

defendant a prescription a while before, sometime before Mrs. Thurman's body was found. Did you give him a prescription? A Yes, sir.

Q How long, if you know, Doctor, was it before Mrs. Thurman's body was found? A I think it was only two or three days; just shortly before, at least.

Q Did you examine him before you gave him the prescription? A To some extent. I didn't make an extensive examination, because he told me what was the matter, and I believe possibly I looked either at that time or before.

Q Do you recall what you prescribed for him?

A In a general way I do.

Q Tell the jury what it was.

A It is a six-ounce bottle and it had in it a half ounce of tincture of hyosciamus, that is the first ingredient, and then the other, it had an ounce and a half of green corn silk fluid extract, and the balance was, I think it was lithiated sorghum.

Q What was that prescription given for, what condition?

A Urethritis and cystitis, an inflammation of the urethra and the bladder.

Q Tell the jury whether or not the medicine that you prescribed for him was either a laxative or purgative.

A It was neither.

MR. CHAFIN: That is all.

- 0 -

HERMAN N. PUGH
SHORTHAND REPORTER
HUNTINGTON, W. VA.

CROSS EXAMINATION BY MR. CHAMBERS:

Q Is Sal Hepatica a laxative? A Yes, sir.

Q You tell the jury that just a day or two before Mrs. Thurman's body was found you gave this man that prescription? A As I remember, yes.

Q It wasn't the week before, was it?

A I don't think so.

Q The date of the bottle is the 20th of June, '32. Do you know whether or not that is correct?

A I take it that it is. In a general way, I think it is.

MR. CHAMBERS: That is all, Doctor.

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M E A D E S M E L T Z E R, called a rebuttal witness by the State, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHAFIN:

Q You are the same Meade Smeltzer that testified in this case before, are you? A Yes, sir.

Q Mr. Smeltzer, the defendant, Clarence Stephenson here, has testified that on the day Mrs. Thurman's body was found, about twelve o'clock that day, that he went up into Jack Thurman's apartments over the Robertson garage, that Jack Thurman was in bed, and that you were sitting there, and that you and Jack Thurman were drinking out of a half gallon jar. Tell the jury whether or not that is true.

A That is not true.

Q Did you see Clarence Stephenson up there at that time?

A He was not in Jack Thurman's house that morning while I was there.

MR. CHAFIN: That is all.

- o -

CROSS EXAMINATION BY MR. CHAMBERS:

Q You were there? A Yes, sir.

Q Did you see that home brew that Fanette poured out?

A No, sir.

Q You didn't see that? A No, sir.

Q And you are Chief of Police of the City of Logan?

A Yes, sir.

MR. CHAMBERS: Stand aside.

- o -

THEREUPON THE STATE AND DEFENDANT RESTED THE CASE.

- o -

I, Herman N. Pugh, Official Court Reporter of the Circuit Court of Logan County, West Virginia, hereby certify that the foregoing is a true and accurate transcript of the testimony and proceedings upon the trial of the case of State of West Virginia vs. Clarence Stephenson, tried in said Court at the September term, 1932, as reported by

me in shorthand.

Given under my hand this 10 day of February, 1933.

Herman N. Pugh
Official Reporter.

- o -

The foregoing transcript contains all the evidence and testimony introduced or reported and all the proceedings reported on the trial of this case.

TESTE: This 23 day of February, 1933.

Naaman Jackson
Judge

The defendant, Clarence Stephenson, tenders to the undersigned Judge of the Circuit Court of Logan County, West Virginia, who presided at the trial of said case, this his Bill of Exceptions, marked for identification, "Bill of Exceptions No. 1" and prays that the same may be signed, sealed and saved to him, which is accordingly done this the 23rd day of February, 1933, and within the time given by the court in which Bills of Exceptions might be signed.

Naaman Jackson (SEAL)
Judge of the Circuit Court
of Logan County, W. Va.

BILL OF EXCEPTIONS NO. 2.

In the Circuit Court of Logan County, West Virginia.

STATE OF WEST VIRGINIA,

VS: Murder

CLARENCE STEPHENSON,

Defendant.

BE IT FURTHER REMEMBERED: That after all the evidence had been introduced before the jury and both the State and defendant had rested, and before argument of counsel, the State prayed the court to give to the jury five instructions, in writing, as the law governing them in the case, to the giving of all of which the defendant at the time objected, as marked thereon, and which said instructions, numbered 1, 2, 3, 4, and 5, are in the words and figures following, to-wit:

STATE OF WEST VIRGINIA,

VS: MURDER

CLARENCE STEPHENSON

STATE'S INSTRUCTION NO. 1.

The court instructs the jury that a murder by poison, lying in wait, imprisonment, starving, or by any willful,

deliberate, and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery or burglary, is murder of the first degree.

You are, therefore, instructed that if you believe from the evidence and circumstances of this case, beyond a reasonable doubt, that the defendant, Clarence Stephenson, with a deadly weapon in his possession without any, or upon slight provocation, gave to the deceased a mortal wound, from which she died, then you should find him guilty of murder in the first degree.

You are further instructed that should you find the defendant, Clarence Stephenson, guilty of murder in the first degree you may, in your discretion, further find that he be punished by confinement in the penitentiary, and if such further finding be not added to your verdict the judgment rendered thereon by the court would be that the prisoner be punished with death and if such further finding is added, then the judgment rendered thereon by the court would be that he be confined in the penitentiary during his life.

W. Va. Code, ch.61, art.2, sec. 1.
State v. Whitt, 96 W. Va. 268
State v. Staley, 45 W. Va. 796

Objected to by dft.
GIVEN
NAAMAN JACKSON,
Judge

" STATE OF WEST VIRGINIA,
VS: MURDER
CLARENCE STEPHENSON

STATE'S INSTRUCTION NO.2.

The court instructs the jury that to prove beyond a reasonable doubt does not mean that the State must make the proof by an eye witness, or to a positive and absolute certainty, this measure of proof is not required in any case, if from all the evidence the jury only believe it is possible or that it may be or that perhaps the defendant is not guilty this degree of uncertainty alone would not amount to such a reasonable doubt as to entitle the defendant to an acquittal, all that is required for a conviction is that the jury should believe that from all the evidence beyond a reasonable doubt that the defendant is guilty.

State v. Huffman, 69 W. Va. 770.

Objected to by Dft.

Given
NAAMAN JACKSON,
Judge.

"STATE OF WEST VIRGINIA,
VS: MURDER
CLARENCE STEPHENSON

STATE'S INSTRUCTION NO.3.

The court instructs the jury that a person charged with crime may be convicted on circumstantial evidence alone

if the jury believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of the crime alleged against him, and you are further instructed that such evidence is not only competent evidence, but is sometimes the only mode of proof in a criminal case.

State vs. Wilson, 95 W. Va. 533.

Objected to by dft.

Given
NAAMAN JACKSON,
Judge

*STATE OF WEST VIRGINIA,

VS: MURDER

CLARENCE STEPHENSON

STATE'S INSTRUCTION NO.4.

The court instructs the jury that they are the sole judges of the evidence in this case, as well as the credibility of witnesses testifying before them, and in determining the weight to be given to the evidence of any witness who has testified, they have the right to take and consider the intelligence of such witness, his conduct, appearance and demeanor while testifying, as well as the interest such witness may have in the result of the trial, and from all these, and all other facts and circumstances in the case, give the evidence of such witness such credit as the jury may believe it entitled to, the jury being the sole judges of the evidence and the weight thereof, as well as the credibility of the

witness who testified in the case.

State vs. Roberts, 40 W. Va. 427.

Given
NAAMAN JACKSON
JUDGE.

*STATE OF WEST VIRGINIA,

VS: MURDER

CLARENCE STEPHENSON

STATE'S INSTRUCTION NO.5.

The court instructs the jury that evidence of good character is a circumstance to be considered by the jury with all the other facts and circumstances in the case on the question of the guilt of innocence of the accused. But you are further instructed that if you believe from the evidence beyond all reasonable doubt that the prisoner is guilty of the offense charged in the indictment, then his good character cannot be taken into consideration to mitigate, palliate, justify or excuse the commission of said offense.

State vs. Huffman, 69 W. Va. 770.

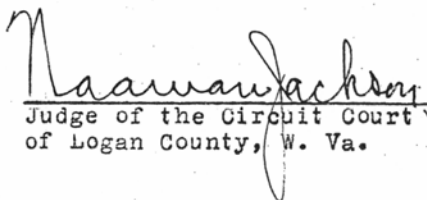
Objected to by Dft.

Given
NAAMAN JACKSON,
Judge

to the giving and reading of all of said instructions, except Instruction No. 4, so given to the jury as the law in the case, the defendant, Clarence Stephenson, at the time objected, and the court overruled said objections as to said instructions

and gave and read all five of said instructions to the jury, to which ruling of the court in giving Instructions Numbers 1, 2, 3, and 5, the said defendant at the time excepted; and inasmuch as the matters and things hereinbefore set out do not fully appear of record the defendant tenders to the undersigned Judge of said Circuit Court of Logan County, West Virginia, who presided at the trial of said case, this his Bill of Exceptions, marked for identification, "Bill of Exceptions No. 2", and prays that the same may be signed, sealed and saved to him, and made a part of the record in this case, which is accordingly done this the 23 day of February, 1933, and within the time given by the court in which said Bills of Exceptions might be signed.

Given under my hand and seal this 23 day of February, 1933.

 (SEAL)
Judge of the Circuit Court
of Logan County, W. Va.

BILL OF EXCEPTIONS NO. 3.

In the Circuit Court of Logan County, West Virginia.

STATE OF WEST VIRGINIA,

VS: MURDER

CLARENCE STEPHENSON, Defendant.

BE IT FURTHER REMEMBERED: That after all the evidence had been introduced before the jury and both the State and the defendant had rested, and before argument of counsel, the defendant prayed the court to give to the jury seventeen instructions, in writing, as the law governing them in the case, said instructions being numbered from 1 to 17 inclusive. The court refused to give Instructions Numbers 1, 2, 9, 10 and 11, to which ruling of the court in refusing to give said instructions the defendant at the time objected. Said seventeen instructions numbered from 1 to 17 inclusive, are in the words and figures following, to-wit:

"STATE

VS

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO. I.

The court instructs the jury to find the defendant not guilty.

Objected to by Counsel
for state.

Refused
NAAMAN JACKSON,
Judge.

*STATE

VS:

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.2.

The court instructs the jury that one of five verdicts may be found under the indictment in this case, if the evidence in the case so warrant: (1) murder in the first degree. (2) murder in the second degree; (3) voluntary manslaughter, (4) involuntary manslaughter and (5) not guilty.

The court further instructs the jury that murder in the first degree is when one person kills another person unlawfully, wilfully, maliciously, deliberately and premeditatedly; that murder in the second degree is when one person kills another person unlawfully and maliciously, but not deliberately; that voluntary manslaughter is when one person unlawfully kills another person without malice, but under sudden excitement and heat of passion; that involuntary manslaughter is where one person while engaged in an unlawful act, unintentionally causes the death of another person, or

when engaged in a lawful act negligently causes the death of another person.

The court instructs the jury that murder in the first degree is punishable by death, or confinement in the penitentiary of this state for life, as the jury shall find in their verdict; that murder in the second degree is punishable by confinement in the penitentiary of this state not less than five nor more than eighteen years in the discretion of the court; that voluntary manslaughter is punishable by confinement in the penitentiary of this state not less than one nor more than five years in the discretion of the court; that involuntary manslaughter is a misdemeanor and punishable by imprisonment in the county jail or fine or by both, in the discretion of the court.

State v. Whitt, 96 W. Va. 268
122 S. E. 742

Refused
NAAMAN JACKSON,
Judge. "

" STATE

VS.

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.3.

The court further instructs the jury that the indictment in this case cannot be considered as evidence against the accused and should have no weight in the determination and result of their verdict. Given
NAAMAN JACKSON,
Judge. "

*STATE

VS:

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.4.

The court instructs the jury that the law presumes every person charged with crime to be innocent until the state has established his guilt by evidence so strong, so clear and so conclusive, that there is left in the minds of the jury no reasonable doubt as to his guilt. This presumption is an abiding presumption, and goes with the accused through the entire case and applies in every stage thereof until repelled by proof. And in this connection the jury is instructed that it is never sufficient that the accused, upon speculative theory or conjecture, may be guilty, or that by the preponderance of the testimony his guilt is more probable than his innocence; for until his guilt has been proved beyond all reasonable doubt, in the precise and narrow terms as charged in the indictment, the presumption of innocence still applies, and they must acquit him.

Draper v. Commonwealth, 132 Va. 665

Given
 NAAMAN JACKSON
 Judge

"STATE

VS:

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.5.

The court further instructs the jury that the defendant, Clarence Stephenson, is presumed to be innocent of the charge against him, and that said presumption entered with him at the beginning of the trial and appears at every stage thereof and should remain with him throughout the entire trial, and the jury is further instructed that such presumption of innocence is not a mere legal form which the jury should lightly disregard or disregard at its pleasure, but is a part of the law of the land and binding on the jury in this case, and the jury is further instructed that it should not and cannot convict the accused of any offense until said presumption of innocence has been removed by evidence clear and conclusive and that beyond all reasonable doubt, and if after weighing all of the evidence in the case and all the surrounding facts and circumstances in the case, the jury entertains a reasonable doubt as to the prisoner's guilt or innocence, the jury should acquit him.

Given
 NAAMAN JACKSON,
 Judge

*STATE

VS:

STEPHENSON

DEFENDANT'S INSTRUCTION no.6

The court instructs the jury that when, upon a charge of murder, the evidence is wholly circumstantial, as in the case here, the absence of all evidence of an inducing cause or motive to commit the offense charged, affords of itself a strong presumption of innocence.

McCue v. Com. 103, Va. 918

Objected to by Counsel for State.

Given
NAAMAN JACKSON,
Judge.

"
STATE

VS:

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.7.

The court instructs the jury that as guides to the safe administration of justice in criminal cases, where the guilt of the accused is to be ascertained and determined, upon evidence in whole or in part, circumstantial, courts and text writers have laid down the following rules, which are the law in this case:

1. It is essential that all the circumstances from which the conclusion is to be drawn, shall be established by full proof, and the party upon whom the burden of proof rests, is bound to prove every single circumstance which is essential to the conclusion, in the same manner, and to the same extent, as if the whole issue had rested upon the proof of each individual and essential circumstance.
2. All the facts and circumstances when established by full proof must be consistent with the hypothesis of the guilt of the accused.
3. It is essential, that the circumstances should be of a conclusive nature and tendency. Evidence is always indefinite and inconclusive when it raises no more than a limited probability against it, whether the precise proposition can, or cannot be ascertained. It is on the other hand of a conclusive nature and tendency when the probability in favor of the hypothesis exceeds all limits of an arithmetical or moral nature. Such evidence is always insufficient, where assuming all to be true, which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis, which invests mere circumstances with the force of proof. Whenever, therefore, the evidence leaves it indifferent which of several hypothesis is true, or merely establishes some finite probability, in favor of one hypothesis, rather than another, such evidence cannot amount to proof, however great the probability may be.
4. It is essential that the circumstances should to a moral certainty actually exclude every hypothesis but the one proposed to be proved.

State v. Flannagan, 26 W. Va. 116
 State v. Bennett, 93 W. Va. 548 117 S.E. 372;
 State v. Dudley, 96 W. Va. 496 123 S.E. 247;
 State v. Harrison, 98 W. Va. 233 127 S.E. 55;
 Potterfield v. Com. 91 Va. 804 22 S.E. 352;

Objected to by counsel for State.

Given

NAAMAN JACKSON
 Judge.

*STATE

VS:

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.8.

The court instructs the jury that, if after you have weighed, analyzed and considered the evidence in this case, you find that you cannot say that it excludes, beyond all reasonable doubt, every hypothesis inconsistent with the innocence of the accused, that is, if such evidence creates only an inference or conclusion of strong suspicion that the accused was in some way connected with the crime, then it is not sufficient to justify a verdict of guilty; for suspicion however strong is never sufficient to convict. Evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of truth; and where the evidence leaves it indifferent which of several hypotheses is true, or establishes only some finite probability in favor of one hypothesis, such evidence cannot amount to proof, however great the probability may be. The accused is entitled to an acquittal unless the fact of guilt is proven to the actual exclusion of every reasonable hypothesis of innocence.

State v. Chafin, 78 W.Va. 140, 88 S.E. 305
 State v. Flannagan, 26 W. Va. 117
 Johnson v. Com., 29 Gratt. 796
 Bundrick v. Com. 97 Va. 783, 34 S.E. 454

Prather v. Com. 85 Va. 125, 7 S. E. 178
Pryor v. Com. 27 Gratt. 1009

Objected to by Counsel for State

Given
NAAMAN JACKSON,
JUDGE.

*STATE

VS:

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.9.

The court instructs the jury, that it is not enough that the evidence in this case raise a suspicion or even a presumption of the guilt of the defendant in the minds of the jury; or that all of the circumstances of the case as proven, point toward the guilt of the defendant; but, the court instructs the jury that before you can find the defendant guilty the jury and each member of the jury, must believe that the evidence of the case as given to you, point so strongly and conclusively to the defendant as being guilty, that the jury and each member of the jury, shall have an abiding and well founded conviction and belief that the defendant is guilty as charged in the indictment beyond all reasonable doubt; and if the jury after hearing the evidence and retire to your room for consideration of your verdict does not have an abiding and well founded conviction and

belief that the defendant is guilty as charged in the indictment, and beyond a reasonable doubt, then the jury shall find the defendant not guilty.

Taken from the record in,
State v. Wilson, 95 W. Va. 525
121 S. E. 730
State v. Dudley, 96 W. Va. 482
123 S. E. 247

Objected to by Counsel for State

Refused
NAAMAN JACKSON
JUDGE

*STATE

VS:

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.10.

The court instructs the jury that all of the evidence in this case is circumstantial and not positive evidence, and that in the application of circumstantial evidence to the determination of this case, caution and vigilance should be used by the jury. Such evidence is always insufficient where, assuming all to be true which the evidence tends to prove, some other reasonable hypothesis may still be true, for it is the actual exclusion of every other reasonable hypothesis which invests mere circumstances with the force of truth. Where the evidence leaves it indifferent which of several hypotheses is true, or establishes only some finite

probability in favor of one hypothesis, such evidence cannot amount to proof however great the probability may be. Therefore, even if the jury should believe from the evidence in this case that there is a strong probability that the defendant, Clarence Stephenson, is guilty of the offense charged in the indictment, still if upon the whole evidence there is any other reasonable hypothesis consistent with his innocence they cannot find him guilty.

Taken from the record in,
State v. Gebhart, 70 W. Va. 232,
73 S. E. 964.

Objected to by State

Refused
NAAMAN JACKSON
Judge.

"STATE

VS:

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.11.

The court instructs the jury that to warrant a conviction on circumstantial evidence each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other, and with the main fact sought to be proved; and the circumstances taken together must be of a conclusive

nature, leading, the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no other person committed the offense charged. The mere union of a number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be incompatible with innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt.

Taken from the record in,
State v. Gebhart, 70 W. Va. 232
73 S. E. 964
Villereal v. State, 61 N. W. 715

Objected to by State

Refused
NAAMAN JACKSON
Judge.

*STATE

VS:

CLARENCE STEPHENSON

DEFENDANT'S INSTRUCTION NO.12

The court further instructs the jury that under the