations —
Upon the whole case we think
the defendant has no reason to
complain of the ruling of the Court
below. He was defended by
able Counsel — received a fair
and impartial trial and obtained
the full benefit of every principle
of law which could be invoked
in his behalf — We do not therefore
feel at liberty to interfere with
the verdict —
The other judges concurring the
judgment will be affirmed

W. F. R. Bay

State (163
vs
Josh Burns

Opinion

Filed April 20. 1863
A.W. Mead
Clerk
N. T. N. Bay

Aff-

108

March Term
1863

State of Missouri
vs
Joseph Burns

Warrant.

RG 600
Supreme Court of Missouri
Case Files

LARGE DOCUMENTS CAN BE FOUND IN OVERSIZED STORAGE

Location 16A/4/9

Box 2

Folder 29

Number of Items 1