

SELDEN v. STATE.

Decided January 30, 1892.

Instructions—Should be harmonious.

The giving of a correct instruction upon a point in a case will not cure an error in another instruction entirely variant, where there is nothing to show the jury which instruction to adopt. Thus, where in a murder case the jury are instructed that if deceased was in the act of striking defendant in self-defense when the fatal blow was given, the jury should convict of murder either in the first or second degree, the error in excluding from the jury the right to decide whether defendant acted under an irresistible passion, which would reduce the crime to manslaughter, is not cured by a distinct instruction upon that point properly stating the law.

APPEAL from *Miller* Circuit Court.

RUFUS D. HEARN, Judge.

No counsel for appellant.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

HUGHES, J. The appellant was convicted of murder in the second degree and sentenced to the penitentiary for twenty-one years. He appealed to this court.

The facts are substantially as follows: Appellant and his wife Ann had been separated and were living apart. The deceased Tama was the daughter of Ann and stepdaughter of the appellant. On the day of the killing the appellant went to the house of Gilbert Boykin, riding and carrying his gun. When he reached Boykin's house, he found Tama and her mother, the appellant's wife, there. He endeavored to persuade his wife to return and live with him, but she refused to do so. Tama about this time made some remark, whereupon appellant went to her and said: "I understand you said you wanted to kill me." He had his gun in his right hand, and she said to him, "Shoot." A bystander interfered and stopped the difficulty. While this was transpiring, Gilbert Boykin, who was a justice of the peace, was writing. The appellant inquired what he was doing, when

Boykin informed him that his wife wanted to put him under bond to keep the peace. Appellant said he was not doing anything, that he only wanted his wife; and went to where she was and began talking to her, trying to get her to go home with him. Tama again spoke to appellant and dared him to come out into the yard. She asked her mother twice to come with her, when the appellant told her to let his wife alone. Appellant and Tama went out into the yard, and she cursed him. Appellant still had his gun. A witness caught Tama; the appellant went into the house where his wife was, and Tama followed him. His wife started to go, when appellant said she should not go. Tama said "Come on," and started with her little brother. Ann, the appellant's wife, told Tama and her brother to go on; she would stay there that night and come tomorrow. The boy came back towards his mother, when the appellant commanded him to go on, and asked him who he was going to mind, his mother or Tama, and pushed and kicked him. Tama then rushed upon the appellant and cut at him four or five times with a knife, cursing all the while. She cut him on the shoulder and head. While she was cutting at him, Ann ran up and caught the appellant around the body with her arms from behind, and thus held his arms. They were separated, and Tama went to the rear of the house. Appellant went into the house to get his gun, but Gilbert Boykin secured it and hid it. Appellant then got some sticks, which were taken from him. He went into the house with his knife in his hand; a person tried to stop him, whom he threatened to cut if he did not get out of his way; he jumped out at the window, rushed up to Tama, who was in the back yard in the act of picking up a hoe. He stabbed her once with the knife he had, ran and attempted to jump the fence, but was caught on the palings.

In obedience to the command of the constable he went toward him at the front gate, whither Tama also went. As appellant went to the gate, he picked up a piece of plank with which to strike Tama, but was prevented from doing so

by the constable. Tama reached the front gate, fell and expired in a short time. It was but a few minutes, says one of the witnesses, and another stated that it was twenty minutes, from the time the appellant and Tama were separated, when she was cutting him with a knife, till she was stabbed by the appellant. As the appellant went into the house when he jumped out at the window, he exclaimed "There's my life's blood," alluding to the blood flowing from the wounds inflicted by Tama. Tama was a very tall and stout young woman. The appellant was an old man.

The court gave for the State, amongst others, the following instruction, which was excepted to by the appellant; and the giving of same was made a ground in his motion for a new trial :

" 8. You are told that when a person voluntarily and unlawfully enters into a difficulty, or unlawfully assaults another, that then they are denied the privilege of taking advantage of the law of self-defense. So, in this case, if you find from the evidence beyond a reasonable doubt that the defendant and deceased, Tama Thurman, engaged in a difficulty, and were separated or separated themselves, and that the deceased had in good faith abandoned the contest, and defendant unlawfully renewed the contest and difficulty, that he cannot avail himself of the law of self-defense; and should you believe that, at the time or just previous to striking the fatal blow, the deceased was in the act of striking or attempting to strike the defendant with a hoe or other instrument, to defend herself, you should convict him of either murder in the first or second degree, as the proof warrants or the proof will justify."

And for the defendant the court, with others, gave the following instruction :

" 7. If you find from the evidence that defendant stabbed the deceased while laboring under passion excited by provocation sufficient apparently to render the passion irresistible, or if you have a reasonable doubt thereof, you cannot

convict the defendant of murder either in the first or second degree.”

The court of its own motion instructed the jury as follows :

“Manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible.”

This eighth instruction given for the State tells the jury in the last clause: “And should you believe that, at the time, or just previous to striking the fatal blow, the deceased was in the act of striking or attempting to strike the defendant, with a hoe or other instrument, to defend herself, you should convict him of either murder in the first or second degree, as the proof warrants or the proof will justify.”

The first part of this instruction is so framed as to indicate that the court in giving it did so to impress upon the jury that if, after the first encounter between the defendant and Tama had ceased, he unlawfully renewed the difficulty, he could not invoke the law of self-defense, though he might have killed Tama when she was in the act of striking him with a hoe. This was correct. But the instruction excluded from the jury the right and duty to consider whether at the time the fatal stab was given, the defendant was acting under and impelled by “a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible.”

It is true that, in the seventh instruction given for the defendant, the court told the jury that if they found from the evidence that defendant stabbed the deceased, while laboring under passion excited by provocation sufficient apparently to render the passion irresistible, or that if they had a reasonable doubt whether this was the case, they could not convict the defendant of murder either in the first or second degree. This was correct; but it does not explain but contradicts the eighth instruction given for the State, which undertook to apply the law to the facts in the case.

By which of these instructions were the jury governed? It is impossible to tell. The probabilities are that they took the seventh as stating the law in the abstract, and the eighth as stating the law as applied to the hypothetical statement of facts embodied in it. They might have so understood them. The eighth instruction was so framed that it might have misled the jury to the prejudice of the appellant, inasmuch as it might have been and probably was understood to exclude from their consideration whether passion excited by provocation apparently sufficient to make the passion irresistible impelled the appellant to strike the fatal blow, in case they should find from the evidence the hypothetical state of facts stated in the instruction to really exist. The seventh given for the defense was not an explanation, but a contradiction of this. "One correct instruction will not always cure an erroneous one. The court should harmonize the instructions, else they are calculated to confuse and mislead the jury." Sackett's Instructions to Juries, sec. 28, p. 25; *Quinn v. Donovan*, 85 Ill., 194. "The giving of a correct instruction upon a point in the case will not obviate an error in an instruction on the other side, when they are entirely variant, and there is nothing to show the jury which to adopt." Sackett's Instructions to Juries, *supra*; *Ill. Linen Co. v. Hough*, 91 Ill., 63; *Vanslyck v. Mills*, 34 Ia., 375.

We have discovered no other substantial error. For the error indicated in the eighth instruction given for the State, the judgment is reversed, and the cause is remanded for a new trial.