

IN THE Supreme Court of Missouri DIVISION NO. 2. OCTOBER TERM, 1923. (January Call, 1924.)  
STATE OF MISSOURI, Respondent, vs. CYREAL DAUGHERTY, Appellant. No. 25240  
APPEAL FROM THE CRIMINAL COURT OF JACKSON COUNTY, MISSOURI.

(Hon. Allen C. Southern, Judge.)

RESPONDENT'S STATEMENT, ABSTRACT OF THE RECORD AND BRIEF.

JESSE W. BARRETT, Attorney-General, ROBERT W. OTTO, Assistant Attorney-General, For  
Respondent.

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STATEMENT.

Appellant, Cyreal Daugherty, was charged in an indictment returned in the Criminal Court of Jackson County, Missouri, on the 26th day of September, 1922, with the crime of robbery in the first degree, in that he, on the 24th day of June, 1922, at the County of Jackson, State of Missouri, feloniously robbed one Ray E. Shore of the sum of \$2,436. On the 14th day of November, 1922, a jury returned a verdict finding the defendant guilty as charged in the indictment and assessed his punishment at ten years in the Missouri penitentiary and judgment and sentence were rendered accordingly. From this judgment appellant appeals to this Court.  
STATE'S EVIDENCE.

The evidence introduced on behalf of the State tended to prove that one R. E. Shore was employed as a building superintendent for the Fletcher Cowherd Real Estate Company of Kansas City, Missouri, and was engaged in building residences in additions on 53rd and 54th streets, between Rockhill Road and Troost Avenue, and in the Morningside Park Addition at 61st and Oak Streets in the City of Kansas City, Missouri. That on the afternoon of the 24th day of June, 1922, the said R. E. Shore was driving in a Ford touring car carrying with him the weekly pay roll of between three and four thousand dollars, which he carried in a small black leather hand bag. (3) As Shore passed 43rd Street west on Gillham some colored men, including the defendant, in a Hudson sport model automobile with red wheels, crowded said Shore over to the curb and forced him to stop and placed the Hudson car in front of the Ford touring car. After stopping the defendant left the front seat of the Hudson car with a revolver in his hand and demanded of the said R. E. Shore that he hand to him the hand bag containing the pay roll, which Shore did. The hand bag at that time contained \$2,470. After receiving the hand bag with the money in it the defendant entered the Hudson automobile and with the others in the car drove west on Gillham to 44th Street and then turned east. (4) Immediately after the robbery Shore proceeded to a gasoline filling station at 46th and Troost Avenue and reported the robbery to the police, (5) and later called at the Westport Police Station and gave a description of the defendant. (6) On the 24th day of June the defendant and another man by the name of Fred came to one Johnny Bowles, a taxicab driver, and rented a Hudson touring car with red wheels; the said Bowles was directed to take the defendant and the person named Fred to 44th and Gillham Road in the City of Kansas City. As they arrived at 44th Street and Gillham Road a Ford touring car drove by and Bowles was ordered by his passengers to crowd the driver of the Ford touring car to the curb and as he did so the defendant took a bag from the driver of the

Ford touring car. Bowles was then ordered to proceed to 16th and Forest streets where the defendant and the person named Freddie left the car and paid Bowles a fifty dollar bill for his services. On the following Monday, Bowles, the taxicab driver, met Officer Higgins on 15th Street and told the Officer about driving the defendant and the person named Freddie to 44th and Gillham Road and about the robbery and that he had received the sum of fifty dollars for his services. (15, 16, 17.) Upon information received from said Johnny Bowles, a taxicab driver, on or about the 24th day of June, Officer Thomas J. Higgins of the Police Department of the City of Kansas City arrested the defendant at 9th and Woodlawn in Kansas City. (11, 12, 13.) The testimony further showed that Chester A. Jones and E. A. Clark, on the 24th day of June were driving in an automobile near 19th and Gillham Road in Kansas City when a large touring car occupied by some negroes passed them. After driving for a distance of about fifty feet Jones and Clark were stopped by Shore, who entered their car, and upon being informed by Mr. Shore about the robbery they immediately gave chase but soon lost trace of the negroes. Upon losing trace of the defendant the witnesses Jones and Clark drove Shore to a filling station on Troost Avenue. (25-32).

#### DEFENDANT'S EVIDENCE.

The evidence on behalf of the defendant tended to prove that Cyreal Daugherty, Sr., the father of the defendant, was a carpenter and was engaged at his trade on the 24th day of June, 1922, at 2444 Flora Street in Kansas City, Missouri, working for one Mr. Kensler, a real estate man, and that on said day the defendant, Cyreal Daugherty, was working for his father at said address and had been working for him the entire day. (36-38, 55.) That one Herman L. Kinsler was engaged in the real estate business in Kansas City at 1816 Vine Street and had contracted to repair some property at 2444 Flora. That on a Saturday during the month of June, 1922, Mr. Daugherty, Sr., and his son, the defendant, at about two-thirty in the afternoon were working on said building. (45.) That on the 28th day of June, at about noon, one Carl P. Werner was at the Police Station and saw witness, Shore, look at the defendant and turn and say that the defendant was not the man. (51, 52.)

#### STATE'S REBUTTAL.

In rebuttal the State introduced evidence to prove that witness Carl Werner was not at the Police Station at the time Shore identified the defendant. (61-65.)

#### ABSTRACT OF THE RECORD.

#### INDICTMENT.

The indictment in this cause was returned on the 26th day of September, 1922. Said indictment, caption and verification omitted, is in words and figures as follows: (R. p. 6.)

"The Grand Jurors for the State of Missouri, duly impaneled, sworn and charged to inquire within and for the body of the County of Jackson, upon their oaths present and charge that Cyreal Daugherty and Johnny Bowles, late of the county aforesaid, on the 24th day of June, 1922, at the County of Jackson, State of Missouri, with force and arms in and upon one Ray E. Shore, unlawfully and feloniously did make an assault and Twenty-four Hundred Thirty-six Dollars, in the aggregate of the value of Twenty-four Hundred Thirty-six Dollars, lawful money of the United States, the money and personal property of the said Ray E. Shore, from the person and against the will of the said Ray E. Shore, then and there, by force and violence to the person of the said Ray E. Shore, and by putting the said Ray E. Shore in fear of an immediate injury to his person, feloniously did rob, steal and carry away; against the peace and dignity of

the State.

Cameron L. Orr, A true bill. Prosecuting Attorney.

R. C. Kemper, Foreman.”

ARRAIGNMENT AND PLEA.

Thereafter, on the 26th day of September, 1922, appellants were formally arraigned and entered their plea of not guilty. (R. p. 8.)

SEVERANCE.

Thereafter, on the 14th day of November, 1922, upon application of defendant, Johnny Bowles, the court ordered a severance and the State elected to try the defendant, Cyreal Daugherty, first. (R. p. 10.)

TRIAL AND VERDICT.

Thereafter, on the 14th day of November, 1922, a jury was duly empaneled and sworn to try the cause, which jury on the same day returned into open court the following verdict: (R. p. 11.) (Bill of Ex. p. 73.)

“We, the jury, find the defendant Cyreal Daugherty, guilty of Robbery first degree as charged in the information and assess his punishment ten years in the Missouri State penitentiary.

Arthur M. Marty, Foreman.”

MOTION FOR NEW TRIAL FILED.

Thereafter, on the 16th day of November, 1922, appellant filed his motion for new trial. (R. p. 12.) Said motion for new trial, caption omitted, is in words and figures as follows: (Bill of Ex. pp. 74-75.)

“Comes now the defendant above named defendant, Cyreal Daugherty, and moves the Court, that he be granted a new trial for the following reasons, to wit:

“First: That the court erred in admitting illegal testimony, over the objections of the defendant.

“Second: That the court erred in excluding competent and legal testimony, over the objections of the defendant.

“Third: That the defendant has discovered new and material evidence, which with due diligence he was unable to find or obtain before the trial, or at the time of the trial; and that said new evidence is not accumulative and is material and to the effect that at the time of the alleged crime was committed, that the defendant was not present at the scene of the crime but was at No. 2444 Flora Ave., in Kansas City, Jackson County, Missouri.

“Fourth: That the verdict is contrary to the evidence.

“Fifth: That the court erred in failing to instruct the jury upon all questions arising in the case.

“Sixth: That because the court erred in giving improper instructions.

CYREAL DAUGHERTY, Defendant,

By R. A. KOPE, His Attorney.”

MOTION FOR NEW TRIAL OVERRULED.

Thereafter, on the 1st day of December, 1922, the Court took up and after duly considering appellant’s motion for new trial overruled same. (R. p. 13.) (Bill of Ex. p. 77.)

MOTION IN ARREST OF JUDGMENT FILED.

On the 16th day of November, 1922, appellant filed his motion in arrest of judgment. (R. p.

12.) Said motion in arrest of judgment, caption omitted, is in words and figures as follows: (Bill of Ex. p. 76.)

“Comes now the defendant above named, Cyreal Daugherty, and moves the court for an arrest of judgment herein, for the following reasons to wit:

“First: Because the indictment fails to charge any crime under the laws of the State of Missouri.

“Second: Because the record does not support the verdict and the judgment.

R. A. KOPE,  
Attorney for Plaintiff.”

MOTION IN ARREST OF JUDGMENT OVERRULED.

Thereafter, on the 1st day of December, 1922, the Court took up and after duly considering appellant’s motion in arrest of judgment, overruled same. (R. p. 13.) (Bill of Ex. p. 77.)

JUDGMENT AND SENTENCE.

Thereafter, on the 5th day of December, 1922, the Court rendered judgment and pronounced sentence upon appellant in conformity with the terms of the verdict. (R. p. 14.)

APPEAL.

Thereafter, on the 5th day of December, 1922, appellant filed his affidavit in appeal and an appeal was granted to the Supreme Court of this State. (R. p. 15.)

BILL OF EXCEPTIONS FILED.

The Bill of Exceptions in this cause was filed in the trial court on the 27th day of November, 1923, (R. p. 21,) (Bill of Ex. p. 82,) and in this Court on the 3rd day of December, 1923.

DEMURRERS.

At the close of the evidence on behalf of the State the appellant requested the Court to give the jury the following instruction in the nature of a demurrer to the evidence, which instruction the Court refused to give: (Bill of Ex. p. 32.)

“At the close of the State’s case, the Court instructs the jury that under the law and the evidence you will find the defendant not guilty.”  
(Refused.)

At the close of all the evidence offered in the case the defendant requested the Court to give the jury the following instruction in the nature of a demurrer to the evidence, which instruction the Court refused to give: (Bill of Ex. p. 66.)

“At the close of all the evidence in the case the Court instructs the jury that under the law and the evidence your verdict will be for the defendant.”  
(Refused.)

INSTRUCTIONS.

The Court gave the jury the following instructions: (Bill of Ex. pp. 67-72.)

“No. 1.

“If the jury find the defendant Cyreal Daugherty guilty of robbery first degree as charged in the information, they may use the following form:

“We, the jury, find the defendant Cyreal Daugherty guilty of robbery first degree as charged in the information and assess his punishment at years in the Missouri State penitentiary.  
Foreman.

“If the jury find the defendant Cyreal Daugherty not guilty, they may use the following form:

“We, the jury, find the defendant Cyreal Daugherty not guilty.

Foreman.”

(Given.)

“No. 2.

“The Court instructs the jury that if you find and believe from the evidence in this case that at any time within three years next before the 26th day of September, 1922, the date of filing the information in this case, at Jackson County, State of Missouri, the defendant, Cyreal Daugherty, took and carried away any money or property described in the information the property of Ray E. Shore from his person or in his presence and against his will, by force and violence to his person by putting him in fear of an immediate injury to his person, without any honest claim to such money or property on the part of defendant, and with the intent to deprive said Ray E. Shore of his ownership therein, then you will find defendant guilty of robbery in the first degree and assess his punishment at imprisonment in the state penitentiary for any term not less than five years.

(Given.)

“No. 3.

“The court instructs the jury that the intent with which an act is done may be proved by direct and positive evidence, or it may be inferred from all the facts and circumstances surrounding and attending the act, and must be determined by the jury from the evidence given in the case.

(Given.)

“No. 4.

“The court instructs the jury that if there is any evidence before you that raises in your minds a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed, (if you find a crime was committed) you will acquit the defendant. (Given.)

“No. 5.

“The court instructs the jury that the law presumes the innocence and not the guilt of the defendant, and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence in the case, when taken as a whole, satisfies you of defendant’s guilt beyond a reasonable doubt, as defined in these instructions.

“The court instructs the jury that if they have a reasonable doubt of defendant’s guilt, they should acquit, but a doubt to authorize an acquittal on that ground ought to be a substantial doubt touching defendant’s guilt and not a mere possibility of defendant’s innocence.

(Given.)

“No. 6.

“The jury are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony.

“In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness’ testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, the motives actuating the witness in testifying, the witness’ relation to, or feelings for or against the defendant, or the alleged injured party, the probability or improbability of the witness’ statements, the opportunity the witness had to observe and to be informed as to the matters

respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit and the testimony of each witness such value and weight as you deem proper.

“If, upon a consideration of all the evidence you conclude that any witness has wilfully sworn falsely as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness’ testimony.”

(Given.)

BRIEF.

At the time of preparing this brief we have not been favored with a copy of appellant’s brief.

POINTS AND AUTHORITIES.

INDICTMENT.

The indictment is sufficient. It contains all necessary averments required to properly charge the crime of robbery in the first degree and fully informs the defendant as to the charge he must meet.

Section 3307, R. S. Mo. 1919;

State vs. Lamb, 141 Mo. 298, 1. c. 301, 302;

State vs. Calvert, 209 Mo. 280, 1. c. 286;

State vs. Flynn, 258 Mo. 211, 1. c. 214, 215, 219, 224;

State vs. Williams, 183 S. W. 308, 1. c. 309, 310, (Mo. Sup.);

State vs. Reich, 239 S. W. 835, 1. c. 836 (Mo. Sup.);

- (a) Section 3307, R. S. Mo. 1919, defines but a single offense of robbery, but sets out two methods of perpetrating the one crime defined. The indictment charges, in the conjunctive, that the offense was committed in both ways, they not being inconsistent with or repugnant to each other, the pleading is not duplicitous.

State vs. Flynn, 258 Mo. 211, 1. c. 214, 215, 219, 224;

State vs. Parker, 262 Mo. 169, 1. c. 177;

State vs. Williams, 183 S. W. 308, 1. c. 309, 319, (Mo. Sup.);

State vs. Affronti, 238 S. W. 106, 1. c. 109, (Mo. Sup.);

- (b) The indictment alleges “\* \* \* feloniously did rob, steal and carry away \* \* \*” but it omits the use of the word “take.” This is not a fatal defect.

Section 3908, R. S. Mo. 1919;

State vs. Wilson, 237 S. W. 776, 1. c. 777, (Mo. Sup.).

II.

OFFERS AND OBJECTIONS.

- (1) Where evidence is admitted in a criminal prosecution without objection, it is too late to object to its admission in a motion for new trial or on appeal.

State vs. Peak, 85 Mo. 190, 1. c. 191;

State vs. Fischer, 124 Mo. 460.

- (2) Appellant in the first assignment of his motion for new trial assigns that the court erred in admitting illegal testimony over the objection of the defendant. An examination of the record will disclose that the attorney for appellant did not make a

single objection or save an exception to the introduction of any evidence by the State.

Failure to save an exception to the ruling of the court as to the introduction or rejection of testimony preserves nothing for review.

State vs. Sadowski, No. 24836, not yet officially reported.

(3) Appellant in the second assignment of his motion for new trial assigns that the court erred in excluding competent and legal testimony. The objections to the introduction of evidence are to be found on pages 34, 35, 38 and 64 of the Bill of Exceptions.

The testimony offered on the foregoing pages was properly rejected. The evidence was immaterial and the rights of the defendant were not prejudiced. A ground assigned in a motion for new trial that the court erred in rejecting competent and legal testimony over the objection of the defendant is too general to save this assignment for review by this court.

State vs. Brown, 168 Mo. 449, 1. c. 474.

III.

#### INSTRUCTIONS.

State's Instruction No. 2 properly declares the law as to robbery in the first degree.

Where all the evidence shows that the crime was committed by "putting in fear," the clerical omission of the disjunctive "or" between the words "by force and violence" and the words "by putting in fear," is not prejudicial to the defendant. There was no evidence of "force and violence" to his person and the instruction without the clause "by force and violence to his person" was entirely sufficient.

State vs. Davis, 186 Mo. 533, 1. c. 538.

State's Instructions Nos. 3, 4, 5 and 6 on intent, reasonable doubt and credibility of witnesses are in the usual form and have often been approved by this court.

#### REFUSED INSTRUCTIONS.

Appellant in the fifth assignment of his motion for new trial assigns as error that the court failed to instruct the jury upon all the questions arising in the case.

The appellant neither offered nor requested an instruction.

His defense was that of alibi; however, he offered no instruction on the law of alibi.

It does not appear from the record in this case that counsel for the appellant ever complained of the failure of the court to instruct as to the law of alibi. If they desired an instruction covering this question they should, in common fairness, have informed the court of this fact at the conclusion of the trial. This question is therefore not before this court for review.

State vs. Parker, No. 24170, not yet officially reported.

IV.

#### NEWLY DISCOVERED EVIDENCE.

Appellant in the third assignment of his motion for new trial states that he has discovered new and material evidence.

(a) The alleged newly discovered evidence is not set out in any form, by affidavits or otherwise, and no witness is named by whom it could be produced; it therefore presents no reason for sustaining the motion for new trial.

State vs. McCullough, 171 Mo. 571, 1. c. 575;

State vs. Spivey, 204 S. W. 259, 1. c. 260; (Mo. Sup.)

State vs. Loness, 238 S. W. 112, 1. c. 114; (Mo. Sup.)

(b) Motion for new trial on the ground of newly discovered evidence is properly overruled where it appears that the evidence would be merely cumulative.

State vs. King, 194 Mo. 475, 1. c. 483.

(c) To entitle a defendant to a new trial on the ground of newly discovered evidence he must show, first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial were granted; fourth, that it is not cumulative only; fifth, that the affidavit of the witness himself should be produced, or its absence accounted for; sixth, that the object of the testimony is not merely to impeach the character or credit of a witness. This appellant has failed to do.

State vs. Smith, 247 S. W. 154, 1. c. 157 and cases cited. (Mo. Sup.)

V.

#### SUFFICIENCY OF THE EVIDENCE.

Actual fear need not be specifically proved but may be presumed where the evidence shows just cause for it.

34 Cyc. p.1809;

23 R.C.L. p.1147,Sec.12;

State vs. Stinson, 124 Mo. 447;

State vs. Lawler, 130 Mo. 366;

State vs. Lamb, 141 Mo. 298;

State vs. Kennedy, 154 Mo. 268.

VI.

#### VERDICT.

The verdict is sufficient. It is in the usual approved form and responsive to the issues.

Section 3307, R. S. Mo. 1919;

State vs. Stark, 202 Mo. 210, 1. c. 220;

State vs. Martin, 230 Mo. 680, 1. c. 691;

State vs. Bishop, 231 Mo. 411, 1. c. 415;

State vs. Jordan, 225 S. W. 905; (Mo. Sup.) State vs. Reich, 239 S. W. 835, 1. c. 837; (Mo. Sup.)

#### CONCLUSION.

Appellant was accorded a fair and impartial trial and there being no error in the record we ask that the judgment of the trial court in all things be affirmed.

Respectfully submitted,

JESSE W. BARRETT, Attorney-General, ROBERT W. OTTO,

Assistant Attorney-General, For Respondent.

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