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Record No. 6218

In the
Supreme Court of Appeals of Virginia
at Richmond

MARTIN THOMAS SMITH

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 6218

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 5th day of October, 1965

MARTIN THOMAS SMITH, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Prince William County
Calvin Van Dyck, Judge

Upon the petition of Martin Thomas Smith a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Prince William County on the 25th day of November, 1964, in a prosecution by the Commonwealth against the said petitioner for a felony; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

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page 34] DEFENSE INSTRUCTION E
Refused

Where, as in the case at bar, the defense is that the killing was an accident, the defendant is not required to prove this fact, beyond a reasonable doubt, or by a preponderance of the evidence, but the burden is upon the Commonwealth to prove beyond a reasonable doubt that said killing was not accidental; therefore, if, after hearing all the evidence, you have a reasonable doubt whether said killing was accidental, or that it was intentional, then you should find the defendant not guilty.

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JUDGMENT

The 24th and 25th days of November, 1964, came the Attorney for the Commonwealth and the defendant, Martin Thomas Smith, who stands indicted of a felony, to-wit: Murder, appeared in court according to the condition of his recognizance. And came also F. Caldwell Bagley, attorney at law, retained by the accused to represent and defend him.

Pursuant to Section 17-30.1 of the 1950 Code of Virginia, as amended, it is hereby ORDERED that the evidence and incidents of trial in this case shall be recorded verbatim by a Court Reporter. Thereupon, the Court Reporter was sworn.

And the sheriff of this county having returned the writ of *venire facias* issued by order of this court entered on the 29th day of September, 1964, together with the names of twenty persons summoned by him in pursuance thereof and taken from the list of forty names attached to said writ and drawn by the Clerk of this Court in the presence of the Judge of this Court from the box and in the manner provided by law, and of the veniremen so summoned and attending a panel of twenty qualified jurors, free from exception for the trial of the said defendant, was made up and completed. And the Attorney

for the Commonwealth and the attorney for the defendant having alternately, beginning with the Attorney for the Commonwealth, each stricken from the said panel the
page 41] names of four of the said veniremen the remaining twelve to-wit: Ray Thurman, Ellis B. Hawkins, J. Preston Smith, Malvin E. Adcock, Claude H. Albrite, Stanley Boatwright, Joseph P. Cooper, Norman Berger, James H. Lambert, Michael H. Mooney, Lon C. Warner, and T. A. McMichael constituted the jury for the trial of the defendant, who were sworn the truth of and upon the premises to speak.

And, after the Commonwealth had presented all of its evidence, the defendant, by counsel, moved to strike said evidence, and, the court, after hearing the arguments of counsel out of the presence of the jury, denied the motion, to which ruling the defendant excepted. The defendant then presented his evidence, and there was no rebuttal evidence offered.

Whereupon, at the conclusion of all of the evidence, the defendant renewed his motion to strike, and the court, after hearing argument thereon out of the presence of the jury, again denied the said motion, to which ruling the defendant excepted.

And the jury having heard all of the evidence and arguments of counsel, and received instructions of the court, were sent to their room to consult upon their verdict and after some time returned into the court and presented their verdict in the following words to-wit:

"We, the jury, on the issue joined in the case of *Commonwealth* vs. *Martin Thomas Smith* find the defendant guilty of voluntary manslaughter and sentence the defendant to two years in the penitentiary. November 25, 1964 (signed) Ellis B. Hawkins, foreman."

And it being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing
page 42] being offered or alleged in delay of judgment, it is accordingly the judgment of this court that the said Martin Thomas Smith be and he is hereby sentenced, this 25th day of November, 1964, to confinement in the penitentiary of this Commonwealth for a period of two (2) years and that the Commonwealth of Virginia do recover against him its costs by it about its prosecution in this behalf expended.

And it is further ordered that as soon as possible after the passing of sentence that the prisoner be removed and safely conveyed according to law from the jail of this court to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

The court certifies that at all times during the trial of this case the accused was personally present.

And the defendant is remanded to jail.

CALVIN VAN DYCK
Judge

Nov. 25 1964

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Circuit Court of Prince William County:

YOU ARE HEREBY NOTIFIED that the Defendant, Martin Thomas Smith, files this his Notice of Appeal from the Final Order of the Circuit Court of Prince William County entered in the above-styled matter on November 25, 1964, and sets forth the following assignments of error:

1. That the Court erred in admitting photographs of the corpse of the deceased.
2. That the Court erred in denying Defendant's motion to strike the evidence of the Commonwealth.
3. That the Court erred in refusing to hear Defendant's motion for new trial filed in writing December 16, 1964, upon notice by *praecipe* given on December 10, 1964.
4. That the Court erred in permitting the attorney for the Commonwealth to exceed the scope of Defendant's argument and give his opinion of Defendant's guilt.
5. That the Court erred in giving instruction to the jury over the objection of Defendant.
6. That the Court erred in refusing instructions offered by Defendant.

7. That the Court erred in such other particulars as may be subject to assignment upon opportunity to examine the transcript Ordered by the Court and not yet available to Defendant or Counsel as of this writing on Friday, January 22, 1965, at 2:30 P.M. at Dumfries, Virginia.

MARTIN THOMAS SMITH
By F. CALDWELL BAGLEY
Counsel for Defendant

Filed January 2, 1965
L. E. ATHEY
Deputy Clerk

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Filed February 1, 1965
L. E. ATHEY
Deputy Clerk

MEMORANDUM OF INCIDENTS OF THE TRIAL

Because of the serious illness of the reporter serving the present trial, it was impossible to get a transcript of the closing argument of counsel and the argument on instructions within the required time. Ground 4 of the notice of appeal and assignment of error relates to matter occurring during such final argument and, in this connection, it is the combined recollection of court and counsel that the following took place with respect to this ground of the assignment error.

Mr. H. Selwyn Smith, attorney for the Commonwealth, stated to the jury in his rebuttal argument that in his opinion the defendant was guilty, to which statement Mr. Bagley objected and after which objection Mr. Smith stated to the jury that they had been instructed to decide the case upon the evidence and not upon his or Mr. Bagley's opinion, but that he believed that the evidence produced by the Commonwealth justified his opinion and, he would hope, theirs.

page 57] Subsequently, attorney for the Commonwealth began to read from instructions which had pre-

viously been read by the court, at which time Mr. Bagley objected upon the grounds that the Commonwealth attorney was exceeding the scope of defendant's counsel's argument, at which time the Commonwealth attorney ceased to read and concluded his argument.

The court and counsel further agree that during the argument on instructions Mr. Bagley, counsel for defendant, objected and excepted to the granting of the instructions that were granted for the Commonwealth, and further objected and excepted to any and all instructions offered by the defendant which were refused or which were not granted in the form offered.

FLOYD CALDWELL BAGLEY
Counsel for Defendant

H. SELWYN SMITH
Commonwealth Attorney for Prince William County, Va.

Tendered this 25th day of January, 1965

CALVIN VAN DYCK,
Judge

Signed this 1st day of February, 1965

CALVIN VAN DYCK,
Judge

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Thereupon,

ABRAHAM S. LINEBERGER,

page 27] was called as a witness by counsel for Commonwealth and being first duly sworn by the Deputy Clerk, was examined and testified as follows:

Abraham S. Lineberger

DIRECT EXAMINATION

By Mr. Smith:

Q. Doctor, would you give us your name for the record?

A. Abraham S. Lineberger.

Q. And your occupation?

A. Doctor.

Q. Are you engaged in the practice of medicine?

A. Yes, I am.

Q. Where are you so engaged?

A. Northern Virginia Pathology Laboratories in Fairfax.

Q. Would you state to the Court and the jury your qualifications and education which enables you to practice medicine?

A. Yes. I completed medical school plus a five-year residency program and I have my Board qualifications in both clinical and anatomical pathology.

Q. And where did you get your education, sir?

A. University of North Carolina.

Q. And how long have you been licensed as a medical doctor in the State of Virginia?

A. State of Virginia, for about a year and a half.

Q. Are you licensed to practice in any other states?

A. North Carolina.

page 28] Q. And how long have you been engaged in actual practice at your present location?

A. About a year and a half.

Q. Are you a licensed medical examiner for the State of Virginia?

A. No, I am not a licensed medical examiner.

Q. During the course of your practice are you called upon on occasion to perform autopsies?

A. *yes.*

Q. I ask you, sir, if you had an occasion, or if you were requested and called upon to perform an autopsy upon Henry Blaine Moore?

A. Yes, I was.

Q. And where did this take place?

A. At Fairfax Hospital in Fairfax.

Q. Did you know the deceased before you performed the autopsy?

A. No, I did not.

Abraham S. Lineberger

Q. And as a result of performing that autopsy did you file reports of the autopsy with the Office of the Chief Medical Examiner?

A. Yes, I did.

Q. (*after* showing document to Mr. Bagley.) I ask you if you filed more than one report with the Office of Chief Medical Examiner relative to your autopsy, sir?

page 29] A. One copy goes to the Office of the Chief Medical Examiner. The medical examiner himself who requested the autopsy gets a copy also. Sometimes we send two or maybe more copies even, to the Chief Medical Examiner's Office.

Q. Was there a report sent on two different occasions, one earlier —

A. That is right, preliminary report, and then the final report.

Q. I ask you, sir, to examine this and tell me whether or not you can identify this document.

A. Yes, I can. This is a copy of the autopsy findings; without additional material I cannot say whether this is the preliminary or final, I would have to have more material to tell.

Q. Is that your signature, sir?

A. yes.

Q. It does bear your signature?

A. Yes, it does.

Q. I ask you if you can identify this document which I show you.

A. Yes, I can.

Q. And does it bear your signature?

A. Yes, it does.

Q. And what is that document?

A. This is the final autopsy report.

Q. And the two documents together constitute

page 30] the preliminary and final reports, autopsy report?

A. That is correct.

Mr. Smith: I offer them as Commonwealth Exhibits 1 and 2.

By Mr. Smith:

Q. Would you state to the Court which is the preliminary and which is the final, doctor?

Abraham S. Lineberger

A. Yes, this (indicating) is the final and this (*indiating*) is the preliminary.

Mr. Smith: I will offer them in the order of the preliminary first as Commonwealth Exhibit A or 1 whichever the Court desires, and the final as B or 2.

Mr. Bagley: May I ask a preliminary question of the doctor?

The Court: All right.

Mr. Bagley: As to the authenticity.

The Court: For the record and for identification, we will refer to the preliminary report as Commonwealth Exhibit 1, Exhibit No. 2 for the final.

Mr. Smith: May I ask the Court to identify them first —

The Court: The witness is better qualified. Which is the preliminary?

The Witness: This is the preliminary and this is the final (indicating).

Mr. Bagley: Doctor, were both of these docu-
page 31] ments, these reports, made by yourself?

The Witness: Yes, they were.

Mr. Bagley: Prepared from notes you took during the performance of this autopsy?

The Witness: That is correct, yes.

Mr. Bagley: And the preliminary report was a resume rather than a detailed report, is that correct?

The Witness: That is correct, and did not include all of the material which would be available at a later date when certain processing was done.

Mr. Bagley: I see, sir. Then these documents do represent your recollection of your examination at the time you took it?

The Witness: That is correct.

Mr. Bagley: I see. My only question, then, Your Honor, would be I am not certain really what the relevancy of these documents is at this time but I would have no objection to the doctor making reference to those as a recording of his past recollection of what occurred.

The Court: You have no objection other than possible relevancy?

Mr. Bagley: Relevancy, yes, sir.

The Court: Subject to that objection, these will be received in evidence as Commonwealth Exhibits 1 and 2.

page 32] (The documents referred to were marked and received in evidence as Commonwealth Exhibits Nos. 1 and 2.

By Mr. Smith:

Q. Now, doctor, would you tell us what in your medical opinion was the cause of death of this subject, Blaine Henry Moore, what he died of, as a result of your autopsy in those reports?

The Court: Do you wish to refer to these?

The Witness: No, I do not need the documents. The man, I feel, died as a result of complications which followed the stab wound.

By Mr. Smith:

Q. And did you find a stab wound on the body?

A. Yes, I did.

Q. And, doctor, I will show you three pictures and ask you if you recognize the subject matter of those pictures.

A. Yes, I *dod.* This —

Q. Don't tell me yet, sir. Did you take the pictures yourself, sir?

A. No, sir, I did not.

Q. But you do recognize the subject matter?

A. Yes, I do.

(Commonwealth counsel handed documents to *defendan't* counsel.)

Mr. Bagley: I will object to the admission of any photographs of the deceased, Your Honor, until a foun-

page 33] dation has been laid as to their relevancy and when and where they were taken and how they relate to this and how they are material or relevant to the offense for which the accused is on trial.

Mr. Smith: Your Honor, I am merely offering these pictures

for the purpose of the doctor identifying what the contents might be.

The Court: May I see the pictures?

Mr. Smith: Yes, sir.

(The documents referred to were handed to the Court.)

Mr. Bagley: If Your Honor please, I have no objection to the doctor making reference to the photographs. I don't feel that the photographs are going to be relevant insofar as the issue before the jury. If they were taken at the time of the incident which we are here for today, I think they might be certainly relevant.

The Court: May I see counsel at the bench, please, including the defendant?

(Discussion between Court and counsel, outside the hearing of the jury and outside the hearing of the reporter.)

The Court: Gentlemen of the jury, I am going to call a recess.

page 34] IN CHAMBERS

(The following proceedings were had in chambers, outside the hearing of the jury, defendant being present.)

Mr. Smith: Your Honor, may I merely state my position here? I recognize that to get this picture in (indicating), anyone would be reasonable and justified, in my humble opinion—who can say that this is who it is. Now, his wife can do that, I am sure of that, she can do it because not only of the wounds but because of all the features, and I knew that the doctor could this (indicating), and it was my opinion that from this picture and because of his report as to the locations upon the head of the abrasions and the wound in the back, as well as the possibility of this scar here (indicating) upon the right hip, which is not too noticeable here, but I understand — that he can identify all three of them and I think that once anyone saw all three pictures there would be no question in their mind that this one (indicating) of only the back would be the

same individual as the one with the face, and the face is necessary as a part of the identification.

Now, I can identify all three of these pictures by the widow. I would like to avoid it as far as possible, having to expose these pictures to the widow because I know it is going to delay the trial and I know that it is going to upset things considerably.

And I do think because Mr. Bagley, I feel
page 35] certain, will want to bring up the question as to whether or not this man actually died of the stab wound or as the result of an operation, that it would probably be material to you to want to show this long scar here (indicating) which I understand was necessary in performing the operation to remove the kidney, isn't that so?

Mr. Bagley: Well, I guess so.

Mr. Smith: Well, you were going to talk to your doctor this morning, and I don't know whether he might even be here to testify or not.

Mr. Bagley: No, he is not going to testify.

The Court: Is there any contest, is there any issue in this case as to whether or not the decedent died of a stab wound?

Mr. Bagley: I think there might be same question, yes, sir.

The Court: Well, you would be entitled to raise it, I am just trying to find out. Is it going to be part of your case that he did not die of the stab wound?

Mr. Bagley: Well, I think the question will be raised, yes, Your Honor, depending upon what the evidence is. As far as the doctor is concerned, this doctor, I intend to cross-examine him to elicit what I can from him because —

The Court: I am doing my best, Mr. Bagley, to try to avoid putting in anything which Mr. Smith may be entitled to and which might have some adverse effect upon the
page 36] defendant's case. But if you dispute the identification he has the right to try to prove the identification.

Mr. Bagley: Yes, I understand that, Your Honor. I am only saying, the same as I would if I were presenting them, it has got to be demonstrated when they were taken and under what circumstances they were taken in order to authenticate them, for one thing and, secondly, to demonstrate they are relevant

in some way to the particular case.

And if the doctor cannot identify them and if the wife was not present when they were taken, I don't see how they can be properly identified, and I think in addition—

The Court: You say the wife cannot identify her husband?

Mr. Bagley: She could probably say that this was her husband but I don't see how this is material to the case. How is it material to introduce a photograph of a deceased? I mean, she can say that her husband is gone. I think it does nothing but inflame the jury and as far as I know photographs are admissible under the law in those cases where they will materially aid the jury in rendering its decision, where a picture of the corpse is *staken* at the scene or something of this kind, or a picture of a wound, an injured person was taken somewhere close in relation —

Mr. Smith: Well, what is that? (indicating).

Mr. Bagley: Well, here is what I mean. Certain-
page 37] ly there has to be identification, if Your Honor please. I don't know where that picture was taken, by whom the picture was taken, what happened to the deceased between the time that he expired and this picture was taken, who was present, what was done to this body, or whether anything was done to it? This is all I am saying, Your Honor.

The Court: Did the doctor give the date of his autopsy?

Mr. Bagley: He says that these were not even taken at his hospital.

Mr. Smith: Well, if Your Honor please, I don't know how Mr. Bagley gets his idea that you have to have the person who took the pictures. If one can identify the content of the picture and without question, or if he can question the identity of the picture, then that is to his advantage; but if someone takes a picture of my house and hands it to me on the witness stand and says, "Do you recognize this?" I don't think you have to bring the photographer in that took it and show the circumstances, If I can identify the content that is all that is necessary.

Mr. Bagley seems to think that I have got to have the man who took the pictures and the circumstances and conditions under which he took them. Well, it is obvious. He took a pic-

ture in the morgue of a dead man and it is just that simple, and this doctor recognized the dead man by this picture (indicating).

page 38] He said that the wounds in here (indicating) would indicate it is the same man, but I recognized that the only thing that is there that really and truly identifies is that this body has a wound where this body is supposed to have a wound, and the wife can say emphatically and she will say that that is her husband.

Now, if you want me to put the wife on, I'll put the wife on, but I think it is going to hurt Mr. Smith's position.

Mr. Bagley: If Your Honor please, if someone can come in and say, "I was present when this photograph was taken, this is what I saw with my own eyes at the time the picture was taken," and it is relevant, I cannot object—

Mr. Smith: That is not necessary at all, just for him to say that he was present—why?

Mr. Bagley: Well, this picture has to depict what someone saw, doesn't it?

Mr. Smith: Well, it depicts it.

Mr. Bagley: If Your Honor please, this picture has to depict what the witness who is testifying actually saw, otherwise I don't think it is admissible at all.

The Court: Are you saying that he did not see the body?

Mr. Bagley: That he did not see this body and that this does not depict something that he actually saw.

The Court: You say the witness did not see the body?

page 39] Mr. Bagley: At the time this picture was taken.

The Court: Is there any doubt that the person in this picture was dead at the time the picture was taken?

Mr. Bagley: I don't know, sir, that is up to the proof of the case. I don't know what Mr. Smith is trying to do.

Mr. Smith: You don't know what I am trying to do?

Mr. Bagley: No, I don't. I don't know what you are trying to do.

Mr. Smith: Why don't you know what I am trying to do?

Mr. Bagley: You are trying to introduce photographs which

were taken somewhere. I don't know where. The accused doesn't know where. We don't know under what circumstances.

Mr. Smith: Does it make any difference when you can recognize the content of the photograph?

Mr. Bagley: Who recognizes it?

Mr. Smith: The witness right here.

Mr. Bagley: Does this depict what this witness who is going to testify actually saw at the time?

I certainly cannot say that a person cannot introduce a photograph into evidence and have someone testify, "Yes, this is what I saw."

Mr. Smith: Mr. Bagley, if the sergeant who took these pictures was present and he testified—

Mr. Bagley: I don't even know who took them.

page 40] Mr. Smith: Well, if the person that took the pictures were present and testified that he took a picture of the body, can he testify to any more than the pictures shown?

Mr. Bagley: He can testify that these pictures were taken at a certain time, that this is the individual who was photographed, that it was taken at a certain place. Perhaps somebody then can testify that nothing happened to this corpse from the time the pictures were taken until—

Mr. Smith: The autopsy—he has already testified that the man died from the stab wound.

Mr. Bagley: He has what?

Mr. Smith: He already testified that he died from the stab wound.

Mr. Bagley: Well, he said he believed—

Mr. Smith: That is exactly right. Now, it is up to you to prove that he died from something else.

Mr. Bagley: I don't think I have to prove it. I can cross-examine this gentleman—

Mr. Smith: Well, you have not read your instructions, that is the only thing I have got to say.

The Court: I still say you are putting the Court in an in-between position, because I am going to do everything I can to try to keep any undue prejudice coming into the case that might hurt the defendant's case.

On the other hand, if you dispute something, I cannot deny to Mr. Smith the right to try to prove what
page 41] you dispute, by having you say you object to his trying to prove because his attempt to prove it would be prejudicial—if you make him prove it, I have got to give him the right to try to prove it to the extent that is necessary to his case.

Mr. Bagley: I am only asking, if Your Honor please, that they properly identify them so we be advised where they were taken—

Mr. Smith: I will stipulate, and if you don't know, I will stipulate it was taken at the U. S. Navy Hospital at Quantico. This picture here (indicating) without any question would identify it—you might even recognize the doctor—I don't, but that is where they were taken. The back of them would indicate that they were taken on the 18th day of June 1964 by Sergeant W. Evans and Frank Bloomer, or whatever it is, at Quantico, but all that the sergeant could testify to was that he took pictures at the Naval Hospital at Quantico at the morgue of the subject and this is the man he took the pictures of. Now, the pictures say that in and of themselves.

I do say that I regret that they did not have something, some tag on his hand or in some manner—it would be necessary on only one, but frankly I was of the opinion that you might want to bring this out at some subsequent time, because you and I both know, we talked about it yesterday, this man had a kidney removed and if he died from uremic poisoning, or what you and I as laymen would call
page 42] uremic poisoning, and that this incision here (indicating) was what was necessary, there might be some member of the jury who might think that that was enough alone to kill a person, I don't know.

I frankly thought that this was an autopsy scar but I am told it was not.

Mr. Bagley: I don't know what it is.

Mr. Smith: And I will say this, it may well have been opened up again, to go in on autopsy, a second incision made—

Mr. Bagley: Are you aware how many operations this man had?

Mr. Smith: No, I am not. That is up to you to bring out.

Abraham S. Lineberger

Mr. Bagley: If you want me to stipulate the man is dead, I have *not* objection to that. You are not going introduce these to prove he is dead?

Mr. Smith: I have to prove the subject matter there, as the judge just got through *tell* you, if there is any question about this, why, then I have got to prove my case and not until this very moment have you been willing to say that.

Mr. Bagley: To say what?

Mr. Smith: To say that this man was dead and we can submit an autopsy report and say that in the opinion of the pathologist he is dead and that he died of—

Mr. Bagley: I didn't say anything except that I would stipulate that the man is dead. The wife is going page 43] to testify that she buried him, I am sure.

Mr. Smith: That's right, and I want my doctor to testify as to what in his opinion he died of.

The Court: Well, hasn't he testified to that?

Mr. Smith: Yes, sir—

The Court: All right.

Mr. Smith: The only thing that could be added in, would be to point out—and I will ask the doctor to show on his body where the stab wound was and the approximate depth of the stab wound and what was necessary after the stab wound was inflicted to be done to him medically.

The Court: Mr. Smith, as far as this doctor is concerned, I am going to reject these photographs. He has stated that as to this particular picture which shows what you wanted to show, that he cannot identify with any sufficient assurance or certainty that—it could be possibly the decedent or it could be another man wounded in the same place.

Then the next question is, could the wife identify it? I think she is entitled, if she has an opinion, to state whether that is a picture of the back of her husband. But I don't think I will let you interrupt the doctor's testimony to do that because suppose she said, "That is," that would not prove it was, it would be evidence that it was, but then the doctor would have to testify by saying, "I cannot say for sure

that this is the man, but assuming that it is''—he
page 44] still could not testify from his own positive
knowledge that this is the man. So I don't think I would let you interrupt his evidence to let the wife testify to that now.

Mr. Smith: Well, I—

The Court: I think I will let him give his evidence. He examined a corpse which was identified as this man and that he found the wound in a certain place.

Mr. Smith: Well, I will go along with that.

The Court: If you want to put the wife on later on to identify this picture as being a picture of her husband—

Mr. Smith: She can certainly say that is her husband.

The Court: What would be the relevance of that?

Mr. Smith: Actually—

The Court: You may want that in rebuttal, I don't know, but as far as showing the wound is concerned—

Mr. Smith: See this scar on his forehead here (indicating)—

The Court: Yes.

Mr. Smith: —that was a part of the same fracas, and see this one on his hand (indicating), that is also, and the autopsy report will show both of those, this was a cut that he received in the fracas, and this abrasion also that he received in the fight.

The Court: Is the cut shown on this picture (indicating)?

page 45] Mr. Smith: Yes, sir. See this hand (indicating)?

The Court: Well—

Mr. Bagley: If Your Honor please, if the proof would show that the cuts were on the body at the time that the man went to the hospital as a result of this affray, I think it would definitely be relevant; but it would have to be, and I will object unless it is established that these could not have been inflicted on the corpse after it was a corpse—I don't know.

The Court: You would have to have evidence that at the time of the fight during the altercation he received blows this way, and this might be relevant to show that they were

on there. But I don't think that I will want you to interrupt the doctor, let the doctor testify from these—

Mr. Smith: I tell you what I will do, I will just—

The Court: They speak for themselves as to the presence of these things on the body, and if there was evidence what caused this damage and if any question arises, then I think the wife can identify—

Mr. Smith: Yes, and I will tell you what I will do. I will I think just put the wife on as the last Commonwealth witness and I will show her these pictures, all three of them, and let her identify them—but I hate to do it that way.

The Court: Well, I am trying to avoid having it done that way.

page 46] Mr. Smith: I do, too, because I think the effect is going to be worse—

The Court: I would suggest at that time that you raise it again out of the hearing of the jury—

Mr. Smith: Yes, sir, I will, but I propose to have these, I will try to develop this cut on his right hand, the abrasion over his left eye and, of course, we will show—

The Court: Can you all stipulate if that is done, that this *incission* (indicating) was caused by an operation.

Mr. Smith: I am willing to stipulate that the man did have an operation—

The Court: I would not want this picture to go to the jury with that on it without that being explained that this was not one of the injuries inflicted that day—

Mr. Bagley: Well, before they were introduced, I would *as* permission of the Court to examine the witness as to how—

Mr. Smith: The wife is going to identify him.

Mr. Bagley: How is she going to—

Mr. Smith: Don't you think your wife could identify you if you were a corpse?

Mr. Bagley: I am talking about the offense we are trying. Certainly she can identify her husband but—

Mr. Smith: That is all I am going to have her identify and key the other three—

page 47] Mr. Bagley: If she can identify this, if she ever saw this (indicating) or this (indicating) at any time, then I think she could identify—

Mr. Smith: Don't forget, after the doctor goes, unless you hold him here there won't be anybody to tell us what all this means.

The Court: Well, I would suggest that you ask him now and have him give oral testimony on that point.

Mr. Bagley: He can describe the condition of the body, I think.

The Court: In fact, I would ask that you do that, so that there will be medical evidence that this was not (indicating).

Mr. Smith: It is so easy to show, it is right on the picture, but that's all right. We will do that.

Mr. Bagley: Do I understand that these will not be introduced?

The Court: At this time I will not permit their introduction into evidence. I am sustaining your objection.

Mr. Smith: What is the objection?

Mr. Bagley: I think it is all on the record.

The Court: We better give these numbers.

(The photographs referred to were marked for identification, Commonwealth Exhibits Nos. 4, 5 and 6.)

page 48] IN OPEN COURT

(Thereupon the proceedings were resumed in open court in the hearing of the jury, as follows:)

By Mr. Smith:

Q. Dr. Lineberger, directing your attention to your report here, will you tell us, sir,—stand up, if you will, and show the jury the location upon the corpse that you said in your pathology report—or the location of what is in your opinion the fatal wound?

A. Yes, sir. Located just underneath—

Q. Turn around so the jury can see.

A. Underneath the right twelfth rib, in this area (indicating).

Q. Would you describe that wound, sir?

A. It was a penetrating wound, it measured about two inches in length.

Q. Take a seat, doctor. From your examination of the

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corpse was death instantaneous or what?

A. Following the stab wound, following the wound?

Q. Yes, this stab wound.

A. No, it was not.

Q. Tell the Court and the jury, doctor, your medical analysis as to the cause of death.

A. Well, not infrequently in a person who has an injury which produces blood loss or shock, lowered blood page 49] pressure for any period of time, this particular type injury can produce the damage to the kidneys and in this particular case I feel to the remaining kidney after surgery, so that the kidney fails to function as it should. The kidney is damaged, in a manner of speaking, so that unless repair is able to take place in a suitable period of time, unless some medical care can be instituted to help this kidney along so it can function again, the person would usually die from kidney failure or complications thereof, which I am sure occurred in this particular case.

Q. Doctor, this wound that you have pointed out to the jury that went in in this area (indicating), did that in effect hit the kidney or pucture the kidney?

A. I saw the removed kidney, the kidney that had been removed was sent to me also. There was a laceration or tear in the kidney, according to the description of the surgeons who did the surgery, this wound had torn through the vessels to the kidney which is certainly a good way to lose blood rapidly, and there certainly was change in the region of these vessels—the kidney as I had it suggested that there had been hemorrhage in this area.

Q. Now, were there other wounds upon the body?

A. There were the surgical wounds, too, actually, surgical incisions which had been sutured. One was the incision which was used to remove the kidney and the other was an incision made for drainage purposes and as I recall there page 50] were two superficial abrasions or slight abrasions.

Q. Describe to the jury where those abrasions were.

A. Along the forehead.

Q. On the forehead?

A. That is right.

Q. And were there any about the man's arms or hands?

Abraham S. Lineberger

A. I don't remember any specific injuries or any evidence of real trauma injury to the hand at this time.

Mr. Smith: All right. Your witness.

CROSS-EXAMINATION

By Mr. Bagley:

Q. Dr. Lineberger, you have testified that you feel that this corpse died as a result of a knife wound?

A. That is right.

Q. That is, a stab wound?

A. That is right.

Q. Do you have any personal knowledge of what the instrument of death might have been?

A. Only by history.

Q. Only by history, no personal knowledge?

A. No.

Q. Were you present at any time during the life of this decedent?

A. No, I was not.

Q. And when did you first see this deceased?

page 51] A. About 24 hours following the alleged death or the time of death.

Q. Approximately what date would that have been?

A. As I recall, the 18th of June.

Q. Of this year?

A. That is right.

Q. All right. And did your examination reveal that a kidney removal or a nephrectomy had been performed on this decedent?

A. Yes, sir, to the deceased.

Q. Can you state to the Court and the jury that the cause of death was the wound on the body in the position where you indicated in the back; or could it have been caused by faulty surgery or care, post-surgery care?

A. Would you please rephrase or restate your question?

Q. Let me ask you—yes, I will. Can you state as your opinion definitely that death of this individual could not have been caused by poor medical attention after surgery?

A. Without additional information I feel it would be unfair

to even try to answer that question for this reason. I feel that the initial wound, stab wound which has been described is the wound which initiated the process leading to death.

If I might speak more freely, I feel that this man according to the history and many diagnoses were made on the basis of the history—75 per cent are made on this basis, but this man apparently was in shock at the time he page 52] came to the hospital for first medical attention which was already preparing the type of process that I am trying to describe—in other words, being in shock, lowered blood pressure, it is possible that even had the other kidney been allowed to remain it also would have suffered damage similar to the other one. So that I feel that the stab would was the thing that initiated the process ending in death.

Q. Yes. Now, in your experience as a doctor, is a kidney removal oftentimes successful, that is, the patient lives?

A. Yes.

Q. All right. But is it possible or even probable that between the time of the operation on the 13th of June and the 17th, something could have occurred post-operative?

A. It is possible.

Q. It is possible, all right. Now, do you know where the body of this man was taken after death and prior to the time you received it?

A. No, I do not.

Q. Do you know whether anything was done to this body after death and before you received it?

A. No, I do not.

Q. All right.

Mr. Bagley: I believe that is all, if Your Honor please.

page 53] REDIRECT EXAMINATION

By Mr. Smith:

Q. Was there any indication that anything had been done to the body between the time of death and when you received it?

A. No.

Q. And could it not have been possible that the man would

never have been in the hospital in the first instance if it had not been for the stab wound?

A. I am sorry.

Mr. Bagley: If Your Honor please, I object to that. I think that calls for a conclusion.

The Court: I think it is a proper question. Go ahead.

By Mr. Smith:

Q. The question was, was it possible that the man would never have been in the hospital in the first instance if it was not for the stab wound?

A. That is correct.

Mr. Smith: No further questions.

The Court: Doctor, you say that there were two surgical incisions on this man's body?

The Witness: Yes.

The Court: Will you state where those were and describe them, if you will, please?

The Witness: All right. May I point this out as well?

page 54] The Court: Yes, sir.

The Witness: The first and the longest incision was located in the right abdomen in this position (indicating), and the second was located more laterally, in this location here (indicating).

The Court: The long incision, what was the purpose of making that?

The Witness: That was for removal of the kidney.

The Court: And what about the other?

The Witness: The other was made, the other incision is often following surgery for purposes of drainage of fluid that accumulates and blood.

The Court: All right.

Mr. Smith: May I ask one question?

The Court: Yes.

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By Mr. Smith:

Q. It was not necessary then after the initial incision to remove the kidney, that that same incision was reopened at a subsequent time?

A. It is possible.

Q. Well, was it reopened, the incision?

A. Yes, I assume that it was, yes, sir. He was explored on two occasions.

Mr. Smith: Thank you.

The Court: Do you have any further questions?

page 55] Mr. Bagley: Yes, Your Honor.

By Mr. Bagley:

Q. You are only assuming, you don't know this, of course?

A. According to this history that I received, he—

Q. But I mean from your own personal knowledge.

A. That's right.

Q. From your examination.

A. That is right.

Q. Are you able to say that?

A. I find no other point through which they could have gone in to explore the abdomen again which they apparently did.

Q. From your examination?

A. Yes.

Q. They apparently went in the second time.

A. That is right.

Q. Before death?

A. I'm sorry, I can't say—I was informed by the history that I received, I was told that they did go in a second time to explore the abdomen when he remained in shock following the initial surgical procedure, and in order to really properly explore the abdomen, they would require an incision of this length, and I assume—I am sure that they had to go back in through that same incision.

Q. But from your examination you cannot tell?

A. That is right. In other words, I cannot be

page 56] sure that they went in there two times.

By Mr. Smith:

Q. Was it necessary that you explore the abdomen during

the autopsy?

A. Oh, yes.

Q. And what incision did you make?

A. An entirely different incision.

Q. I see.

A. Not utilizing any of the others.

Mr. Smith: All right. I have nothing further from the doctor.

The Court: Thank you, Doctor Lineberger.

Mr. Smith: May he be excused?

The Court: Will you have any further need of the doctor?

Mr. Bagley: I have no reason to believe I will need to recall him.

The Court: You have no objection to him being excused at this time?

Mr. Bagley: No, sir.

The Court: The doctor will be excused.

(Witness excused.)

Mr. Smith: Call Deputy Sheriff Hardisty.

Mr. Bagley: Your Honor, the defendant's wife is in the courtroom. She will probably be a witness.

page 57] The Court: You say she will be?

Mr. Bagley: Yes, sir.

The Court: Thank you for calling it to my attention. May I ask you to just step outside, please?

Thereupon,

ROBERT E. HARDISTY,

was called as a witness by counsel for Commonwealth, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. State your name, please, sir.

Robert E. Hardisty

A. Deputy Sheriff Robert E. Hardisty.

Q. And were you so employed on the 12th of June 1964?

A. Yes, sir.

Q. Directing your attention to that date did you have occasion to investigate an alleged crime in which one Martin Thomas Smith was involved?

A. Yes, sir.

Q. And where did this alleged crime take place?

A. It occurred in the Quantico-Triangle trailer park.

Q. In what county is that?

A. Prince William County.

Q. I show you here to my rear a chart and ask you what that chart depicts.

page 58] A. This is the area involved in this crime, the Quantico-Triangle trailer park. Mr. Smith's trailer is the second one up from the left.

Q. This one (indicating)?

A. Yes, sir.

Q. And can you identify any of the other trailers?

A. Mr. Moore's trailer is the second one up from Mr. Smith.

Q. This one (indicating)?

A. Yes, sir.

Q. Do you know any of the other trailers in there?

A. I believe the first one, I am sure the first one is Mr. Harteis at the time. I don't believe he is living there now.

Q. Is there anything else in that picture that you recognize from the scene that you saw when you arrived?

A. Well, the chair there on the scene, was the chair that the subject, Mr. Moore, was in at the time I arrived.

Q. Mr. Moore was in this chair (indicating) at the time you arrived?

A. Yes.

Q. Now, Mr. Hardisty, what was Mr. Moore's condition at the time you arrived, if you recall, just tell us the reaction, how he appeared to you from a lay standpoint?

A. Unconscious to my knowledge, sir. The rescue squad was in the process of moving him onto a stretcher.

page 58A] Q. I see. Now, upon arriving at the scene, did you ascertain what had happened?

Robert E. Hardisty

A. Yes, sir. As I arrived I went over to Mr. Moore when the rescue squad was moving him and Mrs. Moore identified *herself* to me and I asked her who did this and she—

Q. Don't tell us—

Mr. Bagley: I object.

The Witness: Yes, sir, I'm sorry.

By Mr. Smith:

Q. Did you later talk to one Martin Thomas Smith?

A. Yes, sir.

Q. And would you point to Martin Thomas Smith—point him out to the Court and the jury?

A. It is the defendant there (indicating).

Q. And where was your conversation with Mr. Smith?

A. At his trailer door.

Q. At this trailer door (indicating)?

A. Yes, sir.

Q. And how long after you arrived was this conversation?

A. Approximately three to five minutes, I would say.

Q. Did Mr. Smith identify himself to you?

A. I asked if he was Mr. Smith and he said he was.

Q. During the course of your interrogation and conversation with him did he give you anything at all?

A. Yes, sir. He pointed a knife out to me on the table.

page 59] Q. Where was this knife?

A. It was—just inside the trailer on the left there was a table. It was lying on the table.

Q. And what did he say about the knife?

A. When I went inside I did not see the knife at all. He said to me, "There it is," and I in turn asked him if that was the knife. He said yes it was.

Q. And did he give you the knife?

A. Yes, sir. He tore off a piece of towel, and handed it to me, paper towel, to pick the knife up with.

Q. And where had the knife been since that time?

A. It has been in my possession.

Q. You have had it since that time?

A. Yes, sir.

Q. And do you have it with you now?

Robert E. Hardisty

A. Yes, sir.

Q. Is this the knife, then, that Mr. Smith pointed out as being the knife in the paper towel?

A. Yes, sir.

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By Mr. Smith:

Q. Now, did Mr. Smith tell you what use he had made of this knife?

A. No, sir, I—when I first spoke to him, I advised Mr. Smith that he had been accused and I would charge him and advised him of his rights before he said anything, at first, and I told him he would have to come with me to the Justice of the Peace office.

Q. Did he go with you?

A. Yes, he did.

Q. And did he at any time tell you whether or not he had used this knife?

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page 69] AFTERNOON SESSION

(The trial was resumed in open court and before the jury at 1:45 o'clock p.m.)

Whereupon,

ROBERT E. HARDISTY,

resumed the stand and having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION—resumed

By Mr. Smith:

Q. Mr. Hardisty, I believe we were at the point in your

Robert E. Hardisty

testimony where you had gone to the steps of Mr. Smith's trailer (indicating on chart).

Now, tell the jury, sir, at the time you arrived at the top of the steps to Mr. Smith's trailer, what was said to you?

A. Mr. Smith invited me in.

Q. Did you go into his trailer?

A. Yes, I did.

Q. Did he make any statement to you at that particular time?

A. As I went in the door he said to me, he said, "There it is."

Q. What did he mean when he said "There it is?"

A. He looked over to the table on my left—

Q. And what was there on the table?

A. The knife was on the table.

page 70] Q. And is that the knife that we have here, sir?

A. Yes, sir.

Q. Now, subsequent thereto did Mr. Smith go with you to any place at all?

A. The Justice of the Peace office.

Q. Now, upon arrival at the Justice of the Peace office, did you have further conversation with him?

A. Yes, sir. I asked if he would like to make a statement.

Q. And did you get an answer from him?

A. Yes, sir, he said—

Q. Now, prior to his answering you or prior to his making a statement, was he advised of any rights at all?

A. Yes, sir, I advised him of his rights.

Q. Tell the Court and the jury what it was that you advised him of at that moment?

A. I advised Mr. Smith that he has a right to counsel, and also that anything that he says or anything that is written, written statement if he made it voluntarily, could be used as evidence against him.

Q. Had he been charged at that time or advised that he would be charged?

A. We were in the process of charging him, and advised him.

Q. In view of that statement by you to Mr. Smith, did he

Robert E. Hardisty

choose or elect to make any statement?

page 71] A. Yes, sir.

Q. And how was that statement made?

A. It was written out in a form, sir.

Q. And that was in whose handwriting?

A. It was in his.

Q. Did you furnish the form to him, Mr. Hardisty?

A. Yes, sir.

Q. And does that form not contain some language on it relevant to the statement itself that he might make?

A. Yes, sir.

Q. And did he make that statement in his own handwriting and hand it to you, sir?

A. Yes, it did.

Q. Did he sign the statement?

A. Yes, he did.

Q. And is this the statement (exhibiting)?

A. Yes, it is.

Q. And in whose possession has it been since Mr. Smith made it?

A. In mine, sir.

Mr. Bagley: No objection.

Mr. Smith: I offer that for identification as Commonwealth Exhibit—

The Court: Are you offering it now in evidence? There was no objection.

page 72] Mr. Smith: Yes, sir, I am offering it in evidence.

The Court: Officer, you are satisfied that this was a voluntary statement?

The Witness: Yes, sir.

The Court: This will be received as Commonwealth Exhibit No. 7.

(The document referred to was marked for identification as Commonwealth Exhibit 7 and received in evidence.)

Mr. Smith: I ask that the statement be read to the Court—to the jury. I don't know whether Mr. Hardisty should read it or the reporter or the clerk—

Robert E. Hardisty

The Court: You have no objection to the witness reading this?

Mr. Bagley: No, sir.

By Mr. Smith:

Q. Would you read the statement to the Court and the jury, please?

A. On 12 June, 1964 at the time stated, 23:02—which is military time:

"I, Martin T. Smith, do hereby make the following voluntary statement to R. E. Hardisty, knowing him to be a deputy sheriff of Prince William County. I make this statement of my own free will and have not been promised anything or threatened in any manner. I have been advised of my constitutional rights to counsel and know the statement may be used as evidence against me in a court of law.

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"On or about 22:30, 12 June, 1964 I was relaxing from playing volley ball when a friend of mine arrived and informed me that he had brought over some deer meat which we had gotten earlier in the day. As I walked over to my trailer a man whom I do not know asked me if I had his child's ball. I told him I had no knowledge of whose ball belonged to whom and I would ask my wife. As I turned away I was struck on the shoulder. The blow grazed off of my shoulder and hit my ear. I jumped back in surprise and asked what was going on. He said he wanted to fight and reached into his pocket. I reached into mine and a third party stated that he was going to get a pistol out of his car. I told him I would be back out and went into my trailer. I put on my shoes and socks. While I was doing this I heard someone say, 'Get my rifle.'

"Before going outside I picked up my knife. I wasn't going outside but I was afraid of someone shooting in my trailer where my wife and three children were.

"When I got outside I told the bigger man if he wanted to fight with a knife I had one also. Both men jumped me. I wasn't aware either of them had been cut. I was trying to get

Robert E. Hardisty

page 74] away when I heard my wife holler. I got away and ran around the car and got my wife. I pushed her in the trailer and went with her. I laid the knife on the table and called out for someone to call the State trooper.

"Both men had been drinking quite heavily. There were quite a few people present through the entire incident.

"This statement is true to the best of my memory. Martin T. Smith, Corporal 1547551, U. S. M. C."

Q. Hand that up to the judge.

Now, Mr. Hardisty, at that moment, at the time that Mr. Smith made the statement about a third party, up to that time had you learned there was anyone else involved at all?

A. I had learned there was someone involved but the car had left and all they had was a description of the car.

Q. I see. Now, when Mr. Smith said, "There it is," and pointed to the knife which he gave to you, describe to the jury the condition the knife was in at that particular time.

A. Well, the appearance of the knife — it appeared to me that it had—I would assume it to be blood on it, there was a substance on it, and also it had flesh on the serrated top part of the knife, flesh material, meaty material.

Q. Did you ever converse with the deceased, Blaine Moore?

A. No, I did not.

page 75] Q. To your knowledge, did you ever see him after the rescue squad took him away?

A. No, sir.

Mr. Smith: Your witness.

CROSS-EXAMINATION

By Mr. Bagley:

Q. Mr. Hardisty, who was present if you can recall when you arrived at the scene of this incident?

A. The rescue squad, two individuals in the rescue squad, and several people there, and it was a chaotic sort of an incident at that time.

Q. And what did you do when *he* first arrived?

A. I went to Blaine Moore and the two rescue men were over Blaine Moore.

Q. Where was he at this time, in a chair or—

Robert E. Hardisty

A. Well, they were in the process of taking him out of the chair when I walked up, removing him from the chair to put him on a stretcher.

Q. Now, were there any other objects, weapons or anything in this area?

A. Not that I recall, sir.

Q. Did you inspect the area or did you immediately go to Mr. Smith's trailer?

A. Well, I questioned a few people there in the first few minutes and then I went over to Mr. Smith's trailer.

Q. Someone informed you where he lived?

page 76] A. Yes, sir.

Q. Did anyone go over there with you?

A. I am not certain, sir. There were so many people all around that area. I couldn't be sure whether anyone went with me at the time.

Q. When you saw Mr. Moore, can you describe him?

A. Well, all that I saw was Mr. Moore was being removed. He was slumped over and they were trying to move him into—and some of his clothes—in the rescue squad hands or something that they had removed, they were trying to get him in, that is all I could remember of that.

Q. You don't recall whether he said anything at the time, or not?

A. No, sir. At the time I was there I didn't hear him say anything.

Q. All right. Now, did you ever find the third party?

A. Yes, sir, the next day.

Q. Do you know who that was?

A. Yes, sir.

Q. Who was he?

A. Robert Wayne Lesheski.

Q. Where was he located?

A. He turned himself in to the State Police the following day.

Q. All right. Now, who was present in the

page 77] trailer when you were invited into Mr. Smith's trailer?

A. I remember seeing Mrs. Smith.

Q. Mrs. Smith?

A. Yes, sir.

Robert E. Hardisty

Q. There was no one else present?

A. Not that I recall, sir.

Q. Was the door open or closed?

A. It was closed when I went there.

Q. What if you recall was said between you and Mr. Smith?

A. At which time, sir?

Q. When you went in the trailer.

A. When I went in the trailer, I recall Mr. Smith said to me, "There it is."

Q. That was the first thing that he said?

A. Yes, sir. I had talked to him outside and he invited me in and said, "There it is," and I looked to my left and I saw the knife.

Q. What was the conversation outside?

A. I had advised Mr. Smith of his rights, that he was being charged with assault and—

Q. Did you ask him who he was initially?

A. Yes.

Q. And you told him that he was suspected of an offense. And then you advised him of his rights on the

page 78] steps and then you went in the house?

A. Yes, sir, he invited me in.

Q. All right. Then what happened?

A. He said, "There it is," and I turned to the left and there was the knife. And I says, "Is this the knife?"

And he walked over and tore off a towel and came back and handed it to me to pick the knife up with and he stated something about getting a jacket or a shirt, I am not certain what he said, and I told him he would have to come with me to the Justice of the Peace, he said, "Well, wait until I get my jacket," I think it was, or a shirt, I can't be sure which it was.

Q. And he got his jacket?

A. And he came down and—

Q. Did you have to restrain him in any way?

A. No, sir.

Q. Was he totally cooperative?

A. Yes, sir, he was.

Q. And who was present when you arrived at the Justice of the Peace' office?

Robert E. Hardisty

A. No one, sir. I had to call—you have to call the Justice of the Peace, he comes down.

Q. All right. But were there any witnesses present other than yourself and the Justice of the Peace?

A. Deputy Sheriff Russell was there. I believe
page 79] later that Mr. Hunter — I believe he came in later on that.

Q. Mr. Hunter is the owner of the trailer park?

A. Trailer park, yes, sir.

Q. In other words, none of the people who were at the scene were at the Justice of the Peace' office?

A. I am trying to recall, but I don't remember, sir.

Q. Then you charged him with the offense, is that right?

A. Yes, I did.

Q. At that time he was charged with assault?

A. Assault, felonious assault, sir.

Q. All right. Then what disposition was made of him if you recall?

A. Then he was bonded.

Q. At that time?

A. At that time, sir.

Q. He was not placed in confinement?

A. No, sir.

Q. All right. Do you recall how big a man Moore was, if you had observed that?

A. Not at the trailer park, I couldn't tell, I knew he was a heavy man, but that was all.

Q. All right. And were there any, if you recall, were there any people in this vicinity (indicating on chart) when you went to Smith's trailer?

A. It just seemed to me there were people
page 80] everywhere, when we were down there.

Q. Do you recall whether there were any automobiles in this area (indicating on chart)?

A. Yes, sir, I remember one automobile in front of his trailer.

Q. Would that be somewhere along in here (indicating on chart)?

A. Approximately.

Q. Were there any automobiles between any of the trailers?

Robert E. Hardisty

A. I don't recall.

Q. There might have been, but you don't recall?

A. May have been.

Q. All right. Can you, if you will, describe or give us some idea, if you can, what the distance is between these two trailers (indicating), an estimate? You have not measured it, have you?

A. No, I have not.

Q. All right.

A. I would say 15 feet, approximately.

Q. All right. And is this hard ground here (indicating)? Or is it cement or what is the substance?

A. They have cement patios on each one, each trailer has a walkway, and the rest of it is a graveled substance.

Q. All right. Now, do I understand that this is an accurate portrayal, as you recall it, of the direction in which the chair was sitting?

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A. No, sir. The only reason that I had that put on there was to show the approximate vicinity of the chair. As far as the direction of the chair, it was turned around the other way, it was pointed out.

Q. The chair would be facing this way (indicating)?

A. As far as I can remember, sir.

Q. Now, is there a trailer here (indicating)?

A. Yes, sir, there was one.

Q. There was one.

A. There was one on this side of it, yes, sir.

Q. And is this a vacant lot here (indicating)?

A. Yes, sir.

Q. Then as I understand your testimony further, there were a number of people around Moore. Is that correct?

A. Yes, sir.

Q. And you do not recall at this time whether there were any cars between the trailers?

A. I can't remember.

Q. All right. Was this exhibit (indicating) examined to determine what the substance was that was on it when you found it?

A. No, sir.

Q. It has not been examined?

A. No, sir.

page 82] Q. It has not been examined?

A. No, sir.

Q. You don't know whether there was flesh or blood on it, it just looked that way to you?

A. It looked that way to me.

Q. Has it been examined in any way for fingerprints?

A. No, sir.

Mr. Bagley: I guess that is all, Your Honor.

REDIRECT EXAMINATION

By Mr. Smith:

Q. Mr. Hardisty, Mr. Bagley asked you if Mr. Smith was cooperative, or words to that effect. What was Mr. Smith doing—what did he do immediately after you walked in the trailer and he said, "There it is," what was he doing at that time?

A. He had a cup of coffee in his hands, drinking the coffee.

Q. Did he appear to be nervous or upset or alarmed at that time?

A. No, sir.

Q. All right. And I believe you stated the knife was not examined for fingerprints or as to what the substance was that you say appeared to be blood or flesh?

A. No, sir, it was not.

Q. But it is the knife that he handed to you?

A. Yes, sir.

page 83] Mr. Smith: All right, that is all.

The Court: Thank you, Sheriff.

(Witness excused.)

Mr. Smith: Call Mr. Lesheksi.

Whereupon,

ROBERT WAYNE LESHESKI,

was called as a witness by counsel for Commonwealth, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

Robert Wayne Lesheski

DIRECT EXAMINATION

By Mr. Smith:

Q. Would you state your name for the record, please, sir?

A. Robert Wayne Lesheski.

Q. Where do you live, Mr. Lesheski?

A. Fredericksburg, Virginia.

Q. Did you know Mr. Blaine Moore?

A. Yes, sir.

Q. How long had you known him?

A. Approximately a year.

Q. And in what capacity had you known Mr. Moore?

A. I knowed him to work with me, Campbell's Trucking.

Q. What kind of work were you doing at that time?

A. I was a truck driver.

Q. Directing your attention to the twelfth day of June 1964, were you in his company at your place of employment?

page 84] A. Yes, sir, after work.

Q. And what did you and Mr. Moore do after work?

A. We had a few drinks. It was payday night.

Q. Where did you have those drinks?

A. We had them right there.

Q. Where — the place you worked?

A. Yes, sir.

Q. Is that up in Springfield in Fairfax County?

A. Yes, sir.

Q. Then after you had those few drinks, what did you do, where did you go?

A. We headed down towards Dumfries.

Q. In whose vehicle were you traveling?

A. Mine, sir.

Q. And who else was with you at the time?

A. Just me and Mr. Moore.

Q. And where were you going, where did you go when you headed towards Dumfries?

A. We stopped at a restaurant along the way to drink some beer.

Q. And how long were you there?

A. Oh, approximately 25 to half an hour.

Q. And from there where did you go, sir?

A. Well, we just rode around a while. We had something

to drink.

page 85] Q. Something more to drink?

A. Yes, sir.

Q. And rode around for a while?

A. Yes, sir.

Q. And did there come a time when you got near Mr. Moore's home?

A. Well, that was the only time we come near his home was when I took him home.

Q. Approximately what time did you take him home if you recall?

A. I don't recall, sir.

Q. What was your condition at that time?

A. I was feeling pretty good.

Q. How about Mr. Moore's condition?

A. I'd say he was drunk.

Q. What makes you say that, Mr. Lesheski? Describe his appearance that made you think he was drunk, or what he did.

A. Well, he had a hard time getting in and out of the car, for one thing. And I wanted to take him home and he didn't want to go at first and then he said he had to see somebody, so I took him on home.

Q. And when you took him home what did he do?

A. We stopped outside the trailer on the right-hand side of the road. He got out of the car and went over across the street and talked to somebody.

page 86] Q. Had you ever seen the man he talked to before?

A. No, sir.

Q. Had you ever been to Mr. Moore's home before?

A. No, sir.

Q. Had you ever been in this particular location, trailer park location before?

A. Yes, sir.

Q. All right. Now, he got out of the car and went over to talk to someone. Describe to the Court and to the jury how he walked when he went over to that individual.

A. Well, he just walked sort of roughly over to him.

Q. You say roughly. Now, describe what you mean by "roughly."

A. Well, he walked — he walked over — he walked over

Robert Wayne Lesheski

a little bit fast, sort of like.

Q. I see. Was there any conversation being made by him at that *tkme*?

A. He was talking to the man that lived at the trailer.

Q. And do you know that man?

A. No, sir — not at the time.

Q. Did you learn to know him on that occasion?

A. No, sir, I did not.

Q. Could you recognize him today?

A. I could recognize him today.

Q. Is he around here today?

page 87] A. Yes, sir, he is sitting in the courtroom.

Q. Point him out to the Court and jury.

A. Sitting over there on the end table.

Q. All right. Now, when Mr. Moore got up to that man, could you tell what the conversation was about?

A. Well, I believe he said something about —

Q. Don't tell us what you believe, now. If you can't be certain, don't tell us. I want you to be certain, sure.

A. Well, he said, "You took my daughter's ball."

Q. All right. What was the comment, if any, that you recall Mr. Smith made to that?

A. He said, "No, I didn't take your *caughter's* ball."

Q. And then what happened?

A. I guess they started fighting.

Q. And describe from that point on, the start of the fight, tell us what happened after they started fighting — how long did it last?

A. Approximately, I would say, ten minutes.

Q. All right. Did you become involved in that fight?

A. Well, they were fighting about two or three minutes when I run over to them.

Q. Now, when you say they were fighting, were they slinging fists or were they wrestling or just what, Mr. Lesheski?

A. Well, it looked like they had a hold of each other.

Q. Well, were there any fists flying around or were they just tussling, holding each other?

page 88] A. It looked to me like they were just tussling with each other.

Robert Wayne Lesheski

Q. All right. And when you ran over to them, what did you do?

A. I tried to get in between them.

Q. Could you get in between them?

A. No, sir.

Q. What did you do then?

A. I told them, "Let me have Blaine."

Q. Why did you want Blaine?

A. Because I figured that he was drinking and there was going to be trouble, because he was on the man's property.

Q. Could you get hold of Blaine, could you get Blaine away from him?

A. No, sir.

Q. What did you do then?

A. I went back over to the car.

Q. What did you do then?

A. Well, I didn't go back to the car, was standing there, and Blaine says he had a whip or something and I run over to the car and I told Blaine I had a gun.

Q. Did you have a gun, Mr. Lesheski?

A. No, sir.

Q. But you told Blaine that you had a gun?

A. Yes, sir.

page 89] Q. What happened after you said you had a gun?

A. Blaine came over to the car.

Q. What happened to Mr. Smith?

A. I didn't see him.

Q. Prior to your telling Mr. Moore that you had a gun, were they still grappling hand-to-hand or holding on to each other?

A. Well, Blaine come over to the car after I got over there.

Q. I see. And the fight stopped then?

A. Yes, sir.

Q. Mr. Smith followed Blaine over to the car?

A. I didn't see him, sir.

Q. All right. Now, what did you and Blaine Moore do after this happened, Mr. Lesheski?

A. We went over across the street to the patio.

Q. Now, do you recognize this at all (indicating on chart)?

Robert Wayne Lesheski

A. It looks like the trailer park we were in that night.

Q. And you say you went across the street to a patio. Can you tell me, point out where you think you went to?

A. Approximately where that chair is there.

Q. Approximately where the chair is here? (indicating).

A. Yes, sir.

Q. Now, what did you do after you got over there sir?

page 90] A. Blaine started talking to somebody. I can't recognize who he was talking to. I don't know exactly what we done over there.

Q. All right. Now, did there come a time when Mr. Smith appeared on the scene again?

A. Well, a little while later Blaine turned around and started across the street and he said something to — I guess Mr. Smith, and I guess they started tangling in front of my car. My car was sitting off right below the chair there.

Q. Below the chair — you mean this direction (indicating)?

A. Yes, sir.

Q. Which direction was your car heading, Mr. Lesheski?

A. It was heading up toward the right-hand corner.

Q. Heading this way (indicating)?

A. Yes, sir.

Q. Your car?

A. Yes, sir.

Q. Now, what conversation if any did your hear that was taking place between Mr. Moore and Mr. Smith on the second occasion when Mr. Smith came out?

A. I didn't hear any conversation.

Q. Well, tell us what happened? Tell us what happened then.

A. Well, Mr. Moore and Mr. Smith got together there. I assume they started fighting, I didn't see too close

page 91] there. And Mr. Moore hit the ground and it looked to me like Mr. Smith had something in his hand, so I walked over, I got in between them again and that's when I saw the knife.

Q. Now, when you say that Mr. Moore hit the ground, did he fall flat on the ground or how did he hit the ground?

A. Looks like he went to his knees, went down on his knees, to me.

Robert Wayne Lesheski

Q. Now, prior to his going down on his knees, did you see whether or not Mr. Moore and Mr. Smith were fist fighting or was there any fighting going on between them, or just words?

A. I didn't hear any words.

Q. You didn't hear any words at all?

A. No, sir.

Q. All right. Was Mr. Moore on the ground when you went between him and Mr. Smith?

A. He was off to my side, I believe.

Q. I see. Now, was there anything that took place between you and Mr. Smith at that moment?

A. Well, I seen him with the knife and I rushed to get it and I got stabbed.

Q. You did, you got stabbed?

A. Yes, sir, to my left-hand side.

Q. What did you do then?

A. After I got stabbed?

Q. Yes.

page 92] A. After I got stabbed I stumbled back and a lady grabbed me, she says, "You're stabbed," and I left there and went into the trailer, one of the trailers, I don't know which one. I told her, I says, "I don't want no more trouble." And I got up — I was standing up and she led me over to the trailer and I laid down on the couch.

Q. Where did Mr. Smith go, if you know?

A. I don't know. I didn't see him.

Q. Where was Mr. Moore when this lady was leading you away?

A. I don't know, sir. I turned around, so I had my back towards them.

Q. She took you over and laid you down somewhere and —

A. I don't know whether she laid me down but she handed me some kind of a cloth. I was holding on to my side and I walked into the trailer and laid down on the couch.

Q. Then what happened to you, where did you go?

A. I laid there for a while. And then I come back out and Mr. Moore had gone to his trailer and got a rifle.

Q. Where was Mr. Moore then?

A. He was sitting in that chair there.

Q. Did you see him go to his trailer and get a rifle?

Robert Wayne Lesheski

A. No, sir.

Q. Well, did he have a rifle at that time?

A. When I come back out of the trailer, it was
page 93] laying there next to the chair.

Q. The rifle was laying next to the chair?

A. Yes, sir.

Q. And Mr. Moore sitting in the chair?

A. Yes, sir.

Q. Now, what did you do then? Where was Mr. Smith, if you recall?

A. I don't recall, sir.

Q. What did you do then, Mr. Lesheski?

A. I picked up the rifle and I told everybody to stay away from us.

Q. And then after that what did you do?

A. I got in my car and left.

Q. Did you seek medical attention at that time?

A. No, sir.

Q. When did you finally seek medical attention?

A. The next following morning.

Q. Did you ever see Mr. Moore after that?

A. I seen him at the hospital later.

Q. All right. Did Mr. Smith have anything at all to say to you during the time you were involved with him when you got cut?

A. No, sir.

Q. Nothing whatsoever?

A. No, sir.

page 94] Mr. Smith: Your witness.

CROSS-EXAMINATION

By Mr. Bagley:

Q. Mr. Lesheski, when you and Mr. Moore were drinking earlier, how much would you say that you had to drink?

A. Well, I would say about 8 bottles of beer, and maybe about half a pint of whiskey.

Q. How about Mr. Moore?

A. About the same.

Q. He had about the same?

Robert Wayne Lesheski

A. Yes, sir.
Q. How big a man was Mr. Moore?
A. He was a pretty good sized man.
Q. Was he *heav*?
A. Yes, sir.
Q. Now, while you were drinking, did you have any indication that Mr. Moore wanted to fight with somebody?
A. No, sir.
Q. He never indicated to you that he wanted to fight with somebody that night?
A. No, sir.
Q. You didn't tell somebody later on that Mr. Moore had been looking for a fight all evening?
A. No, sir.
Q. You didn't tell anybody that?
page 95] Q. All right. Was anyone else in the car with you and Mr. Moore?
A. After the fight was over.
Q. After the fight was over?
A. Yes, sir.
Q. Who was in the car then?
A. Mr. Martin.
Q. Who?
A. Mr. Martin.
Q. Was he present during the fight?
A. No, sir, I picked him up after the fight.
Q. I see. Now there anyone in the car before the fight while you were drinking or while you were *brining* Mr. Moore home?
A. No, sir.
Q. All right. Had you been drinking with Mr. Moore before this?
A. Before the fight?
Q. Before this particular payday night.
A. No, sir.
Q. Never had?
A. No, sir.
Q. All right. Now, when you got to the trailer park, did Mr. Moore tell you to stop at this particular place?
A. Yes, sir.
page 96] Q. He did?
A. Yes, sir.

Robert Wayne Lesheski

Q. Did he indicate to you what he wanted to do there?
A. He said he had to see somebody there.
Q. Do you know where he lived?
A. I believe he lived in the third trailer from the end.
Q. The third trailer from here, this one (indicating)?
A. Well, where he stopped was just one trailer, I believe there was one trailer in between his —
Q. Would this be his (indicating)?
A. No, sir, the one behind the tree there.
Q. This (indicating) being Smith's?
A. No, this would be Smith's — on the end there.
Q. This would be Smith's over here (indicating). I see. Now, where did you park the car?
A. I parked it on this side, on the right-hand side of the road a little below that chair.
Q. Right in here somewhere? (indicating)
A. No, back further.
Q. Back up here?
A. Yes, sir, a little ways from the curb.
Q. What did Mr. Moore do when you stopped?
A. He got out of the car and went around the car over to the man's house.
Q. Did you get out of the car too?
page 97] A. I believe I did. I believe I got out of the car and stood up by the door.
Q. Are you sure you did or you don't know whether you did?
A. I don't know whether I did or not, at that time?
Q. You don't remember what you did at that time?
A. No, sir.
Q. Do you remember whether you ever got out of the car?
A. Yes, sir.
Q. Now, what was happening between Mr. Moore and Mr. Smith when you got out of the car?
A. They were having a fight.
Q. They were having a fight?
A. Yes, sir.
Q. Well, just what was taking place?
A. Well, they had a hold of each other, they was *wrastling* around.
Q. This was when you first stopped and he went over and

asked about the ball?

A. Yes, sir.

Q. They were wrestling around?

A. Looked like it to me.

Q. Where were you?

A. I was standing next to the car.

Q. Back here (indicating)?

page 98] A. Yes, sir.

Q. And where were they?

A. Well, the car was sitting right almost directly across from his trailer, maybe at a slight angle.

Q. Well now, is this Mr. Smith's trailer (indicating)?

A. I don't know, I can't tell the way it is drawn.

Q. You don't know which one, then, is Mr. Smith's trailer. Let me ask you this then. Where was your car in relation to Mr. Smith's trailer?

A. Almost directly across from it.

Q. Almost directly across from Mr. Smith's trailer?

A. Yes.

Q. All right. I see. When, at what point in this fight as you describe it did you get out of the car?

A. (No response).

Q. I believe you said — I withdraw that other question. I believe you said that you heard Mr. Moore say, "What did you do with my daughter's ball?"

A. Yes.

Q. Isn't that right?

A. Yes.

Q. Then what did you do at that point?

A. I was still standing there. The fight hadn't started yet.

Q. The fight hadn't started?

page 99] A. No.

Q. All right. Now, would you describe this fight — you were standing and watching it, is that right?

A. Yes.

Q. Would you describe that to the jury?

A. Well, like I said, it looked like they had a hold of each other.

Q. Looked like they did. Well, did they or didn't they?

A. Well, they had a hold of each other, yes.

Robert Wayne Lesheski

Q. All right. Now, who was facing you and who had his back to you?

A. Mr. Moore had his back to me.

Q. Mr. Moore had his back to you?

A. Yes, sir.

Q. And did it look like he had a hold of Mr. Smith?

A. Yes, sir.

Q. Could you see Mr. Smith at all?

A. I could see a man in front of him, yes, sir.

Q. All right. Then what did you do?

A. Well, I run over and tried to get in between them.

Q. You tried to get in between them?

A. Yes.

Q. And you couldn't?

A. No, sir.

Q. All right. Then what happened?

page 100] A. I went and come back over to the car.

Q. That's when you said you had a gun?

A. Yes, when I started back over to the car, he said, Mr. Blaine said that he had a whip, I started back over to the car —

Q. Who had a whip?

A. He didn't mention the name. He said he had a whip.

Q. Did you see a whip?

A. No, sir.

Q. Did you see any other men standing around Mr. Smith's trailer?

A. I believe there was two or three standing on the corner of the trailer.

Q. And didn't you put your hands behind your back and say, "I've got a gun," and told them to stand still or you would shoot them?

A. No, sir, I did not say that.

Q. You didn't say that?

A. No, sir.

Q. You don't remember it or you didn't say it?

A. I didn't say it. I said I had a gun.

Q. You did say you had a gun?

A. Yes, sir.

Q. And you were facing Mr. Smith and Mr. Moore and

these other men?

page 101] A. I said I had the gun when I started back towards the car.

Q. Yes. And what did you do when you got to the car? Didn't you reach into the car and put your hand behind your back?

A. I don't remember it.

Q. You may have done it; you don't remember?

A. I don't remember.

Q. All right. Then what happened between Mr. Smith and Moore?

A. Well, Mr. Moore was standing next to me when I had the car door open.

Q. Now, which side of the car are you talking about?

A. Driver side.

Q. The driver's side; and Mr. Moore was standing next to you?

A. Yes, sir.

Q. What if anything was he doing?

A. I don't remember, sir.

Q. What if anything was he saying?

A. He asked me, "Do you really have a gun?" And I said, "No, I don't have one."

Q. Mr. Moore said that to you?

A. Yes.

Q. And did he say he was going after his own rifle?

page 102] A. No, sir.

Q. What did he say?

A. He walked on away from me, around the car, and I followed him over to the patio.

Q. He walked around the car and he went over here where this chair is (indicating)?

A. Yes, sir.

Q. And then what happened?

A. We stood around for some period of time and then —

Q. And did he call Mr. Smith a few names at that time, saying he was going to get him, do you remember that?

A. No, I don't remember that.

Q. You wouldn't remember it. It could have happened but you don't remember?

Robert Wayne Lesheski

A. It could have happened, yes, sir, but I don't remember it.

Q. When was it that you got the gun and told everybody to stay away?

A. After Mr. Moore was stabbed and sitting in the chair, and the gun was laying off to the side of the chair and I picked the gun up.

Q. Now, after you and Mr. Moore came back across here (indicating) — over to where the chair is?

A. Yes, sir.

page 103] Q. What happened then? How did Mr. Moore get back across there? You said he went over there rather quickly?

A. Yes, sir.

Q. Would you say that he charged over there at him?

A. He went quickly. I wouldn't say he charged. He was walking quickly, or fast.

Q. Did you go over there right after?

A. I followed behind, yes, sir.

Q. And this all happened within so many seconds, sixty seconds, perhaps, or two minutes? It was all quick, wasn't it?

A. You mean from the time we come from the car to the patio?

Q. Yes.

A. I couldn't tell you the time period on it.

Q. Well, how long, if you remember — were you over here a long time after you came back from the car?

A. I can't remember.

Q. Do you remember what time of the day it was when you were there?

A. It was night time.

Q. Yes. About ten-thirty, wasn't it?

A. I'd say approximately ten-thirty, eleven-thirty.

Q. Ten-thirty or eleven-thirty?

A. Yes, sir.

Q. It was dark?

A. Yes, sir.

page 104] Q. All right. Could you see over here (indicating)? Could you see anything from over here (indicating) to over here (indicating)?

Robert Wayne Lesheski

A. You mean from the patio to the trailer?

Q. Well, from where you were across the street, or Mr. Smith's trailer was and where Mr. Moore charged at him, could you see, was there enough light to see anything?

A. There wasn't too much light.

Q. All right. Now, when Mr. Moore charged over there — as you say, he went over there fast?

A. Yes, sir.

Q. You were right behind him?

A. Yes, sir.

Q. All right. Now, what do you remember?

A. I remember Mr. Blaine being down.

Q. He fell down?

A. I don't know, sir. He was down at my side.

Q. Do you remember him having Mr. Smith by the head, in a headlock?

A. No, sir, I don't.

Q. Do you remember kicking Mr. Smith?

A. No, sir.

Q. You don't remember any of that?

A. No, sir.

Q. Do you remember trying to get the knife
page 105] away from Mr. Smith?

A. I remember reaching up there, yes, sir.

Q. Reaching out at it?

A. Yes, sir.

Q. And where was it?

A. He had it in his hand.

Q. Which hand?

A. His right hand.

Q. Are you sure?

A. No, I'm not sure. He had it in his hand.

Q. All right. Now, how did — let me ask you this. Was there a car between these two trailers (indicating)?

A. Yes, sir, there was my car.

Q. Was there a car between Mr. Smith's trailer and another trailer?

A. I couldn't tell you.

Q. You don't remember?

A. No, sir.

Robert Wayne Lesheski

Q. When you first stopped here, do you remember whether where Mr. Moore went there was a car?

A. No, I don't remember.

Q. Do you remember about the car —

A. No, sir, I don't.

Q. All right. It could be, though, is that correct? It is possible there was one there?

page 106] A. Yes, it is possible.

Q. Now, what if anything was being said between Mr. Smith and Mr. Moore when, as you say, Mr. Moore was down?

A. I didn't hear any conversation.

Q. You heard no words of any kind?

A. I don't remember hearing any.

Q. Did you speak any words?

A. I don't remember saying anything.

Q. It all happened pretty fast, didn't it?

A. Yes.

Q. All right. Then what is the next thing you remember? You reached for the knife?

A. That's when I remember reaching for the knife.

Q. Did you cut your hand or anything?

A. No, sir.

Q. Where were you cut?

A. I was cut across the elbow and left side.

Q. In trying to get the knife?

A. I don't know.

Q. Well, what was being done with the knife when you were trying to get it?

A. I just seen it and reached up for it.

Q. You saw it and reached for it?

A. Yes, and the next thing I know the woman said, "You're stabbed."

Q. She said this to you?

page 107] A. Yes.

Q. Which woman, do you remember?

A. No, sir, I don't.

Q. Were you stabbed or slashed?

A. Stabbed.

Q. You mean there was a puncture wound?

A. Yes, sir.

Robert Wayne Lesheski

Q. Where?
A. On the left-hand side.
Q. Left-hand side?
A. Yes, sir.
Q. All right. Now, where was Mr. Moore at the time you were stabbed, if you remember?
A. Where was he at at the time I was stabbed?
Q. Yes.
A. I don't remember being stabbed right then.
Q. You don't remember?
A. No.
Q. In other words, everybody was just moving around at that time, is that correct?
A. Yes, sir.
Q. All right. After you were stabbed, where did you go?
A. I went into the trailer.
Q. And where did Mr. Moore go?
A. I don't know.
page 108] Q. You don't know where he went?
A. No, sir. I didn't see him leave.
Q. You just went right straight across to the trailer?
A. I come across the street and the woman grabbed me by the arm and she had a rag or something she put on my side and she took me and led me into the trailer and I sat down on the couch and I don't know what was going on between that time —
Q. You didn't hear anything?
A. No, sir.
Q. Do you remember how long you were in there?
A. No, sir, I don't.
Q. Do you remember Moore saying he was going to get his rifle?
A. No, sir.
Q. Do you remember seeing the rifle?
A. Yes, after I come back out of the trailer.
Q. And where was the rifle?
A. It was laying, he had dropped it, it was laying there. I guess he had dropped it.
Q. Was it near him?
A. Yes, sir, it was a few feet from him.
Q. A few feet from the chair?

Robert Wayne Lesheski

A. Yes, sir.
Q. What kind of a rifle was it, do you remember?
A. No, I don't remember what kind of rifle it
page 109] was.
Q. But you picked it up?
A. Yes, sir.
Q. And what did you do with it?
A. I told everybody to stay away from us.
Q. And where was Mr. Smith at this time?
A. I don't know.
Q. Who else was there when you picked up the rifle?
A. I don't know who was there.
Q. What did you do with the rifle?
A. I picked it up and told everybody to stay away from us.
Q. Stay away from "us?"
A. Yes.
Q. Meaning you and Mr. Moore?
A. Yes.
Q. Then what did you do?
A. I dropped the rifle back down and got in my car and left.
Q. Now, you dropped the rifle where Mr. Moore was and then ran over to your car or what?
A. I don't remember where I dropped it. I dropped it and went to the car.
Q. You dropped it and went to the car?
A. Yes, sir. My car — my car had been moved then.
Q. And then you took off, is that it?
page 110] A. Yes, sir.
Q. Do you remember coming back that night?
A. Yes, sir.
Q. Do you remember talking to Mrs. Smith?
A. Yes, sir.
Q. Do you remember telling anybody that night that you wanted to forget about the whole thing?
A. No, sir.
Q. You don't remember that?
A. No, sir.
Q. And telling people that you didn't want to get in trouble, that you were on parole?
A. Yes, I remember saying that.

Robert Wayne Lesheski

Q. You do remember saying that?
A. Yes, sir.
Q. What else do you remember saying?
A. I remember her saying something to me that, "You better leave and forget about all this," she says, "my husband didn't need a knife, he could have done it with his hands or" — she says, "he knows *carati,* he didn't even need that knife, the best thing for you to do would be to leave and forget about it."
Q. Who said this?
A. Mrs. Smith.
Q. *Mts.* Smith said this to you?
A. Yes, sir.
page 111] Q. And what did you say to her?
A. She asked me again, "Did you really have that gun?"
Q. She asked if you had a gun?
A. Yes.
Q. In other words, you told her at this time whether you had the gun or not?
A. She said, "My husband didn't even need the knife."
Q. All right, she said her husband didn't even need the knife?
A. Yes, sir.
Q. But what did you tell her about the gun?
A. She asked me if I had it.
Q. You did threaten Mr. Smith with a gun, then?
A. No, she asked me if I had it.
Q. She asked you if you had a gun?
A. Yes.
Q. What did you tell her?
A. Well, I was scared, he was still around, that I might get hurt again, I said, "Yes, I have."
Q. You said, "Yes," you had the gun?
A. Yes.
Q. But you didn't have a gun?
A. No, sir.
Q. You didn't have a gun?
A. No, sir.
page 112] Q. Why did you say you had a gun?
A. I was scared after I got stabbed. I didn't

know anybody was there, I come back to see if Blaine was hurt bad —

Q. Mr. Lesheski, you told us that you said you had a gun prior to the time that you were stabbed.

A. (No response)

Q. You just testified to that?

A. Yes, sir.

Q. Well, is that your testimony or isn't it?

A. I say —

Q. You say you were scared after you were stabbed?

A. I said I had a gun before I got stabbed.

Q. That's right.

A. I didn't tell her I had a gun — she asked me —

Q. All right. But didn't you tell the men and Mr. Smith and Mr. Moore that you had a gun, and didn't you hold your hand behind your back and tell them?

A. I don't remember holding my hand behind my back, but I said I did have a gun.

Q. All right. And who was present when you said this? Mr. Smith, Mr. Moore and some other men that were around that trailer?

A. Yes, sir.

Q. Now, this was before the knifing or anything else took place, wasn't it?

page 113] A. Yes, sir.

Q. This was before that?

A. Yes, sir.

Q. And then later on you actually picked up a rifle and threatened some people with a gun, didn't you?

A. No, I —

Q. And said, "Get away from us?"

A. Well, we both had been stabbed and I was scared — I I didn't know if we were going to get hurt any more or not. I didn't know who done it. I didn't know who the —

Q. Had the sheriff arrived at this time, Mr. Lesheski?

A. No, sir.

Q. The sheriff had not arrived?

A. No, sir.

Q. I see. You left before the sheriff arrived?

A. Yes, sir.

Robert Wayne Lesheski

Q. Why did you feel you had to leave before the sheriff arrived?

A. I was scared.

Q. You were scared?

A. Yes, sir.

Q. Where was Mr. Moore when you left?

A. I left him sitting in the chair.

Q. Now, is it your testimony that at no time on this evening did Mr. Moore *indicated* to you that he wanted

page 114] to fight with somebody?

A. You mean while we was in the trailer park?

Q. Before that — in the trailer park, or any time that evening, when you got to the trailer park, didn't he indicate to you that he wanted to fight with somebody? That he wanted to get somebody?

A. He said something about he had to go see a man about a ball.

Q. Is this when you pulled up in front of Smith's place?

A. Just before I come off Route 1 there.

Q. Before you came off of Route 1?

A. Yes, sir.

Q. To come into this trailer park, is that right?

A. Yes, sir.

Q. Even then, he was talking about he had to see a man?

A. He —

Q. He didn't say which man, did he?

A. No, he didn't mention any names.

Q. He didn't mention any names. Did *he* try to talk him out of it?

A. I tried to talk him out of going home until he sobered up a little bit.

Q. Not going home until he sobered up a little bit?

A. Yes, sir.

Q. And what was his response to that?

page 115] A. He said, "No, I want to go home."

Q. He wanted to go home or he wanted to see the man about the ball?

A. Well, he didn't say he wanted to see the man about the ball, he said he wanted to go over to the trailers. That is what he said.

Q. He wanted to go over to the trailers?

Robert Wayne Lesheski

A. Yes, sir.

Q. If you remember now, did you have any indication from Mr. Moore that he knew Mr. Smith?

A. Any indication?

Q. Or did he say anything to you that would indicate to you that he and Mr. Smith were acquainted during your ride back from work to this trailer park?

A. He kept saying some man, he never mentioned any names.

Q. He talked about him quite a bit, did he, on this trip?

A. He said — yes, he said he wanted to go see the man.

Q. He didn't say he wanted to get him, he just wanted to see the man?

A. Yes, sir, see him about some business.

Q. About some business?

A. Yes.

Q. And then about the ball?

page 116] A. Then he said something about this man's daughter taking his daughter's ball and he wanted to go see about getting it back.

Q. All right, and this was when you were coming back from the beer parlor where you had several beers?

A. Yes, sir — the beer parlor is only about a mile off the road from where he lives.

Q. I see. Did you know Mrs. Moore or any of Mr. Moore's family?

A. You mean prior to this?

Q. Yes.

A. I knowed his wife.

Q. You had met his wife?

A. Yes, sir.

Q. I see.

A. She had an accident one morning when I was coming to work and I stopped to see if I could help anybody and it turned out to be his wife. That is the only occasion I had to meet her.

Q. I see. Now, this was during the day and everybody was completely sober?

A. You mean this accident?

Q. Yes.

A. No, this was prior to that date.

Robert Wayne Lesheski

Q. Prior to that date?

page 117] A. Yes, sir.

Q. But on that occasion everyone was sober and it was during the day, is that right?

A. Yes, sir.

Q. All right. Did you see Mrs. Moore on this night that we are talking about, the 12th of June?

A. I didn't see her when we first come into the trailer park, no.

Q. Did you see her at all?

A. I don't remember seeing her, no.

Q. You don't remember seeing her at all?

A. No, sir.

Q. She wasn't anywhere around that night as far as you remember it?

A. Well, I couldn't recognize anybody, as far as I can remember.

Q. You couldn't recognize anybody?

A. No.

Mr. Bagley: All right, I believe that is all.

REDIRECT EXAMINATION

By Mr. Smith:

Q. Mr. Lesheski, you stated that you recall getting in your car and then leaving?

A. Yes, sir.

Q. And this man that you had picked up after

page 118] you had been stabbed or cut, was that someone in the trailer park or did you pick him up outside?

A. I picked him up on the other side of Dumfries.

Q. So that it was completely out of the trailer park?

A. Yes, sir, it was.

Q. Do you recall how much later it was that you came back to the trailer park that night?

A. It was a good while later. I couldn't tell you the time.

Q. And did you see Mr. Smith when you came back?

A. No, sir.

Q. But you do recall talking to Mrs. Smith?

Robert Wayne Lesheski

A. I talked to the girl there. I assumed she was Mrs. Smith when she said, "my husband."

Q. That is when she told you her husband didn't need a knife?

A. Yes, sir.

Q. And what was it specifically that she said, now?

A. She says, "You know that my husband didn't need a knife to take care of you," she says, "his hands is registered with the Commonwealth."

Q. "His hands are registered with the Commonwealth?"

A. Yes, sir.

Q. Did you know what that meant?

A. No, sir.

page 119] Q. Now, what was this — was it about Karate or something like that?

A. She mentioned something about he knew *ju-jutsu* and Karate, that's when I realized what she meant by having his hands registered.

Q. I see. And she asked you about the gun?

A. Yes, sir.

Q. I believe Mr. Bagley asked you if she asked you whether or not you did have a gun?

A. Yes.

Q. And what did you tell her then?

A. I told her "yes."

Q. Why did you tell her that then?

A. Because I didn't know where he was at and I was scared of getting hurt again.

Q. Were you still pretty much high at that time?

A. Well, I was dizzy and weak, I don't know whether from drinking or being stabbed, I had lost plenty of blood.

Q. You had not been to the doctor then?

A. No, sir.

Q. Well, I ask you, sir, did you have a gun?

A. No, sir, I did not.

Mr. Smith: Your witness.

Mr. Bagley: No further questions.

The Court: Thank you very much.

page 120] Mr. Smith: May this witness be excused? I have no further use for him unless the Court wants

him held.

The Court: Mr. Bagley?

Mr. Bagley' I see no reason for holding him. I think he could be excused, Your Honor.

The Court: Will you be available so that you could be reached?

The Witness: Yes, sir. I will be in Fredericksburg.

The Court: Fredericksburg?

The Witness: Yes, sir.

The Court: You don't feel you will need him?

Mr. Smith: I do not anticipate that I will.

The Court: All right.

Mr. Smith: I can't imagine what might come up. I have no objection to the Court holding him.

Mr. Bagley: Well, we might want to call him, if Your Honor please.

The Court: I think you better stay here for the rest of the day.

The Witness: All right.

(Witness excused.)

Mr. Smith: Mrs. Cowart, please.

Whereupon,

WILMA COWART

was called as a witness by counsel for Commonwealth, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

page 121]

DIRECT EXAMINATION

By Mr. Smith:

Q. Will you state your full name, please?

A. Mrs. Wilma Cowart.

Q. Where do you live, Mrs. Cowart?

A. Lot 1-B, Quantico — the trailer court.

Q. Were you living at that location on the 12th of June 1964?

Wilma Cowart

A. Yes.

Q. How long have you been living there?

A. Two days.

Q. Mrs. Cowart, I ask you if this picture here (indicating) portrays anything to you, if you recognize this picture?

A. *yes*, that's just about our trailer park.

Q. And can you recognize what would be your trailer in that picture?

A. Ours would be on this side of the chair.

Q. Down on this side, down below the chair, right here — it is not shown on this picture at all?

A. No.

Q. Mrs. Cowart, do you know Martin Thomas Smith?

A. Yes.

Q. Is he also a resident of that trailer park?

page 122] A. Yes, sir.

Q. Did you know Blaine Moore?

A. No, sir.

Q. Directing your attention to the 12th day of June 1964, did you observe anything taking place at that trailer park concerning two or three or four men?

A. Yes, sir.

Q. What did you witness?

A. Well, we had just come back from Alexandria —

Q. Who is "we?"

A. My husband and family.

Q. All right.

A. To turn in our U-Haul trailer, we had just moved in and there were a lot of the neighbors around there, they had been playing volley ball and they had been drinking some beer there, and we was only there maybe five or ten minutes when this station wagon drove up and Mr. Smith said that the guy had brought his meat, his deer meat, so he went across the street.

And they were over there to get his meat out of the car and this other car drove up and Moore and Leshenski were in that car, and they were just over there a few minutes and we heard their loud voices —

Q. Well, you say "their loud voices" —

Wilma Cowart

A. Some loud voices. It was Mr. Moore talking
page 123] to Smith and he said, "Where's my child's ball?"
And Mr. Smith said, "I haven't seen the ball."
And somebody yelled, "They're fighting." And so Mrs. Harteis and I went across the street and the scuffle was about ending then, and Leshenski said he had — that he had a gun in his car, that he would get it, and he went to the car— but he didn't get a gun.

Q. Did he make any motion into the car at all, Mrs. Cowart?

A. Yes, sir, he reached in like he was getting a gun.

Q. Then what did he do after he reached like he was getting a gun?

A. He held one hand behind him like this (indicating).

Q. Where were you standing at that time?

A. Behind him.

Q. How close were you to him?

A. I was about the fender of this car. I had went across the street, about to the fender of his car, the left fender and he was at the front door — at the door.

And he reached in like he got a gun and he put his hand behind him and he put his other hand out and he said, "Now, if any of you other guys want to fight" — but he didn't have a gun in his hand.

Q. Which hand did he have behind him?

A. I believe he had his right hand, I am not
page 124] sure that it was the right.

Q. And he held his other hand out and said, "Do any of you other guys want to fight?"

A. Yes, sir.

Q. And his right hand, or a hand was behind him like he had a gun?

A. Yes, sir, and he pointed to the other guys.

Q. At the other guys — and this time he told them he had a gun?

A. Yes, sir.

Q. And how far were you — at the left front fender?

A. No, the back.

Q. The back fender?

A. I had come around the back of the car.

Q. I see. And he was at the front door?

A. He was at the door.

Wilma Cowart

Q. What was the lighting condition at that moment, Mrs. Cowart?

A. Well, it was dark, it was about ten o'clock, I guess, when we got back it was around ten, when we got back and we did have a street light right by the trailer.

Q. And could you see and be absolutely certain that there was nothing in his hand that was behind him?

A. Yes, sir.

Q. Mr. Leshenski, that there was nothing in his hand that was behind him?

page 125] A. No, sir.

Q. Now, what happened after he said he was going to get his gun and — as between, as between the fight between Mr. Moore and Mr. Smith?

A. Well, Moore had gone back, he had come back across the street near where the chair is setting there (indicating), and Smith ran. And we came over — we came over to where Moore and Leshenski and everybody was, over on this side (indicating), and he kept saying he was mad and that he would kill Tom — that is, Smith.

Q. That was Moore, wasn't it, saying that?

A. Yes, sir. Yes.

Q. All right.

A. And he looked in my estimation pretty drunk. And he said that he would kill him and he was calling him names. And Leshenski kept telling him not to worry, he had a gun, if they wanted to fight, he had a gun — but he never went for it again.

Q. I see. And how long did you stay at this location when Mr. Moore was spouting off like that?

A. Maybe ten, fifteen minutes, fifteen to *wenty* minutes.

Q. Where was Mr. Smith all this time?

A. I guess he was in the trailer. His trailer.

Q. So from the time the first fight broke up and

page 126] until — when you came back over here (indicating on chart), and there was a crowd of people gathered around here (indicating), it was ten or fifteen minutes before Mr. Smith showed up again?

A. Yes, sir.

Q. And at that time you think he was in his trailer?

A. Yes — well, he came out the door.

Wilma Cowart

Q. Now when Mr. Smith came out the door, what called your attention to him, Mrs. Cowart?

A. Well, he yelled over and said something, "Come and" — I don't know exactly what he said, but it was something like, "Come get me. If you want me, come get me," or something like that.

Q. All right. And where is Mr. Smith's trailer on this picture?

A. I presume it is the second one on the left there.

Q. This one (indicating)?

A. Well, if that is the — he lived the second trailer up.

Q. I see.

A. From the corner.

Q. You presume this is Mr. Smith's trailer, then? (indicating).

A. Yes, sir.

Q. Now, he came out, you say — on the porch, like?

A. I don't remember the steps being there, but
page 127] anyway he came out of his yard, he was coming
out towards the street, but he didn't come out
into the street.

Q. And who did he direct his conversation to?

A. Mr. Moore.

Q. Now, tell the jury exactly what you understood his statement to be, Mrs. Cowart?

A. He said something, and then he said, "Come and get me," I believe he said, "I'm ready for you, come and get me," I thought, "Come and get me" I know he said something before that. And he had a whip in his left hand and a knife on his right side.

Q. Now, you say he had a whip in his left hand. Describe to the jury what this whip looked like?

A. Well, he was holding it by the handle, it was rolled up, I couldn't identify it —

Q. Had you ever seen it before then?

A. I saw him in the yard once, but I believe this was after — I don't know whether before or after.

Q. With the whip?

A. Yes, sir.

Q. What was he doing with the whip?

A. Just popping it.

Wilma Cowart

Q. How *die* he pop it?

A. With his hands, like.

Q. How long a gadget was it?

page 128] A. Well, it was more than three feet, I guess, I don't really know.

Q. Well, could you describe it by the distance between you and the judge or this gentleman over here (indicating) or me or the jurors or somebody?

A. I really don't know how long it was.

Q. But he was popping this whip in the yard, you say?

A. Yes, sir.

Q. And you believe that is the whip that he had when he came out that day and said, "Now, come and get me" — and the knife was strapped to his side?

A. Yes, sir.

Q. Now, what did Mr. Moore do then?

A. He took off, running across the street and he said, "I will" — he said he would kill the s.o.b. with his hands, he said he didn't need a gun.

He had asked where his wife was, before — in between the arguments — and Mrs. Moore came over then. He asked us where his wife was and we didn't — one girl knew his wife, and — well, he was talking about — he kept saying that he was going to get his gun, but he never did get it, neither.

But when Smith came out the door he said he didn't need the g— d— *gune*, he could kill her with his bare hands, and he went across —

Q. Would you describe his condition, the way

page 129] and manner in which he walked across the road?

A. He was kind of staggering, like, he was running and staggering at the same time, really.

Q. And then when he got across the street, what happened?

A. Well, they started fighting.

Q. Now, with fists, the whip, or what?

A. Well, they were — I remember seeing Tom with the knife in his hand, like this, like he was stabbing at Mr. Moore (indicating).

Q. I see.

A. And then I remember that they — I didn't see all of it. you know, because I was in and out of my trailer getting my children, trying to get them to bed and not to look at it.

Wilma Cowart

Q. How long did this fight go on, then, on that occasion, from the time that Mr. Smith came out and you recall him saying something to the effect, "Come and get me," and Moore running towards him and staggering towards him, how long did that fight take place?

A. I really *douldn't* tell you.

Q. But you recall seeing this knife and Mr. Smith going like this (indicating)?

A. Yes, going like that (indicating).

Q. I see.

A. They were going towards each other in a
page 130] bear-hug.

Q. You say you saw them in a bear-hug?

A. Yes, and I remember once before I went into the trailer, Mr. Smith's arms were around his back, going like this (indicating).

Q. Then, when you came out of the trailer after you saw Mr. Smith with his arms around him and going like that (indicating), where was Mr. Moore?

A. Well, he was in the bear-hug.

Q. All right.

The Court: Show the court reporter, he can't tell what you mean when you say "like this."

The Witness: Well, putting his arms around him, like in sort of a bear-hug.

The Court: All right.

The Witness: And at one time when I came out, Mr. Lesheski said, "He got me." And I didn't know how bad he was cut or anything, I went into the house and got a wet diaper and brought it out to him. And so he went in my trailer, I think, while I was out another time —

By Mr. Smith:

Q. Who is "he?"

A. Lesheski, went into my trailer. And then I went back in and somebody said that — that Smith had cut Moore, and I saw Moore laying out in the middle of the street with blood all the way down his trouser leg. And I —
page 131] Q. The front or back?

A. In back.

Wilma Cowart

Q. I see.

A. And so I was running in the house to get something to put on him. And Mr. Lesheski was then in the house and he asked if he could stay in there and I told him, "No, we just moved in," and I said, "We don't want to get involved in anything like this."

Q. Now, did you go back out and assist Mr. Moore?

A. Well, when I get back out there, he was sitting in the chair.

Q. All right.

A. I didn't see him, but I heard —

Q. Don't tell us what you heard. When you got back out there, he was sitting in his chair?

A. In the lawn chair — he wasn't in the lawn chair then, because I took the lawn chair up and told him to sit there, because I thought he was bleeding to death.

Q. And did someone sit him in the lawn chair?

A. Yes, someone sat him in the lawn chair and they got ice and water and put towels, wet cloths on his head.

Q. On his head — why? Was there anything wrong with his head, do you know?

A. No, he was in there — I thought he was dying, really, and they was just putting cold cloths to his head, his face and head.

page 132] Q. Then what did you do after that?

A. Well, really, nothing. We waited for the — my husband called the sheriff and we were waiting for the rescue squad.

Q. Where did Mr. Smith go after this, if you know?

A. I don't know. Back to his trailer, I presume that's where he went to.

Q. Did you at any time prior to coming back out and seeing Mr. Moore in the middle of the street on the ground, see him when he was on the ground next to Mr. Smith?

A. No, I didn't see them scuffling on the ground, really.

Q. But you did see this knife in Mr. Smith's hand?

A. Well, I can't really say that I saw the knife in his hands. I saw him moving like this (indicating), he was making the motions like he was going at Mr. Moore with the knife, he was going towards Mr. Moore with the knife and, really, with that kind of a knife in his hands, his hands couldn't have been

going like that without the knife in it, I mean.

Q. What happened to the whip, if you know?

A. I don't know. I never did see it again.

Q. You didn't hear it being used, you didn't hear it cracking?

A. I thought I heard it crack, one crack, he might have made a noise with it and then put it down, but I

page 133] didn't see him use the whip that night.

Q. *Piror* to this date had you known either Mr. or Mrs. Moore?

A. No, sir, I never seen Mr. Moore before.

Q. But you say you do recall that Mr. Moore really was drunk?

A. Yes, sir.

Q. Real drunk?

A. Yes, sir, he was drunk.

Mr. Smith: All right, your witness.

CROSS-EXAMINATION

By Mr. Bagley:

Q. Mrs. Cowart?

A. Yes, sir.

Q. When you first saw Mr. Moore and Mr. Smith, was it right after they first came into the trailer park?

A. I saw them —

Q. Did you see the car stop?

A. Yes, sir. Mr. Smith was over — about near the lawn chair, talking to us with the man with the deer meat and a minute or two later the other car drove by, right behind him.

Q. Had you *ala* been playing volley ball or something like that?

A. We hadn't, but the neighbors had.

page 134] Q. And you were talking with Mr. Smith in this area (indicating)?

A. Yes, sir.

Q. And the car drove up; and where did they park?

A. Over by his trailer.

Q. Along in here (indicating)?

A. Yes, sir.

Q. Okay. What kind of a car was it?

Wilma Cowart

A. It was a station wagon.

Q. Then did Mr. Smith go in his trailer?

A. No, sir he was there talking with the man with the meat.

Q. How many men were there, do you recall?

A. I really don't.

Q. Two or three?

A. Two or three men, I know it was more than one.

Q. All right. And it was about that time — or approximately what was the time period that the other car came?

A. It was just a few, just a couple of minutes. In fact, we thought that the two cars were together, that is how close they came to each other.

Q. Now, where did the second car park, do you remember?

A. Right in the road.

Q. In the middle of the road?

page 135] A. Yes, sir — well, yes — it was almost in the middle of the road.

Q. This street (indicating) is wide enough or just about wide enough for two cars to pass, is it not?

A. Yes — not much wider.

Q. Side by side. So would it be a fair statement to say that the other car parked along in this area (indicating)?

A. Yes, sir.

Q. And then what did you observe?

A. Well, Mr. Moore got out on the right-hand side and Mr. Lesheski got out on the left-hand side and Mr. Moore went around the car and that is when I heard this scuffle when he said, "Where's my child's ball?"

Q. That is when Moore said, "Where's my child's ball?"

A. Yes, sir.

Q. And did you see any blows struck at that time?

A. No, sir, I didn't. I didn't see Mr. Moore hit Tommy, hit Mr. Smith at that time.

Q. All right. Now —

A. Someone yelled "They're fighting," but I didn't actually see the blows.

Q. All right. You were in the trailer?

A. No, sir, we were over on this side by the cars, that kept us from seeing this, Lesheski's car.

Wilma Cowart

Q. All right. When did you next observe what
page 136] was taking place?

A. That is when someone yelled, "There's a fight," and that's when the fight was stopped, when Lesheski said he had a gun, if they wanted a fight —

Q. This is when you walked over?

A. Yes, sir, that is when I walked over across the road, yes, sir, on the other side of the car.

Q. Now, you said that you went over near the car — Lesheski's car?

A. Yes, sir.

Q. What part of it?

A. The left.

Q. Was it the rear fender, the left rear fender?

A. Well, by the left side of his car.

Q. So you would have been closer to this (indicating) trailer?

A. Yes, sir.

Q. Where was Lesheski at that time?

A. He was going into the car for his gun.

Q. All right. Now, would that be quite close to here (indicating)?

A. Yes, sir.

Q. Did you ever see Mr. Smith off his property at any time?

A. No, sir, not after he went over to see about
page 137] the deer meat.

Q. Everything that you saw, did it take place on this property (indicating)?

A. Yes, sir.

Q. And after Lesheski told these men that he had a gun, did Moore come away from there, then?

A. Yes, sir, he came across by where the chair is, on that patio over there (indicating).

Q. And where, if you recall, where did Mr. Smith go at that point?

A. Well, that is when Mr. Smith ran.

Q. Where did he run to?

A. Well I thought he run by his trailer — I don't know — or towards — he went back towards the end of his trailer, I guess, left end, I guess you would say from here — I don't

know whether — I saw him turn and go, because we came across the road, too. But Lesheski did not have a gun in his hands.

Q. But he had his hand behind him?

A. Yes, like he did have a gun, yes.

Q. Did you tell anybody then that he did not have a gun?

A. I didn't — he said, "Anybody else want to fight?" And somebody said, "No." And —

Q. Was that one of the men here (indicating)?

page 138] A. Yes, sir, somebody said, somebody answered, "No."

Q. All right. Was it at that point, then, that Mr. Moore left Smith?

A. It was just before he went to get the gun that Mr. Moore came over.

Q. All right. Do you remember what if anything Mr. Moore was saying? Was he threatening Mr. Smith, he was going to get him or anything of that kind?

A. Well, yes, he came over and he said that he would kill the s.o.b., and he said, where's my wife?"

Now, we didn't know who his wife was at that time and he said, "Mary," and then Mrs. Harteis — she did know *hiw* wife, but she didn't know where she was. But he kept cursing Mr. Smith and he kept saying that he would kill him, he would kill him and he wanted his gun —

Q. Was this real loud?

A. Yes, real loud. And he was —

Q. He said he was going to get his gun?

A. At that time he — Mary, his wife, came walking down the road and he says, "Go get my gun." And she looked up and she says, "Well, what's wrong with you?" And she never went to get the gun, she stayed right there, too.

Q. Where was Mr. Smith at this time — in his trailer?

A. I presume in his trailer.

Q. You are not sure where he was?

page 139] A. No.

Q. All right. Now, if you could remember, Mrs. Cowart, where were you when he was *king* all these statements?

A. Over to the right of the chair.

Wilma Cowart

Q. Over in this area in the vacant lot (indicating)?

A. Not in the vacant lot, we were over in the Dry's patio.

Q. This? (indicating)

A. Behind that chair is the Dry's patio, yes, sir.

Q. Here (indicating)?

A. Yes, sir.

Q. This is the Dry's trailer and yours is down here (indicating)?

A. Yes, sir.

Q. That is, people named Dry live there?

A. They used to.

Q. Were they there at the time?

A. Yes, sir.

Q. And were they in the group?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. Was there any conversation — don't tell me what it was, but was there any conversation between Mr. Moore, Mr. Dry or any of the other people?

page 140] A. Yes, sir.

Q. There was conversation?

A. When Mr. Moore was over there talking.

Q. And how long, if you can remember it, was it a short period or a long period of time before you saw Mr. Smith come out and make a statement to Mr. Moore before Mr. Moore went back across?

A. It wasn't too long, maybe ten minutes or so.

Q. It was ten minutes?

A. It must have been ten minutes because Mr. Moore was over there threatening and he had spoken to several of the guys over there.

Q. Do you recall whether anyone was urging him to go back over there or anything?

A. Not anyone other than Lesheski, he kept saying if they want to fight, he had a gun and he would use it. But the others did not entice him to go back.

Q. It was only Lesheski that enticed him to go back, if you recall?

A. Well, he didn't say, "Go get him," He just told them

that if they wanted a fight, he had a gun. He said that Mr. Moore didn't have to worry, he had a gun in his car.

Q. And prior to this Mr. Moore had said something about getting his gun?

A. Yes, sir.

page 141] Q. All right. Then do you remember when Mr. Moore went across after Smith, was Mr. Smith on his property?

A. Yes, sir.

Q. Did he at any time come off his property that you remember?

A. No, sir.

Q. Mrs. Cowart, do you remember whether there was a car between the Smith's trailer and the trailer next to them?

A. Yes, sir, a black car, this side of the trailer (indicating).

Q. Would it have been in this area (indicating)?

A. Yes, sir.

Q. Do you remember what kind of a car, by any chance?

A. Ford or Chevrolet, I don't remember which.

Q. Black?

A. Black, yes. It was the Wysingle's car.

Q. Wysingle's car?

A. Yes, sir.

Q. All right. Now, did you see Wysingle at any time that night?

A. No, I really — there was three guys up there, and I really don't —

Q. Over in this area (indicating)?

A. Yes, sir, over by the station wagon.

Q. By the station wagon?

page 142] A. And I didn't remember, really, who was up there.

Q. Now, was Lesheski's car a station wagon?

A. Yes, sir. It was about a '62 or '64 Ford.

Q. Let me go back now. Do you remember Mr. Moore, then, rushing over — or would you say that he rushed over to Mr. Smith's?

A. He staggered across the street, really to Mr. Smith.

Q. Did he get there in a hurry, or would you say that he

just lumbered over there — did he strike Mr. Smith with his body —

A. No.

Q. — or what actually happened?

A. Well, I didn't really see him when he first got to him, because the two wives were together, and we were watching their wives and I think that they struck the first lick —

Q. What were the wives doing?

A. They were fighting over by this other car (indicating.)

Q. Over by this trailer (indicating)?

A. Yes, sir, and Mrs. Moore and Mrs. Smith were fighting.

Q. And would you say, if you can recall, whether Mrs. Moore was drinking, too, or had been drinking or could you tell?

page 143] A. I couldn't tell if she had.

Q. What — do you have any idea what started this fight betwen the two women?

A. No. One of them said something. I don't remember what was said but the other one said, "Come on, you bitch, and fight me," and I don't know which one said it. That's all I heard.

Q. Now then, did any of you go over there other than Lesheski on this second contact between —

A. No, we didn't go to that one, no. We were out in the road, we weren't on his lot, we weren't.

Q. All right. You went back in the trailer, I think you said?

A. Yes.

Q. And Lesheski came over?

A. Well, I had gone in the trailer, I had gone out and my kids were crying and I was trying to — my husband told me to get them and put them to bed and as soon as the second scuffle started, he left to call the sheriff.

Q. Your husband did?

A. Yes, sir.

Q. All right. Do you remember Mr. Smith telling somebody to call the sheriff?

A. No, sir.

Q. You don't?

page 144] A. I didn't hear him.

Q. Now, you said that when Mr. Smith came out he had a knife strapped to his side, is that correct?

Wilma Cowart

A. Well, I didn't actually see — he had something strapped to his side, but I am not saying it was the knife, I presume it was the knife, but he did have something strapped there.

Q. Subsequent to that you saw a knife in his hand?

A. I am sure that I did.

Q. All right. Then I believe that you described that they were in a bear-hug or something?

A. Yes, at one time I saw them, they were like in a bear-hug.

Q. Did either one of them go to the ground, did you notice that?

A. I didn't see either one of them fall to the ground at that time.

Q. All right. Now what, if you remember, caused Moore to get away from Smith, do you remember that?

A. I didn't see them break.

Q. You didn't see them break?

A. When I came out the trailer, Mr. Moore was laying there in the street.

Q. He was lying in the middle of the street?

A. Well, he was — yes, he was, he was kind of
page 145] in front of that porch and he was lying in the
street, just this side of the breaker, I presume that's the breaker going across the street there.

Q. Is this (indicating) what you are speaking of?

A. Yes.

Q. This is where Moore was?

A. It was just this side, I am pretty sure, of that breaker.

Q. Just this side (indicating) of it?

A. Yes.

Q. He was walking, or he was lying in the street?

A. Well, when I first saw him, he was — he was lying in the street.

Q. Face down or on his back or what, if you recall?

A. No — I seen the back of his trousers with the blood running down.

Q. You saw the back —

A. I did see him walking and then I saw him lying down there. When he fell, I didn't see him fall.

Q. You don't know about —

Wilma Cowart

A. But I do remember seeing the blood running down his pants leg.

Q. Yes, ma'am, but you don't know whether he stepped over this thing (indicating)?

A. No, sir. I believe he was this side of the page 146] breaker.

Q. This side (indicating)?

A. Yes, sir.

Q. All right. Could you tell which way he had been headed before he fell?

A. Like he was going home.

Q. Like he was going home?

A. Yes, he lived two trailers up.

Q. And did he stay there or someone pick him up or what?

A. I don't know who helped him, I didn't see that.

Q. You didn't see that?

A. No, I was back in and out of the trailer, I can only say what I thought, I don't know who helped him up, if he got picked up or what.

Q. Yes, ma'am, and that is all we want, *wyat* you know, what you saw.

Now, do you recall at any time seeing a rifle?

A. Yes, sir.

Q. When did you first see the rifle in point of time, was it after the second altercation between Smith and Moore?

A. Yes, sir — well, when I came back out of the trailer again, I had — I saw the rifle there at my chair, we had two lawn chairs there, Mr. Harteis and I had just put the chairs over there just a few minutes before —

Q. In this same area (indicating)?

page 147] A. Yes, sir.

Q. And the rifle was near the chair?

A. Yes, sir, it was under, kind of under my lawn chair.

Q. And was anyone in your lawn chair — was Mr. Moore in your lawn chair?

A. Yes, that's when Mr. Moore had sat down in my lawn chair.

Q. All right, and was it at this time that the sheriff came?

A. He was still in the lawn chair when the rescue squad and sheriff got there.

Q. Did you at any time see Mr. Lesheski pick up this rifle?

A. No, sir, I did not.

Q. You did not, all right.

Now, do you remember whether in the second altercation — and I realize that you were in and out of your trailer — Mr. Smith and Moore were up against this car parked there (indicating)?

A. No, sir, I never saw them near that car.

Q. You didn't notice them there?

A. No, sir.

Q. All right. Were they ever up against the trailer here (indicating), do you recall?

A. No, sir, not that I saw them.

page 148] Q. All right. Were they ever up against the trailer here (indicating), do you recall?

A. No, sir, not that I saw them.

Q. Were they in the middle here, on the patio there (indicating), or could you tell?

A. No, they were at the end of the patio.

Q. You mean this in here (indicating)?

A. Yes.

Q. Now, was this station wagon still parked here (indicating)?

A. Yes, sir.

Q. All the time?

A. Yes, sir.

Q. And was the Ford of Lesheski's parked here (indicating)?

A. Yes, sir.

Q. During both altercations?

A. Yes, sir.

Q. This car (indicating) had never been moved from the time it first arrived?

A. No, sir.

Mr. Bagley: I think that is all.

REDIRECT EXAMINATION

By Mr. Smith:

Q. Mrs. Cowart.

page 149] A. Yes, sir.

Q. Did you see a rifle at any time prior to the

time that Mr. Moore got stabbed?

A. No, sir.

Q. You say when Moore went across to meet with Smith in the second altercation, he staggered across the street?

A. Yes, sir — well, he wasn't really walking, he wasn't really running, but he was going pretty fast, but he was staggering, too.

Q. Now, between the first and the second altercation when Mr. Moore was apparently back in this vicinity (*indicatint*) and using some loud and profane language and talking about he was going to kill the s.o.b. and all that, were the neighbors dispersing or were they still staying in this general area?

A. The only ones there was the ones that were there when it began; nobody else had come out.

Q. And you heard all of this loud boisterous talk that he was talking?

A. Yes.

Q. And his wife, you say, walked up and asked — what?

A. He says, "Mary, where's my gun?" Or, "Go get my gun." And she says, "Well, what's wrong with you?" And that's all she says to him. She never left to go get it.

Q. But between — would you tell us how much
page 150] time elapsed between the first altercation ending
and the *secone* one beginning, Mrs. Cowart?

A. I wouldn't say over ten or fifteen minutes because he spoke to several of the men around there, he said, "I'm not mad at you, I'm your friend, you know me," —

Q. A typical drunk?

A. *Welll* — yes.

Q. But you wouldn't say it was over fifteen minutes, somewhere between —

A. I would say it wasn't over fifteen minutes.

Mr. Smith: I have nothing further.

The Court: Mrs. Cowart, on the second go-round, did the wives fight first or did the husbands start fighting first?

The Witness: Well, Mr. Moore went towards Mr. Smith and I remember Mary went across the street and one of them —

The Court: Which one is Mary?

The Witness: Mrs. Moore.

Wilma Cowart

The Court: Mrs. Moore?

The Witness: Mrs. Moore. I don't remember exactly what one of them said, but then the other one said, "Come in, you bitch, and I'll fight you."

The Court: And they started *fightint*?

The Witness: Yes, sir.

page 151] The Court: Had the men started to fight before the women started to fight?

The Witness: About the same time, I guess, they kind of went together.

The Court: Now, during the first fight, did Mr. Lesheski take any part in that fight?

The Witness: I don't know. I didn't see the licks that were passed in the first scuffle.

The Court: How long did the first scuffle last?

The Witness: It didn't last very long, maybe five minutes or a little longer.

The Court: With regard to the second scuffle, did Mr. Lesheski take any part in that fight?

The Witness: Yes, he went over — I believe Mr. Moore went around Lesheski's car and Mr. Lesheski went around the front of it.

The Court: But when the fight started, was Mr. Lesheski there at the scene of the fighting?

The Witness: Yes, sir, I am pretty sure he was there.

The Court: Could you tell whether or not he had taken an active part in the fight?

The Witness: Yes, he was right up there fighting, the three of them was scuffling. He was really right up in there, but I *couldn's* say, I couldn't really say I saw him hit

page 152] Tom.

The Court: Do you recall how long it was that Mr. Lesheski was there?

The Witness: Not very long, because he says, "You cut me," or "You got me," or something like that, he said and that is when I went to get a wet towel.

The Court: Well, can you recall whether it was a case of Mr. Smith fighting Mr. Moore, just the two of them, or was it a case of all three fighting each other, was it Smith against both Mr. Moore and Mr. Lesheski?

The Witness: Well, Mr. Lesheski wasn't over there very long before he got cut and he left, I mean he came on over across the street and then it was Mr. Moore and Mr. Smith continuing the fighting.

The Court: It is your recollection that he had taken an active part in the fighting, Mr. Lesheski?

The Witness: Yes, he was going to help Mr. Moore.

The Court: Did he say so?

The Witness: Yes.

The Court: All right.

Mr. Smith: I have nothing further of her, Your Honor.

The Court: Thank you, Mrs. Cowart.

(Witness excused.)

Mr. Smith: Call Mr. Dry.

page 153] Whereupon,

LACEY DRY

was called as a witness by counsel for Commonwealth and having been first duly sworn by the Deputy Clerk, was examined and *and* testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. Will you state your full name, please?

A. Lacey Dry.

Q. Where do you live, Mr. Dry?

A. Woodbridge.

Q. Directing your attention to the 12th day of June 1964, where did you live?

A. Quantico-Triangle Trailer Court.

Q. How long had you lived there, Mr. Dry?

A. Moved there on Sunday, May 10th of this year.

Q. Did you know Mr. Blaine Moore?

A. Yes, sir.

Q. Do you know Thomas Smith, Thomas Martin Smith?

A. Yes.

Q. Directing — or Martin Thomas Smith, excuse me.

Lacey Dry

A. Yes, sir.

Q. Now, directing your attention to the 12th day of June 1964, did you have occasion to see either Mr. Smith or Mr. Moore late in the evening at the Dumfries Triangle

page 154] Trailer

A. Yes, I seen them.

Q. Both of them?

A. Yes, sir.

Q. Approximately what time was it when you saw them there?

A. It seems to me it was about, oh, I would say about seven o'clock on that night, and Mr. Moore, I seen him about ten minutes after, when he drove up.

Q. What had Mr. Smith been doing around the trailer court from the time you had observed him early in the evening up until the time that Mr. Moore drove up?

A. We had been out there playing volley ball. He had been out there playing with us.

Q. Were you playing volley ball?

A. Yes, sir.

Q. Were you all having anything to drink?

A. I wasn't.

Q. Had Mr. Smith had anything to drink?

A. The rest of them was drinking beer.

Q. When Mr. Moore came up, what happened, Mr. Dry?

A. Well, Mr. Moore's car was following this other car and Mr. Moore got out of the car and he slugged Mr. Smith.

Q. Was there any conversation? Did you hear any conversation before Mr. Moore slugged Smith?

A. I heard no words.

page 155] Q. Did you see the slugging?

A. Yes.

Q. And then after that what happened between the two men?

A. Well, Mr. Moore, Blaine got on — Smith got out from him, though, and run in the trailer.

Q. I see.

A. And Mr. Moore come back over there where I live.

Q. Where were you standing? Where were you at that time?

Lacey Dry

A. You see where that *char* is setting there in that picture?

Q. Yes.

A. Well, you see that little block there, at this side of that chair was a little patio, patio of my trailer — there ain't no picture of my trailer there — and I was standing right there, about where that chair is — it wasn't there at that time.

Q. I see. You were standing in this vicinity, in the vicinity of this chair here (indicating)?

A. Right, the first fight.

Q. That is where you were during the first fight?

A. Right there at the edge of the road, yes, during the first fight.

Q. All right. Now, where did the fight take place?

page 156] A. Right there (indicating).

Q. Here (indicating)?

A. No.

Q. Here (indicating)?

A. Right there.

Q. Here, all right.

A. Yes, right there.

Q. Where there are these trash cans or what appear to be trash cans?

A. Between those two trailers.

Q. Between these two trailers (indicating)?

A. Yes, sir.

Q. All right. How long did that first fight take place? How long did it last?

A. Well, that was just a short one, that was just one good lick on Tom, and then he got out and was gone.

Q. I see. And after the fight you say Mr. Smith ran into his trailer. Did you have a conversation with Mr. Blaine Moore?

A. Yes, sir.

Q. And this had taken place over here (indicating)?

A. Yes, sir — a little bit back more this way (indicating).

Q. Now what was Mr. Moore's condition of sobriety, how was he acting at that time?

page 157] A. Well, he said he was mad, that is his exact words, he said, "I am mad," he says, "I'm so *made* I'm shaking," and he held his hands out and they were

Lacey Dry

just trembling like this (indicating).

Q. Could you tell whether or not he had been drinking?

A. Well, it appeared that he had been. Now, whether he was so mad and upset that was causing him to do that, or whether it was from drinking, as far as smelling, there wasn't no rank smell to him.

Q. Now, how long were you there talking to him, Mr. Dry?

A. I would say it took maybe not over ten minutes, not less than five minutes, between the times.

Q. Between the times of what?

A. The time from Smith went into his trailer and Mr. Moore come back across the road and — well, you might say he was letting off steam and talking to me there.

Q. All right. And then did Mr. Smith appear back on the scene?

A. Yes, sir. He come out on his porch.

Q. Now, how long from the time that Mr. Smith disappeared was it until he came back on the porch?

A. How long was the time?

Q. Yes, sir, how long, approximately?

A. Well, like I said, it was not less than five page 158] minutes, but it wasn't over ten minutes.

Q. I see.

A. I could be just about certain of that.

Q. All right. Now, when Mr. Smith came out on the porch, Where was Mr. Moore and where were you at that time?

A. Back — just back, towards you from that chair a little bit, right in front of my trailer, on the edge of the concrete, that patio there.

Q. You all were back in here (indicating)?

A. Yes, sir.

Q. All right. Now, Moore was still blowing off steam?

A. Yes, sir. Well, he had quietened down, fast, I mean, but at first, when he come back over there, there was a whole lot of steam, I mean.

We had a little old volley ball net tied there to one end of my trailer there, and he run over that, he kicked that down and he was cussing a little bit and kicked his shoe up in the air, but he had quietened down, he was talking to me without raising his voice too much by the time that Smith come back out of his trailer.

Lacey Dry

Q. What happened when Smith came back out of his trailer?

A. Well, he stood there about, oh, less than a minute, it wasn't over a minute, it was just a little bit —

Q. Smith, you are talking about?

A. Yes, sir.

page 159] Q. All right. Go ahead.

A. And then he said, "Now come over here and I'll cut your damn guts out," that's the exact words Smith quoted to him.

Q. Who was he addressing that conversation to, Mr. Dry?

A. Mr. Moore.

Q. What did Smith have with him, if anything, at the time, did you observe?

A. Well then, when he said that, he come walking off his steps, oh, not quite to the edge of the road like, oh, he lacked roughly about six foot being at the edge of the pavement.

Q. Generally in here, somewhere (indicating)?

A. Yes, sir, right in there.

Q. All right. And you say that he stood up here on the porch for a minute or so before that?

A. Yes. He stood up there. His wife come out with him, too, now.

Q. And they stood up there approximately a minute?

A. Yes, sir.

Q. And then he came out to here (indicating) and said, "Come here and I'll cut your guts out?"

A. "Your damn guts out."

Q. All right.

A. That's what he said.

Q. All right. Now, did you observe whether or page 160] not he had anything with him at this time?

A. Yes, sir.

Q. What did he have with him?

A. On his right side he had some kind of a little sheath, or at least that's what I call it, some people might call it a holster, now, anyway, it's something to carry a knife in, you can call it a *sheat* or a holster, either one.

Q. All right.

A. In his left hand he had that old bullwhip that he showed off with.

Lacey Dry

Q. He had an old bullwhip — describe to the jury what "an old bullwhip" is?

A. What an old bullwhip is?

Q. Yes. You used that term, "old bullwhip." Would you describe to the jury what an old bullwhip is?

A. Well, I mean — I don't necessarily mean it was old, it could have been a new one, I mean it could have been around, but — well, it had a handle on it, and I never did pay too much close attention to it but I would say it was about six feet long, at least, and you can make it pop something like a gun, you know.

Q. Had you ever seen Mr. Smith using this whip before?

A. Yes, sir.

Q. Where had you seen him use it?

A. On the Wednesday night before that, right

page 161] in front of my trailer, again, he was beating a man with his about six-months' old baby with that same bullwhip on Wednesday night, before Mr. Moore got killed on Friday night.

Q. Did he actually hit the man with the bullwhip?

A. As far as hitting him in the face, no, but the old bullwhip went around the man, he wrapped the thing around the man.

Q. When Mr. Smith came out of his trailer here (indicating) and came down about to here (indicating), he had the bullwhip in his left hand and the sheath strapped to his right side?

A. Yes, sir.

Q. And he said, "I'll cut your damn guts out?"

A. Yes, sir.

Q. Now, what happened after he said that?

A. Well, when he said that, Mr. Moore turned. Mr. Moore had a hold of me, I mean, he wasn't actually bothering me, he was burning me up a little bit, you know, he — well, you know how you grab somebody, you know with his hand like that (indicating), and — well, he turned and started just walking over that way. I mean, he just made a direct bee-line to where he was at.

Q. He went on across to Mr. Smith?

A. Yes, sir, on across the road.

Q. Now, when he walked, did he appear to walk normal or was it in an abnormal manner?

Lacey Dry

A. (No response.)

page 162] Q. Describe the manner in which he walked across the street to meet Mr. Smith.

A. Well, he wasn't staggering, it wasn't no crooked walk, he went on a straight line. I mean, he was a good-sized man, I mean in my opinion, and maybe it's because I'm so little that he looked so big. And —

Q. He was a big man, all right, was he?

A. Yes, sir.

Q. Heavy man?

A. Yes, sir.

Q. All right. Now, he went across the street. Did you hear anything that he had to say?

A. I heard no comments from him.

Q. And were there any other comments you heard from Mr. Smith?

A. No, sir.

Q. Now, what happened when he went across the street?

A. He went — while he was walking, he had his arms out like this (indicating), you know, like he was going to reach for something and when he got to Mr. Smith he put what I call a bear-hug, you know, kind of went on him, and there was a car behind, just about — just about back of Mr. Smith, and he had him right up against the car — he was a powerful man.

Q. And what happened then?

A. Well, he had his arms around Smith and

page 163] Smith then had that knife in his right hand with the blade held downwards, it wasn't no upward stab, and come around him, come around him, around the back with a downward stroke, twice, into him. (indicating).

Q. Yes.

Now, I ask you if you have ever seen an instrument that looked like this (exhibiting)?

A. (No response.)

Q. For the record, this is identified as Commonwealth Exhibit No. 3.

A. I couldn't say that was the knife but the blade is about the same length of the blade of the knife that was in his hand, right like this (indicating).

Q. I see.

Lacey Dry

A. And I was between six and eight feet from where Mr. Moore got stabbed, I stopped behind him.

Q. And at the time the knife was in this man's hand like this (indicating), Moore had a bear-hug on Smith?

A. He had him pushed there, you know.

Q. Against the car?

A. Yes, sir.

Q. Backed up against the car?

A. Yes, sir.

Q. What happened then?

A. Then this other — I can't say his name —

page 164] Q. Lesheski?

A. Yes, sir, that's him. He went over there, I guess to help out. Now, he come in between Blaine and Smith, facing me — I'd say that he come in from the right side, it would be from my *lift* from here, and he got stuck in the — well, he got stuck in the side, now, I couldn't —

Q. Did you see both of these men get stuck?

A. Yes, sir.

Q. After Mr. Blaine Moore had got stuck or stabbed, what did he do?

A. Well, after Smith got him with the knife a couple of times, Blaine, he walked right up the side of the car — his trailer was two more trailers up —

Q. This is Smith's trailer here (indicating)?

A. Yes, sir.

Q. Moore's is up here (indicating)?

A. At that time, yes, sir, it was.

Q. All right. And after he got stuck, he came up alongside of his trailer?

A. Yes, he went up thataway (indicating).

Q. He came this way (indicating)?

A. Yes, sir.

Q. And where did he go?

A. (No response.)

Q. If you know?

page 165] A. Went into his trailer.

Q. He did go into his trailer?

A. Yes, sir.

Q. And did you see him any more after that?

A. Yes, sir. He come back.

Lacey Dry

Q. He did come back?

A. He come back down the road, right in the middle of the road.

Q. I see.

A. But when he come back in the road he was — he was partly slumped and he was partly staggering and swaying a little bit, and he had a rifle in his hand.

Q. How was he carrying the rifle — up, or was he dragging it along?

A. It was just — if it wasn't dragging, it was the closest thing to be drug.

Q. And he was sort of slumped?

A. Yes, sir. He had it by the barrel.

Q. And he was coming down here like that (indicating)?

A. Yes, sir.

Q. And what did he do?

A. And when he got — you see where that chair is, setting right there?

Q. Yes.

A. Well, straight on over thataway —

page 166] Q. This way (indicating)?

A. No, back this way, back towards the back of my lot.

Q. Back here (indicating)?

A. No, up a little.

Q. Here (indicating)?

A. No — whoa — about six feet from where that chair is, is where he slumped. And me and two others, we picked him up, and that is when that chair was moved, and put him in that chair, and then we started getting pans of water, you know, and started — well, helping him, or trying to help him, there wasn't none of us that was too smart about fixing up something like that, you know.

Q. All right. Where was Mr. Smith during all this?

A. He had went back inside after he stabbed Mr. Moore, he went inside his trailer and did not come back out until Sheriff Hardisty or Deputy or whoever it was, got there.

Q. I see. Now then, you all tried to help Mr. Moore?

A. Yes, sir.

Q. Did anything else happen after you started to help Mr. Moore? Did you see Lesheski any more?

Lacey Dry

A. Oh, yes, he was around there, he was — he had a baby diaper or something to patch up his wound, you know, up here (indicating).

Q. Did you see him there with the rifle —

A. Yes, sir.

page 167] Q. And saying, "Everybody back?"

A. Yes, sir.

Q. Was Smith around at that time?

A. No, sir.

Q. What did the people do when he ordered them to leave them alone?

A. Well, we tried to explain to him that we was helping him — of course, I mean, he wasn't actually ordering any of us — but there was five or six of us up there, you know with pans and wash cloths and towels helping him, and he wasn't necessarily ordering us, he said, "Everybody get back now, and leave him alone."

Q. And did you see his bullwhip any more?

A. No, sir. I don't know what happened to the bullwhip.

Q. And then after Mr. Lesheski appeared and you acquainted him that you were trying to help him, what happened to him, if you know?

A. *Who'se* that, Lesheski?

Q. Yes.

A. Well, he stayed there, he got to talking back, about he had to get away from there, because he was already in trouble, you know.

Q. Now, were you present when the rescue squad came?

A. Yes, sir, I helped them to pick him up and put him on the stretcher, I had a hold of the chair.

page 168] Q. Mr. Dry, you said that he had him in a bear-hug and Smith had this thing (indicating) and he was cutting at his back?

A. Yes, sir.

Q. Was there any blood, did you see any blood at all on Mr. Moore in the vicinity of his back at all?

A. There was blood all over his back, *he* shirt and his *paints,* and we put him on that chair —

Q. Could you tell where the wound was in his back?

A. Yes, sir, he had a big hole there.

Q. Point out on my back to the jury where it was.

Lacey Dry

A. Well it looked like right about in here (indicating), because when *the* picked him up on the stretcher, there was an awful big glob of blood about the size of my fist that tumbled out on my patio.

Q. Now —

The Court: Mr. Smith, would you indicate for the record where he pointed?

Mr. Smith: Yes, Your Honor.

By Mr. Smith:

Q. Point that out for the record.

A. About right in there, that is where he was stabbed (indicating).

Mr. Smith: Your Honor, just about my pelvis, between my pelvis and the ribs and pretty close to the spine, page 169] is where he pointed.

The Court: On which side of your back?

Mr. Smith: On my right.

The Court: Thank you.

By Mr. Smith:

Q. Did you notice any cuts about Mr. Moore's face and hands or any other portions of his body?

A. No, sir, no other cuts — I mean, he was right bloody, I mean, it would be pretty hard to tell if he had other small cuts.

Mr. Smith: Your witness.

The Court: Mr. Bagley, will your examination be extended?

Mr. Bagley: It might be, Your Honor.

The Court: In that event, I think that we will take about a five-minute recess.

(Thereupon, a recess was taken.)

CROSS-EXAMINATION

By Mr. Bagley:

Q. Mr. Dry, how well did you know Blaine Moore?

Lacey Dry

A. We were good friends. He drove to work with me. I seen him every day at work on the job.

Q. Quite a large fellow, wasn't he?

A. I can't understand you. Talk a little louder.

Q. Quite a large man, wasn't he?

page 170] A. Good size fellow.

Q. I believe you said a while ago that he was a powerful fellow?

A. He was.

Q. How did *he* know he was powerful?

A. How did I know he was powerful? I heard him telling how in his younger days he could whip a whole *beear* joint full by himself, that's how I drew my conclusions that he was powerful.

Q. Now, did I understand you to say that you heard Mr. Smith, when Mr. Moore was talking with you, you heard Mr. Smith say that he was going to cut somebody's damn guts out?

A. Yes, sir.

Q. All right. What did Mr. Moore say?

A. He said nothing.

Q. He didn't say anything?

A. No, sir. He started, he started over that way. He said, "Come over here now and I'll cut your guts out," and he just turned and looked and started going.

Q. I see. Had he said anything prior to this time about getting a gun, Moore?

A. No, sir. He said he didn't need a gun, he could kill him with the bare hands.

Q. He didn't ask his wife for a gun?

A. He said — Moore?

page 171] Q. Yes.

A. He didn't ask —

Q. He didn't ask Mary Moore where his gun was?

A. Yeah.

Q. He did?

A. Yes, sir.

Q. All right. Now, this was before he went over there the second time, wasn't it?

A. Yes, sir.

Q. You heard what Mr. Smith said across the street, but

you didn't hear Mr. Moore say anything?

A. I know he didn't say nothing back, because he had a hold of him when he left.

Q. Did he say anything to him before that?

A. About what?

Q. Before Smith said anything, did Moore, did Mr. Moore say anything?

A. Oh, yes, he was talking to me before Smith ever come out of the trailer.

Q. But he wasn't talking loud enough for anybody else to hear him?

A. Oh, yes.

Q. He could be heard?

A. Oh, yes.

Q. All right. And then I think you said that

page 172] you saw Mr. Moore going across the street with his hands outstretched like this (indicating)?

A. Not that wide. More or less to the front.

Q. Like this (indicating)?

A. Yes, sir.

Q. Where was this fellow Lesheski at that time, do you remember that?

A. Lesheski?

Q. Lesheski.

A. Lesheski, he was back — he was to the right of Mr. Moore and I.

Q. Then I believe you said that you were within eight feet of Moore and Smith and they were backed up against the car?

A. That is correct. I was just in the road. I didn't get all the way across the road.

Q. Now was this car located along in here (indicating), the car that was parked there?

A. Yes, sir.

Q. All right, and you came — what? You say within eight feet?

A. Yes.

Q. In the middle of the street?

A. What?

Lacey Dry

Q. About in the middle of the street is where you got to?

page 173] A. Yes, sir, maybe a little more to the — a little more, past the middle.

Q. All right, and I believe you said you saw Mr. Smith stab —

A. Yes, sir.

Q. Mr. Moore twice in the back?

A. Yes, sir.

Q. And I believe you indicated that the knife here (exhibiting) was being held like this (indicating), is that right?

A. (Taking knife) Like this (indicating), coming around like this, that is absolutely the way he was stabbed.

Q. I see.

A. Not like this (indicating).

Q. I see.

A. Positively coming around like that (indicating), twice, and you could hear the grunting going on.

Q. All right.

Mr. Bagley: Your Honor, may we for the record show that the witness demonstrated with the knife held in his right hand with the blade down from the *smallef* finger of the right hand and that he made motions across a body from the right to left.

By Mr. Bagley:

Q. All right, and then what happened after you saw him stab Moore twice, what happened then if you remember?

page 174] A. That is when Lesheski, or however you say his name, that is when he come from the side, looking to pull them apart, and that is when he got uppercutted, though.

Q. I see.

A. He got uppercutted like that (indicating), and then he jumped back and Smith had broken loose from the way that Mr. Moore had him and went to his trailer and Mr. Moore went up the street.

Q. All right. Then your statement is that he had the knife the way you just held it and then that he changed positions

with the knife to uppercut Lesheski?

A. Whether he changed it in his hand or not I don't know, but it come up , in other words, he couldn't come, he couldn't come the same way and get Lesheski the same way that he got Mr. Moore.

Q. I see. All right, now, where were Mrs. Moore and Mrs. Smith at that time, if you remember?

A. That trailer next to you, right there in the corner there.

Q. Right here (indicating)?

A. Yes, sir.

Q. Were they between this trailer and this trailer?

A. Right there where your pencil is at, that is right at the very exact spot that they was at.

Q. Then were they between the car that was
page 175] parked here and the trailer (indicating)?

A. Yes, sir.

Q. All right. Then Moore and Smith were right there at the tail end of this car, is that right, at the back of the car?

A. No, more the side of the car.

Q. Side of the car?

A. Yes.

Q. All right. Then presumably *theh* would have been, and you correct me if I am wrong, presumably they would have been at the right rear fender of that car that was parked there, would you say that?

A. (No response.)

Q. This car was pulled in directly, was it not, with the rear end back here (indicating), do you remember that?

A. (No response.)

Q. Was the rear end like this (indicating)?

A. It was on a slant, I mean it was more or less slanting.

Q. But the rear end was back here, wasn't it of the car?

A. Yes, sir.

Q. It wasn't backed in there, was it?

A. No, sir, the thing wasn't backed in there.

Q. All right.

A. I mean, there was one already in there, it was already setting back in there.

page 176] Q. Yes, that is what I am talking about the car parked in between the trailers.

A. There were three cars there, though, you know.

Lacey Dry

Q. Where were all these cars located?

A. One of them was back in there, one of them was in there on a slant and the car Mr. Moore came in was more or less down the street in front of the — well, it had been moved, though, by that time, yes, sir.

Q. Whose car had been moved?

A. The one Mr. Moore come in.

Q. Was that his car or Lesheski's car, do you know?

A. It wasn't Mr. Moore's now, Lesheski was driving the car and whether it was his or not I don't know, but Mr. Moore had a Chevrolet.

Q. Now, how much, can you say how much taller than you Mr. Moore was?

A. How much taller than I was he was?

Q. Yes.

A. Was Mr. Moore than I was?

Q. Yes.

A. Well, the top of my head wouldn't hardly come to his shoulders, something like that. He was a good head bigger than I was.

Q. A little wider than you?

A. Oh, yes, he was wider than I was.

Q. How tall are you, sir?

page 177] A. I claim five foot, I don't know, and about four or five inches with my boots on, or more.

Q. Now then, I believe you stated that Mr. Smith had a whip?

A. Yes, sir.

Q. An old bullwhip?

A. Yes, sir.

Q. And what did he do with it if anything when you saw him come out of the trailer?

A. I don't know what happened to the whip. The whip wasn't used on Mr. Moore.

Q. I see.

A. I mean, when Mr. Moore grabbed him, what happened to the whip I couldn't tell you, but the whip was in his hands when he came out the trailer, whether he throwed it down on the porch and just used the knife or not, I mean I couldn't tell you.

Q. And you said that you saw the sheath —

Lacey Dry

A. Yes.
Q. — at his side?
A. Yes, sir.
Q. Could you see whether he had a knife at the time that he came out?
A. When he come out the knife was in that thing.
Q. It was in it?
page 178] A. Yes, sir.
Q. Now, at this point you were over here (indicating on chart) with Mr. Moore, weren't you?
A. Yes, sir.
Q. And Mr. Smith was here (indicating)?
A. Yes, sir.
Q. Right on the steps?
A. Yes, sir.
Q. What kind of illumination, what kind of lighting do you have there?
A. Very good. There is a big spotlight right at the corner, oh, about four foot from where that chair is setting, about where your thumb is.
Q. Here (indicating)?
A. Right. I mean, it is light enough that we can sit there and we can play ball, which we were doing, play cards. And there is another street light right up the street, too, on the opposite side of the road.
Q. In other words, you all were playing volley ball in here (indicating), weren't you?
A. Yes, sir — well, we had played up to a quarter — about five after ten — I mean, at that time of the night if we had been playing volley ball, it had to be lit up pretty good, I mean.
Q. All right, now. Now, you said when Mr.
page 179] Moore, when Blaine Moore first came out, he just went on in and hit Smith a good lick and then backed away, is that correct?
A. Yes.
Q. Just what did first happen on that first go-round?
A. When he hit him?
Q. He struck him with his fist, didn't he?
A. *First* or palm of the hand, one or the other.
Q. Struck Smith?

Lacey Dry

A. Yes.
Q. I see.
A. Correct.
Q. All right, and then he came right on across the street?
A. Yes, he wandered over there to where we was at.
Q. Did you see at any time what Mr. Lesheski was doing at that time when Moore struck Smith?
A. No, sir, I mean, I wasn't paying too much attention, I mean, he —
Q. You mean you were more or less paying attention to Moore, weren't you?
A. Yes, sir.
Q. Because you knew him?
A. Yes, sir. I knew who it was.
Q. All right. Did any of you over here (indicating) when Mr. Moore came over here after hitting that first good blow —
page 180] A. Yes, sir.
Q. And he came over here, did any of you try to stir him up to try to get him back over?
A. No, sir. There was — as a matter of fact, Lesheski was trying to keep him from it, I mean, get him out of there, in other words.
Q. Did Lesheski at any time say, well, "You don't need a gun because I got one?"
A. Yes, sir.
Q. He did say that to Mr. Moore?
A. Lesheski said that he had a gun..
Q. I see.
A. Now, that's what he said, "I got a gun."
Q. All right, sir. Now, I believe you said you have seen Mr. Smith use this whip.
A. Yes, sir.
Q. And what do you say he did with it?
A. Beat a man and his baby with it.
Q. And he hurt them?
A. Well, I don't reckon that he hurt them, but he sure was hitting them with it.
Q. He was hitting the child with the whip?
A. As far as I know, he didn't hit the child. The man had the young one in his arms, shielding — I mean, you know,

how they hold a baby, I wouldn't — I ain't got no young ones, so I wouldn't —

page 181] Q. He didn't hit the man, did he?

A. Yes, he hit the man with the whip, hit the man.

Q. Where did he hit the man?

A. On the side (indicating), and wrapped it around him, around his waist.

Q. I see. And then what happened?

A. Well, the man he was hitting was saying, "Stop, stop, don't" — well, trying to tell him to put it down and then Smith, he throwed his whip down — you know, he claims to be a big Karate or Japanese fighter, an expert, and he went over there and kicked him and throwed a few arms around the man while the man was holding the baby.

Q. Did he ever harm the baby?

A. I don't know whether he hurt the baby or not, I didn't check the baby.

Q. Did you check the man?

A. I didn't check the man neither. All I am trying to tell you is, I know he hit the man. As far as I know, I don't think he hit the baby. But I know he hit the man.

Q. When was that?

A. Wednesday night before Blaine Moore got killed on Friday night.

Q. Who is the man that you are talking about, do you know who the man was?

A. I know his face — Bill Coffey, or somebody like that.

page 182] Q. Bill Coffey or somebody like that?

A. Somebody like that name. You see, I didn't associate with him.

Q. All right. And where did that take place?

A. Right there in front of my trailer again.

Q. Over in here (indicating)?

A. Right, right.

Q. You don't think that he and this other man were just fooling around, do you?

A. I —

Q. Or do you think that he was trying to hurt him?

A. I don't know whether he was trying to hurt him or not.

I was sitting right there in the door with my shotgun in my hands. I knew he wasn't going to hit me with that whip.

Q. You held a *shutgun* —

A. Yes, sir, I had a shotgun, I had a shell right in it, yes, sir.

Q. Did Mr. Smith know you had that shotgun?

A. I don't know whether he did or not.

Q. You didn't tell him?

A. No, but if he was too blind to see me sitting there with it in my hand — I didn't have to tell him.

Q. In other words, you were sitting here (indicating), in your trailer?

A. Right, with the door wide open.

page 183] Q. With the shotgun?

A. Yes, sir.

Q. All right.

A. Because I don't go for that old bullwhipping stuff.

Q. He never made — he never made any attempt to hurt you with it?

A. He better not, with me.

Mr. Bagley: I believe that is all, Your Honor.

REDIRECT EXAMINATION

By Mr. Smith:

Q. Why did you have the shotgun that night, Mr. Dry?

A. Well, they was both been drinking and just about as high as you can get without toppling over drunk.

Q. Mr. Smith and Mr. Coffey?

A. Smith and Bill Coffey — some name like that, I knowed him as Bill.

Q. All right. Now, on that particular occasion they were both just about as drunk as you can get without toppling over?

A. That's right.

Q. Well now, was this the first time — when was the first time you had ever seen the bullwhip? Was this the first time?

A. No, sir. I mean, he had, since I moved there, I mean, maybe every evening or at least three or four

page 184] times a week he would get out there with it in the street and pop it and pop it, you know, carry on,

show off with it, he was out there showing off with the bullwhip, was what he was doing.

Q. And you say that it appeared to you that Mr. Coffey was trying to shield himself or the child from the *bullwheip*?

A. Well, I think he was more interested in the young one he had in his arms than he was himself. He was doing that, yes.

Q. Were you afraid of the bullwhip?

A. No, I ain't afraid of it, but I wouldn't want to be hit with it — not but once, no way.

Mr. Smith: All right, that is all.

Mr. Bagley: No further questions.

The Court: Mr. Dry, this first fight between Mr.Moore and Mr. Smith, you say that Mr. Moore hit Mr. Smith the first lick?

The Witness: Yes, sir.

The Court: Was that right at the beginning?

The Witness: Yes, sir. In other words, he just got out of the car and went right to him.

The Court: Did Mr. Smith know there was going to be a fight, or could you tell — was he ready for a fight? Or do you think he was taken by surprise?

The Witness: Well, he was surprised, he got up wondering, like, what was going on.

The Court: Did you hear any words between page 185] the two prior to the blow being struck?

The Witness: No words between Mr. Moore and Mr. Smith, no. There wasn't no good feelings between them, but I never heard them have no words.

The Court: Prior to the striking of this first blow you heard no words between them?

The Witness: Not between them two, no.

The Court: After this first fight, when you say when you were talking to Mr. Moore —

The Witness: Yes, sir.

The Court: Did he make any statements or say anything which would be threatening to Mr. Smith that Mr. Smith could hear?

The Witness: Well, he was saying that he would kill him, that he would do it with his *bar* hands, if he didn't leave

people alone.

The Court: When he said that, was Mr. Smith in or out of his house?

The Witness: Inside. There was no lights in the trailer, I guess he might have been peeking out of the window where he could hear, or he could have been back at his bed, I couldn't tell you.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Smith: Mr. Coffey.

page 186] Thereupon,

WILLIAM COFFEY,

was called as a witness by counsel for Commonwealth, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. State your full name, sir?

A. William Coffey.

Q. And where do you live?

A. Lot 42-A, Triangle Trailer Court.

Q. And what do you do?

A. I am a corporal in the Marine Corps.

Q. Do you know Mr. Smith?

A. Yes.

Q. Martin Thomas Smith?

A. Yes.

Q. How long have you known him?

A. It has been approximately eight or nine months.

Q. Are you in the same outfit in the Marine Corps as Mr. Smith?

A. No, I am not.

Q. But you live close to him in the trailer park?

A. Yes, I do.

William Coffey

Q. I ask you if you can identify this picture
page 187] here, if you can recognize this as being a portion of that trailer park.

A. Yes, it looks familiar.

Q. Do you know whose trailer this might be here (indicating)?

A. I don't know him — he is in the Marine Corps but I don't know his name.

Q. How about this next one?

A. That is Mr. Smith's trailer.

Q. This next one?

A. That's where I live.

Q. And this one up here?

A. That was — Mr. Moore lived there, used to live there.

Q. I see. Now, directing your attention back to the 12th of June 1964, was Mr. Moore's trailer parked next to yours?

A. Yes.

Q. And these are still side by side (indicating)?

A. Yes.

Q. In this same area?

A. Yes.

Q. I direct your attention, sir, to the night of the 12th of June and ask you if you witnessed any portion of this fracas that took place between Mr. Smith and Mr. Moore?

A. Witnessed by eyesight, no, sir, I did not.

Q. Did you hear any portion of it?

A. Yes, I did.

page 188] Q. What did you hear, Mr. Coffey?

A. Well, sir, I heard — I was watching television and I wasn't listening too closely at first but, of course, the conversation outside got pretty loud, and I heard loud talk about a gun, at which time I cut my lights off my trailer, I got pretty scared.

I heard Mr. Moore mention a gun — he mentioned a gun, I recognized his voice and also another voice out there mentioned a gun also.

Q. You didn't know who that other voice was?

A. No, I didn't.

Q. Did you come outside any time that night?

A. No, I didn't come outside at all.

Q. All right.

William Coffey

A. Well, I did after, later on I came outside.

Q. Was this after things quietened down?

A. Yes, sir.

Q. Now, directing your attention to the Wednesday night before this, immediately before this 12th of June, had you been drinking with Mr. Smith?

A. Yes, I had.

Q. Have you ever seen Mr. Smith use a so-called bullwhip?

A. Yes, I have seen his bullwhip.

Q. On the Wednesday night before this 12th,
page 189] Friday the 12th, did you see Mr. Smith using the bullwhip then?

A. Yes, I did.

Q. Whereabouts did he use it, Mr. Coffey?

A. It was in a little place to the right of the picture there (indicating), where we played volley ball.

Q. Is this generally the vicinity where you play volley ball (indicating)?

A. I think that is the area.

Q. All right. Now, what was the occasion that you saw him using that?

A. Well, he was snapping the bullwhip over my head, I wasn't hit by the bullwhip, but he was cracking the bullwhip.

Q. Did you have anything or anybody in your arms at the time?

A. Yes, my son was with me.

Q. How old was your son?

A. At the time he was about 13 or 14 months.

Q. I see. Did you see Mr. Dry when Mr. Smith was cracking the whip over your head that time?

A. I don't know Mr. Dry, sir.

Q. You don't know Mr. Dry at all?

A. The name I don't know, sir.

Q. All right. Did you see anyone in the trailer that was parked right in this vicinity (indicating)?

A. Yes, sir. I did.

page 190] Q. What was he doing there?

A. He was sitting there with his wife.

Q. And was this at the same time that Mr. Smith was demonstrating his ability with the bullwhip over your head?

A. Yes, sir, it was.

William Coffey

Q. And you had your — how old was your son?

A. He was thirteen or fourteen months at the time.

Q. Did you have him in your arms?

A. Yes, I did.

Q. Well, what were you doing at that particular time that he was snapping this whip over your head?

A. I didn't do anything. I just stood there. The whip wasn't hitting me. I didn't understand what was going on, really, at the time, I just stood there, I didn't do anything.

Q. Were you frightened?

A. Well. I — I was pretty high. I wasn't scared, no, sir, I wasn't.

Q. But you didn't know what was going on, did you?

A. No, sir, I didn't know why the whip was being snapped.

Q. Had you ever seen him use this whip, snap this whip before?

A. Yes, sir, out in front of his trailer out in the road out there, he would crack it, not at anyone or anything, just cracking the whip. He was just practicing cracking the whip.

page 191] Q. But this night and you were pretty high, you say he was snapping it over your head?

A. Yes, sir.

Q. And you had your child in your arm?

A. Yes, sir.

Q. Were you trying to shield the child from him, do you know?

A. I may have been, sir, yes, sir.

Q. Do you know whether or not the whip at any time was wrapped around you?

A. Yes, sir, it was, it did wrap around me one time.

Q. He did take that whip and wrap it around you, didn't he?

A. Yes, sir, but there was no pain or nothing.

Q. But at that time he got up close enough so he could wrap it around your body?

A. Yes, I think so.

Q. And you still had the baby in your arms at the time?

A. Yes, sir.

Q. And you couldn't understand his actions, could you?

A. No, sir.

Q. Was he high then, too?
A. I would say so, yes, sir.

Mr. Smith: All right. Your witness.

CROSS-EXAMINATION

page 192] By Mr. Bagley:

Q. Mr. Coffey, what if anything on the night of June 12 did you see with respect to this, what took place there in the Trailer Park, did you see any part of it, or after it?

A. Sir, the only thing I seen that night was when I came out the trailer, Mr. Moore was lying on the ground out there — I am sorry, was sitting in a chair out there.

Q. Sitting in a *chari* where, about in this position (indicating)?

A. Yes, sir.

Q. Which way would he have been facing, towards the street?

A. I think he was facing toward the street.

Q. And that's all you saw?

A. Yes, sir.

Q. And what you heard was Moore saying that he wanted a gun, or something of that kind?

A. Yes, sir, and I heard the other man mention there was one in the car, and I heard him say, "I'll kill that son of a bitch."

Q. That was Moore?

A. No, sir, that was the other one.

Q. The other one?

A. Yes, sir.

Q. Did you look out to see where these men were?

page 193] A. No, sir, I didn't. I was sitting — you can see that tree there —

Q. Yes, sir.

A. And I have a big picture window in my trailer, which is —

Q. On this side (indicating)?

A. Yes, sir, and I couldn't see anything for the tree.

Q. All right, but you heard what was being said? And you

were in this trailer (indicating)?

A. Right.

Q. Now, on this occasion when Mr. Smith was using the bullwhip, both of you had been drinking together, had you not?

A. Yes, sir, we had been drinking.

Q. On that occasion, is that right?

A. Yes, sir.

Q. And didn't you get together and sort of laugh about it the following night?

A. Yes, sir, it was a big joke the next day.

Q. He didn't hurt you with this whip, did he?

A. No, sir, he didn't hurt me.

Mr. Bagley: That is all.

By Mr. Smith:

Q. But it wasn't a joke that night, was it, Mr. Coffey?

A. No, sir, *ahe* wasn't.

Mr. Smith: All right, thank you, that is all.

page 194] The Court: Thank you.

(Witness excused.)

Mr. Smith: Mrs. Moore.

Whereupon,

MARY ALICE MOORE,

was called as a witness by counsel for Commonwealth, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. What is your full name, please?

A. Mary Alice Moore.

Q. Where do you live, ma'am?

A. I am staying at my brother's place, 22 Triangle Trailer

Mary Alice Moore

Court.

Q. What kin were you to Blaine Moore?

A. He was my husband.

Q. And is your husband now dead?

A. Yes.

Q. I direct your attention to the night of June 12, 1964 and ask you if you and your husband were living together in the Dumfries-Triangle Trailer Court in Prince William County?

A. Yes, sir, we were.

Q. All right. I ask you to look at this picture to my left here and ask you if you can identify or recognize this

page 195] as being a portion of that area in which you were living?

A. Yes, sir, it is.

Q. And I ask you if you can tell us what this mobile home is here (indicating)?

A. That was our home.

Q. And this one (indicating)?

A. That was Coffey's.

Q. And this (indicating)?

A. Smith.

Q. And that one (indicating)?

A. That one, I don't know the last name.

Q. You don't know who lived here (indicating)?

A. No, sir.

Q. And any of these others, those not shown here, you don't know who lived there?

A. No, sir.

Q. How long did you live there, Mrs. Moore?

A. Well, I think it was over a year.

Q. How big a man was your husband?

A. My husband weighed 235 pounds.

Q. How tall was he?

A. Six-foot two.

Q. And how old was he?

A. He was 36.

Q. Thirty-six years of age; how many children do you have?

page 196] A. We have one little girl.

Q. What kind of work did he do?

A. He was a truck driver.

Mary Alice Moore

Q. Did he drink much?

A. Yes, he drank.

Q. Heavily?

A. Sometimes, yes.

Q. Now, further directing your attention to the 12th of June, 1964, I ask you if you were present when your husband first arrived in the trailer court that night?

A. No, sir, I wasn't.

Q. Where were you, if you recall, at the time he first arrived?

A. I was at my brother's.

Q. Did there come a time when you arrived at the trailer court?

A. Yes, I came over from my brother's.

Q. Where was your husband at the time that you arrived?

A. He was standing over there (indicating) just about where the chair is.

Q. Standing in this vicinity (indicating).

A. Yes.

Q. What was he doing?

A. Well, he was just carrying on with those people who were playing ball.

page 197] Q. What was his condition as to sobriety at that time?

A. Well, he was so drunk he couldn't hardly stand up.

Q. Did he have any comment to make to you then when you first saw him there?

A. I told him to go home and he didn't want to.

Q. Was there anything said or mentioned by him about a gun?

A. No, sir. No.

Q. Did you see any portion of the fight which your husband and Mr. Smith had prior to the time that he was standing right here (indicating)?

A. No, sir, I wasn't there.

Q. Now, was your husband — was there any conversation about any fight when you first came up and your husband was standing right here (indicating)?

A. Yes.

Q. Was this conversation in normal tones or was it loud and boisterous?

Mary Alice Moore

A. Well, it was kind of loud.

Q. Now, after you arrived, did Mr. Smith come back on the scene?

A. Yes, he did, he came out of his house.

Q. And what called your attention to him?

A. Well, he slammed the door and hollers, "I'm ready for you."

page 198] Q. And who was he directing *thaat* conversation to?

A. To my husband.

Q. Did your husband reply?

A. My husband just starts staggering across the street.

Q. Was there any effort made on your part to stop him while he was going across the street?

A. Yes, I tried.

Q. What did Mr. Smith, if anything, did he have at that time that you observed?

A. He had a knife.

Q. Had he anything else in his hands?

A. No, sir, not as I know of.

Q. Then did you see your husband and Mr. Smith become involved in a fight?

A. Yes, and then me and his — me and *Mrs.* Smith's wife got into a fight.

Q. Why did you and Mrs. Smith get into a fight?

A. Well, she was up there hollering for her husband to get mine.

Q. And what happened?

A. And I jumped her.

Q. And what did you all do?

A. Well, we got on the ground, down on the ground.

Q. How long did you fight?

A. Not very long.

page 199] Q. What broke up your fight?

A. Smitty got her up from under me and she quit and she asked me what the hell we were fighting about and I says I didn't know what we were fighting about.

Q. She asked you what you all were fighting about?

A. Yes.

Q. And you said you didn't know?

A. Yes.

Q. And at that time Smitty had already grabbed his wife —

A. Yes, from under me, just about the time she got through saying that, jerked her from under me.

Q. He did that just about the time she was saying, What are we fighting for?"

A. Yes.

Q. And you said you didn't know?

A. Uh-hu.

Q. Now did you actually see any portion of the stabbing of your husband?

A. No, sir.

Q. After Smitty grabbed his wife out from under you where did they go?

A. They ran in their house.

Q. Where was your husband at this time?

A. My husband had went up to — to our trailer.

Q. How do you know he went to your trailer?

page 200] A. Well, I got up, and he come back down that way with the gun.

Q. What gun?

A. This gun he had.

Q. What kind of a gun did he have?

A. Oh, a long shotgun, I guess is what you would call it.

Q. It was a long gun?

A. Yes.

Q. Now, did you see where he had been in the trailer?

A. Yes, there was blood all over, by the refrigerator and everywhere that he had walked there was blood.

Q. And he went and got this gun?

A. Yes.

Q. Did he attempt to get any bullets, do you know?

A. Well, the bullets was in my cedar chest and he had been there just to put his fingers on the bullets, but he didn't get one out.

Q. He didn't get any out?

A. No.

Q. How could you tell that he had touched down in there?

A. Because there was blood on the shell.

Q. And then he came back on out and where did you next see him, when you saw him the next time?

A. Well, he was coming down by Coffey's trailer, down a

little ways —

page 201] Q. Is this Coffey's trailer (indicating)?

A. Yes, sir.

Q. In this vicinity (indicating)?

A. Yes.

Q. What does this line across here (indicating) portray, Mrs. Moore?

A. *That'a* a hump in the road.

Q. Hump in the road?

A. Yes.

Q. To slow down the drivers, was it not?

A. Yes.

Q. Now, was he in the center of this hump?

A. Just a little below that.

Q. Was he standing or was he —

A. No, he was standing up and as he was standing there I laid my hand on his back and there was blood on it.

Q. And was that the first time you knew your husband had been stabbed?

A. Yes.

Q. What portion of his back did you lay your hand on?

A. That part where he was cut (indicating).

Q. Then where did he go from there?

A. Well, somebody got him over to the chair and put him in the chair.

Q. Do you know whether or not he fell to the

page 202] ground at any time?

A. Yes, I believe he did *fell* to the ground, they picked him up and helped him into the chair.

Q. At this time what were you doing, Mrs. Moore?

A. I ran to call an ambulance to get him to the hospital.

Q. Now, your husband subsequently did go into hospital, didn't he?

A. Yes.

Q. And did you visit him in the hospital?

A. Well, I practically stayed with him the time he was in there.

Q. Did he regain consciousness so that he could talk to you?

A. He talked to me some.

Q. Did you have occasion to observe his wound in his back?

A. No, he just asked me what he cut him with, with a butcher

knife, and I told him no, it wasn't a butcher knife.

Q. Had you seen what he cut him with?

A. I seen the knife, I know it was a big knife — I never asked him —

Q. Where was the knife when you saw it?

A. When Smith come out the door with it.

Q. I see. And your husband asked you what

page 203] Smitty cut him with?

A. Yes.

Q. But you say you never did have occasion actually to see this wound in his back, that is, the open, raw wound?

A. No.

Q. Did you ever have any occasion to see whether any compresses or any bandages were put on him?

A. Yes.

Q. On his back?

A. Yes.

Q. Did he have *anay* cuts or abrasions or —

A. He had a cut just about right up in here (indicating).

Q. A stab right in there?

A. Yes, just a little bit, just enough to cut the skin.

The Court: Mr. Smith, would you indicate for the record where she was pointing?

Mr. Smith: I would call it the sternum, right in the middle of the chest.

By Mr. Smith:

Q. Is that right?

A. Right there, yes (indicating).

Mr. Smith: Let the record show that the witness points to the sternum.

By Mr. Smith:

Q. Now, you say that was just a —

page 204] A. Just stabbed at.

Q. A stab wound, more or less on the breastbone, so to speak?

A. Yes, right in here (indicating).

Q. And how long a cut, how long an incision was that?

Mary Alice Moore

A. What do you mean?

Q. How long was it?

A. It was just about that long (indicating).

Q. That would be about approximately one half inch. Was it bandaged while he was in the hospital?

A. No, sir, it wasn't.

Q. Did he have any abrasions or cuts or scars about his face, Mrs. Moore?

A. No. He had a black eye.

Q. Black eye?

A. Yes, he had that.

Q. I see.

A. He had that when he was buried.

Q. He had what?

A. He had that when he was buried.

Q. Were there any cuts about his hands?

A. Well, he had some bruises on his hands but I wouldn't say that they was from the fight, I don't know for sure.

Q. How about his legs or his *ankes*?

A. No, I didn't see any.

page 205] Q. How long after this fight on June 12 did your husband live, Mrs. Moore?

A. He lived to June 17.

Q. And do you know at the time your husband passed where you were?

A. What do you mean?

Q. Where were you when he actually died?

A. We was on the way to the hospital, to Washington.

Q. And did anything unusual happen on the way to the hospital?

A. Yes, he died.

Q. The ambulance in which — were you riding in the ambulance?

A. Yes, sir.

Q. Did this vehicle in which you were riding have a collision with any other vehicle on the trip?

A. Well, he had a small bump, going over Memorial Bridge —

Q. You say a small bump — how did this happen?

A. Well, it was just a —

Mary Alice Moore

The Court: Mr. Smith, does this have any bearing on the issues?

Mr. Smith: I am afraid, Your Honor, it may well have.

The Court: Let me speak to you gentlemen, please.

(Conference at the Bench between the Court and counsel, defendant being at the Bench, out of the hearing of the jury and of the reporter, following which the page 206] proceedings were resumed in open court in the hearing of the jury, as follows:)

By Mr. Smith:

Q. Mrs. Moore, I am going to ask you to look at some pictures now and ask you only if you can identify the pictures. You have seen these before, I am sure. I ask you, can you identify that picture?

A. (Nods.)

Q. And this picture?

A. (Nods.)

Q. Would you tell the Court and the jury who they are?

A. They are my husband.

Mr. Smith: We offer them. Your witness.

The Court: I take it from our previous conference that there is no objection to these?

Mr. Bagley: No, Your Honor.

The Court: All right.

CROSS-EXAMINATION

By Mr. Bagley:

Q. Mrs. Moore, were you present when those pictures were taken?

A. No.

Q. Do you have any idea where they were taken?

A. (No response.)

Q. How long were you and Mr. Moore married?

page 207] A. Five years.

Q. And you had resided here for one year, I believe you said?

A. Yes.

Mary Alice Moore

Q. And had there been anything between Mr. Moore and Mr. Smith prior to this time?

A. Not as I know of.

Q. As far as you know they weren't even acquainted, were they?

A. Not that I know of.

Q. All right. Now, do you remember, Mrs. Moore, when you first came to this area (indicating), where you first saw your husband on the night of June 12, did he ask you for his gun — he didn't ask for his gun? Do you recall?

A. Not as I recall.

Q. He may have but you don't recall?

A. I don't think he did.

Q. You don't think he did. All right. Do you remember hearing anything — strike that. Do you know a man named Lesheski?

A. Not until my husband came in the park with him that night.

Q. And when did you first meet him — down here in this area (indicating)?

A. No, it was over here where my husband was at.

page 208] Q. In this area (indicating)?

A. Yes.

Q. Were you introduced to him then?

A. No.

Q. You met him?

A. I wasn't introduced to him.

Q. He was not introduced. Now, when you arrived — what caused you to come down here (indicating)?

A. Well, I heard my husband down there and I went up to where he was at.

Q. You heard him all the way from your trailer?

A. Yes.

Q. What was he saying or yelling, if you remember?

A. Well, he was just carrying on where they were playing ball, he wasn't yelling especially about anything.

Q. Did he ever make any statements that he was going to get Mr. Smith or Tom or Smitty?

A. I heard him saying a lot of things, I don't remember exactly what he did say.

Mary Alice Moore

Q. All right. And then I believe you said that after his fight with Smith or at the same time, you and Mrs. Smith were fighting?

A. That is correct.

Q. And I take it you had her down on the ground?

A. Yes.

page 209] Q. Because Mr. Smith pulled her from under you, is that correct?

A. Yes, sir.

Q. Had you been drinking on this night?

A. No, sir. I just came home from work that evening.

Q. You work until nine or ten o'clock, is that it?

A. No, I think it was about six o'clock when I went home.

Q. Do you recall what time this was when you came down here (indicating)?

A. It was about 9:30 or 10:00 o'clock.

Q. All right. Had you seen your husband before at all on this particular night?

A. No, sir.

Q. And you say he did drink quite often?

A. Weekends, yes.

Q. Weekends?

A. Yes.

Q. Did he ever beat you up?

A. No, sir.

Q. Never did?

A. No, sir.

Q. Never struck you?

A. If he ever struck me, I made him strike me. My husband was very good.

Q. Mrs. Moore, you may recall that I asked you this question once before —

page 210] A. I know you did.

Q. And you said that there was only when you deserved it that he beat you.

A. I said only when I make him beat me.

Q. Oh, when you made him beat you?

A. Yes.

Q. I see. All right. Now did I understand you to say that your husband went to the trailer and got his gun after he had been cut up?

A. After he was stuck.

Mary Alice Moore

Q. And you don't remember any time prior to that, that he asked you for that gun?
A. Not that I recall.
Q. You don't remember or you don't recall?
A. I don't remember it, or I don't recall it.
Q. All right. Do you remember whether your husband fell?
A. After he came back with the gun.
Q. He did. Where was it that he fell?
A. The middle of the road, I think that is where he fell at, they picked him up and took him to the chair.
Q. Over here (indicating) or here (indicating)?
A. Up a little bit.
Q. In here (indicating)?
A. Yes.

Q. Now, did you hear anybody call for the
page 211] police or say, "Call the police," or the sheriff or anything of that nature, do you remember that?

A. I can't remember.
Q. Do you remember the people who were around in this area that night on that occasion?
A. Well, there were a lot there.
Q. Do you remember who they were?
A. Not all of them, no.
Q. Can you remember some of them, can you tell us who some of them were?
A. Well, I know Lacey and his wife, and the one that lived below him, I don't know exactly her name.
Q. Lacey would be Mr. Dry and his wife?
A. *yes.*
Q. And do you remember Lesheski?
A. *yes.*
Q. Do you remember any men over by Mr. Smith's trailer?
A. No.
Q. Remember seeing any men over there?
A. No.
Q. Your husband was employed as a truck driver, was he?
A. Yes.
Q. Was your husband a pretty rough man?
A. No, he wasn't.

Q. Was he — he never had been in a fight or
page 212] anything of that kind?

A. Not as I know of since we were married.

Mary Alice Moore

Q. Five years, he hasn't been in a fight?
A. No.
Q. To your knowledge?
A. Just between me and him, sometimes.
Q. He never had a fight with another man?
A. No, sir, not that I recall.
Q. Well, if he had of, you would have known it?
A. I think I would know it.
Q. And you would recall it?
A. Yes.
Q. Did he stay away from home often?
A. No, sir, he did not.
Q. *Die* he get the way he was on this particular night often?
A. Sometimes on weekends; it wasn't every weekend.
Q. But did he often want to go and fight with somebody like that?
A. No, sir, never did.
Q. This is the first time he ever did it?
A. Yes, it is.
Q. He had never had any altercations with anyone in this trailer park before?
A. No, sir.
page 213] Q. He didn't even know Mr. Smith, did he?
A. Not as I know of.
Q. As far as you know. All right. Now, after this incident, you visited your husband in the hospital, didn't you?
A. Yes.
Q. He went to the Navy Hospital at Quantico. Did you stay there with him?
A. Yes, just about all the time.
Q. Now, how was he the second day, I mean, did he appear well, did he know you and so forth?
A. Yes.
Q. And did you talk with him?
A. Yes.
Q. And did you feel that he was going to get well?
A. Well, I felt it all the time, but he told me he wouldn't get better.
Q. He told you that he wouldn't get better?
A. Yes.
Q. Then on the 17th they decided to take him up to Georgetown, didn't they?

Mary Alice Moore

A. Yes.
Q. And he passed away in the ambulance?
A. Yes.
Q. All right. Let me ask you this, Mrs. Moore. Did you see him again from then until the funeral after he passed away?
page 214] A. Yes.
Q. You did; and where?
A. Where I seen him?
Q. Yes.
A. After he died, I had him embalmed up here and then I had him shipped back *hom* to be buried.
Q. I see. The funeral was at home?
A. Yes.
Q. Do you know whether he was taken back to the hospital at Quantico after he passed away?
A. Yes, he was.
Q. And do you know where he was taken from there?
A. He was taken to Fairfax.
Q. And then from there, where to?
A. The funeral home.
Q. And from there, you had control over the remains from there, is that right?
A. Yes.

Mr. Bagley: I believe that is all.

REDIRECT EXAMINATION

By Mr. Smith:
Q. Mrs. Moore, I believe you said you did not know Mr. Lesheski until that night in the trailer park?
A. No, sir.
Q. I ask you, if some time prior to this par-
page 215] ticular night you had been involved in an automobile accident one morning or evening?
A. Me?
Q. Yes.
A. No — I was one morning, but that *wa* —
Q. Well, did some gentleman come along and ask if he could be of assistance that particular day?
A. Yes, and that was Lesheski, and he asked us if we had

gotten hurt, and that is when he told me that was him.

Q. I see.

A. And I never had known him before that.

Q. But really you did not realize on that occasion that it was the same man, that it was Mr. Lesheski, the night that your husband was injured?

A. No, sir, I did not.

Q. All right. Now, I believe that you had answered that Mr. Moore beat you, so to speak, but only when you made it necessary, or when you caused it. Did Mr. Smith ever witness any of those beatings?

A. No, sir, he did not.

Q. Did you ever tell Mr. Smith that he did?

A. I never did talk to him.

Q. To your knowledge, did Mr. Smith ever have any knowledge that your husband had *evern* beaten you?

A. Why, I don't see why he should ever know anything like that, because it didn't happen.

page 216] Q. Mrs. Moore, do you know why *the* were taking you husband up to Georgetown University?

A. To put an artificial kidney in.

Q. And I believe Mr. Bagley asked you if on the second day your husband didn't appear to be getting well. What did your husband tell you about his condition?

A. My husband told me he was going to die.

Q. When did he say that?

A. It was the day before he died. Well, it was the day he died, I think, and he told me at the time that he would never get better.

Q. And he died en route to the hospital?

A. Yes.

Q. Georgetown University Hospital?

A. Yes.

Q. And did you all come back to Quantico Hospital —

A. After he died.

Q. Did he ever arrive at Georgetown University Hospital?

A. No.

Mr. Smith: I think that is all.

The Court: Mrs. Moore, there has been some evidence that your husband accused Mr. Smith of taking a ball belonging

to a child. That was denied by Mr. Smith. Do you know anything about a ball incident?

page 217] The Witness: Yes, sir, my little girl's balls, there were three of them laying underneath his trailer.

The Court: Three what?

The Witness: Three of my little girl's balls, and she had been crying for them.

The Court: What kind of balls were they?

The Witness: Oh, just big round rubber balls.

The Court: Do you know how they got under there, of your own knowledge?

The Witness: No, sir.

The Court: All right.

By Mr. Smith:

Q. Was this discussed between you and your husband, that these were your daughter's balls underneath Mr. Smith's trailer?

A. Yes, my husband seen them, and he bought them for my little girl, he knew them. They were there that night, about 7:30, we went to bed, I got up early the next morning when I got ready to go to work, and they were gone.

Q. Was this the night immediately before?

A. The night before, but it was that night and the next day, and that evening my husband coming from work — it was about two days before he was stabbed.

Q. And you say your little girl had been asking or crying for these balls?

A. Yes.

Q. They were just toys, were they not, like a beach ball?

page 218] A. Yes.

Q. Had you yourself seen them under the trailer?

A. Yes, sir, I had.

The Court: Had any requests been made of the Smiths for these balls?

The Witness: No, sir.

Mr. Smith: I have nothing further.

The Court: Mr. Bagley?

Mary Alice Moore

Mr. Bagley: No questions, Your Honor.

The Court: Thank you.

(Witness excused.)

Mr. Smith: Your Honor, that would be the Commonwealth's case in chief.

Mr. Bagley: If Your Honor please, I would like to make a motion, if I may.

The Court: Would you come up here?

page 219] (Thereupon, the Court and counsel, the defendant being present, conferred at the Bench, out of the hearing of the jury, as follows:)

Mr. Bagley: I would like to make a motion to strike the Commonwealth evidence on the basis that it has not been established — this man was on his own property and if the defendant believed that he was going to be attacked, as he was attacked, he has the right to defend himself and he has the right to arm himself and he did so and another man was injured — I do not feel that the Commonwealth has established a *prima facie* case of murder in the first degree, murder in the second degree, or manslaughter and I ask to strike the Commonwealth's evidence at this point.

The Court: Do you want to be heard on this?

Mr. Smith: I don't have to be heard on that, Your Honor, I think it is basic, academic. That is not a defense.

The Court: I am going to deny your motion to strike it at this time. I will review all the evidence at the time of the instructions — for the record, the motion to strike will be denied.

Mr. Bagley: May I have an exception for the record?

The Court: All right.

(Thereupon, the proceedings were resumed in open court within the hearing of the jury.)

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page 221]

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Thereupon,

KARLHEINZ ADAM,

page 222] was called as a witness by counsel for defendant and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bagley:

Q. Mr. Adam, you have been sworn, have you not?

A. Yes, sir, I have.

Q. All right. What is your full name, sir?

A. Karlheinz Adam.

Q. What is your occupation?

A. I am a corporal in the United States Marine Corps.

Q. And where are you stationed?

A. At Quantico, Virginia.

Q. And directing your attention to the 12th of June, 1964, were you so employed and so stationed at that time?

A. Yes, sir, I was.

Q. All right. Do you know Mr. Smith?

A. Yes, sir.

Q. And directing your attention to June 12, 1964 again, did you have occasion to see Mr. Smith?

A. Yes, sir.

Q. On that date?

A. Yes, sir.

Q. And did you see him where he lives?

A. I did.

page 223] Q. And was that at the trailer court where he lives?

A. Yes, sir.

Q. All right. At approximately what time did you see him?

A. Well, it must have been around nine o'clock or so in the evening.

Q. Was it dark?

A. Yes, sir.

Karlheinz Adam

Q. And can you recognize this drawing here and tell us if this represents any part of that trailer court?

A. Yes, sir, that is the trailer right there, that second one from the —

Q. This one (indicating)?

A. Yes, sir.

Q. Would that be Mr. Smith's trailer?

A. Yes, sir.

Q. All right. Now, did you know Mr. Smith to be a member of the Marine Corps also at that time?

A. Yes, sir.

Q. Now, will you tell the Court and the jury how you arrived here (indicating on chart) and what occurred, if anything, after you arrived?

A. All right, sir. Well, to start off with, there was a deer killed up on the reservation, and I'm the one that got the deer and got it dressed, undressed and skinned it and cut it up. Ane Mr. Smith wanted the deerskin and some of the meat.

page 224] So, we got through about 8:30 or so, I couldn't remember the time exactly, and Mr. Rosen, who is not here right now, knew where Mr. Smith lived and we went and took it over there —

Q. Mr. Rosen, where is he?

A. He is in Japan right now, he got transferred.

Q. All right.

A. And I parked right—my station wagon was even with the last garbage can on that trailer there (indicating).

Q. Here (indicating)?

A. Yes, sir, right about there.

Q. With this garbage can (indicating)?

A. Yes.

Q. With the tailgate right around here (indicating)?

A. Yes, sir.

Q. All right. And what direction would your car have been facing?

A. Over towards that way (indicating).

Q. Towards the road?

A. Outward, yes, sir.

Q. In this direction (indicating), then?

A. That's right.

Q. And what is your vehicle, what type?

A. 50 Ford Station Wagon.

Q. All right, sir, and you stopped right here (indicating)

and this (indicating) is your tailgate?

page 225] Q. What happened then?

A. Well, I opened — we went out and I opened the tailgate and Mr. Smith was — well, I don't know where he was, but anyway after we drove up he came there.

And I had the deerskin in a bucket or — and I was handing it to him when another car drove up and stopped in the center of the road —

Q. In this area here (indicating)?

A. Yes, sir, just about right there, yes, I couldn't say exactly where.

Q. All right.

A. But it was in the center of the road.

Q. Was it past you?

A. No, sir, it wasn't.

Q. It would be right in this area (indicating)?

A. Yes, sir.

Q. All right. (Writing on chart.) I am not much at writing on an easel, I am not much of an artist.

Now, tell us what happened when this car came up, if anything?

A. Well, the car came up and an elderly man got out and he came up to Mr. Smith and he asked him about a rubber ball, his little girl's rubber ball, I believe was his exact words —

Q. Do you remember it well enough to describe this man for the jury?

page 226] A. Yes. He was, oh, I would say about thirty, thirty-five, big, strong, he had a T-shirt on — that's about all there was.

Q. Short or long trousers?

A. He had long trousers on, yes, sir.

Q. All right.

A. And he asked Mr. Smith where the little rubber ball was and so Mr. Smith says he doesn't know and he says, "Well, I've seen it laying here by this garbage can this afternoon."

Q. All right.

A. So Mr. Smith says, "It's probably across the trailer park where they were playing with the ball."

And at that time the old man swung at Mr. Smith and did hit him on the arm, I believe it was.

And another man was in the car and he yelled, "I'm going to kill him," and *oapened* the back door of this car that was stopped in the center and reached in it and came out with his

hand held behind him, he says, "I'm going to shoot him." At that time I left.

Q. Who was he talking to?

A. Mr. Smith, he says, "I'm going to kill him, I'm going to kill him, I'm going to shoot him."

Q. Where were you at this time when you saw this?

A. Well, I was right by my front door by the station wagon.

Q. Right in here (*indicationg*)?

page 227] A. Yes, sir.

Q. And where were the parties involved, were they in this area (indicating)?

A. Yes, sir — well, if we can put it forward a little bit, about even with the line.

Q. Here (indicating)?

A. Well, right about there — a little closer to the garbage can.

Q. Over here (indicating)?

A. Right about there.

Q. And that would be the point where —

A. Where the scuffle took place, right.

Q. And you were over here (indicating)?

A. That's right, sir.

Q. And then what happened to you?

A. I left.

Q. Where did you go?

A. I went between the trailers.

Q. I see.

A. There's another bush between that trailer, or a tree.

Q. Another bush in here (indicating)?

A. Right — further back, almost all the way to the end, just move backward, behind the trailer, right there in the center, between them — right in there, that's right.

Q. Over in here, back in here (indicating)?

page 228] A. Right.

Q. That's where you went?

A. That's right.

Q. What if anything happened after that, that you are able to tell us?

A. Well, we waited about ten minutes.

Q. Who's "we" now?

A. Mr. Rosen and somebody else and then I says, "I'm leaving" and I went back forward to get in the car, and at that time Mr. Smith must have gotten out of his trailer, and I seen two men run across the road and — well, they attacked Mr.

Karlheinz Adam

Smith and a fight happened and I seen one man —

Q. Now, where were you at this time, Mr. Adam?

A. By my car, again, ready to leave.

Q. Then you were by the door of your car?

A. That's right, sir.

Q. And you saw two men come across here (indicating). And then what happened?

A. Well, they got into a fight. The elderly man had held Mr. Smith and the younger one kicked him, and then it broke up, and I seen the elderly man running up the street and he was holding up his pants, or something, and I saw he was hurt, and I didn't even see the other one leave, I didn't even know where the other man went to and I got in my car and I left.

Q. And you left?

page 229] A. That's right.

Q. All right, sir. Do you remember giving the deer meat to Mr. Smith?

A. Yes, sir, and I think he placed it on the garbage can. I don't know which one.

Q. And do you remember whether he had the bucket in his hand?

A. He did have and he laid it down after these two men approached him.

Q. Now, this was the first time they approached him?

A. That's right, that was the first time.

Q. Now, did you see Mr. Smith the first time doing anything to Mr. Moore?

A. No, sir.

Q. Mr. Moore did — what? Strike him or what?

A. Yes, sir, he swung at Mr. Smith.

Q. And hit him?

A. Yes, sir.

Q. All right. Now, do you remember any of the details of the second altercation?

A. Well, like I just said before, I got up to my car and just as I was ready to leave, Mr. Smith must have come out of the house and the two men ran across the street and the elder one held Mr. Smith and the younger one was kicking him and then it broke up and Mr. Moore, I seen Mr. Moore run

page 230] up the street and I don't remember where the other one went to.

Q. All right; and then you left?

A. That is right.

Q. That's all you know about it?

A. That's right, sir.
Q. Thank you very much.

Mr. Bagley: Your witness.

CROSS-EXAMINATION

By Mr. Smith:
Q. Corporal — is it Corporal Adam?
A. Yes, sir.
Q. Corporal Adam, are you in the same company or command as Mr. Smith?
A. No, sir, I was not.
Q. But you happened to be the one that got the deer?
A. No, sir. Mr. Rosen — somebody hit the deer with a car, but I had to — Mr. Rosen didn't know how to dress it and I told him I'd skin him and cut him up for him.
Q. I see. Now, Mr. Rosen was bringing you to Mr. Smith's trailer so you could deliver a piece of meat and the skin?
A. Yes, sir, that's right.
Q. Now, this first fight that you witnessed, there was in effect one blow struck, was there not?
A. Yes, sir, there was.
page 231] Q. And Mr. Moore hit Mr. Smith, after he didn't get apparently what he assumed was a good answer about the ball, isn't that correct?
A. That's right.
Q. But they did have a conversation about a ball, didn't they?
A. Yes, sir, they did.
Q. And Moore said, "It was here this morning?" Smith said he didn't know where the ball was?
A. That is correct.
Q. And Moore said, "It was here this morning"?
A. Yes, this morning — "this afternoon."
Q. "This afternoon?"
A. Yes, sir.
Q. And Smith said, "It's probably over there," and then —
A. That's right.
Q. And without any more provocation than that, Moore struck Smith, is that correct?
A. Well, they called each other names and he says, "I don't believe you," and struck him.
Q. They each called each other names, didn't they?

A. Yes, sir.
Q. What was Moore's condition as to sobriety, Mr. Adams?
A. Well, I assumed Mr. Moore was drunk but —
Q. He seemed to be drunk to you, didn't he?
page 232] A. Yes, sir, he did.
Q. How about Mr. Smith?
A. No, sir, he wasn't drunk.
Q. Was Mr. Moore so drunk that it appeared to be comparatively easy to handle him, so to speak?
A. Well, I don't know, sir. I know he was drunk, but —
Q. All right. How long have you known Mr. Smith?
A. Well, I didn't — I knowed him from the motor pool, I had seen him.
Q. Have you ever seen him demonstrate his ability at Jujitsu?
A. No, sir.
Q. Or — what's the name of that? — Karate?
A. No, sir. I don't work at the motor pool, sir, I just pick up my trip tickets and leave.
Q. So you knew nothing about his ability —
A. No, sir, I didn't.
Q. — in things like that?
A. No, sir.
Q. Let me ask you this. Is this (exhibiting) the type of knife the Marine Corps issues, do you know?
A. Yes, sir.
Q. Is that what you would consider to be Marine Corps issue?
A. Yes, sir, that's it.
page 233] Q. That is Marine Corps issue?
A. Yes, sir.
Q. By the way, how old are you?
A. Twenty-two, sir.
Q. And this "elderly" gentleman was Mr. Moore that you were talking about?
A. Yes, sir, it was. Well, I don't know him by name, so I'm not going to say anything — (laughter).

Mr. Smith: I think that is all.

REDIRECT EXAMINATION

By Mr. Bagley:
Q. By "elderly" you mean older than you are?

A. Yes, sir.

The Court: Corporal Adams.
The Witness: Yes, sir.
The Court: Do you live in the subdivision?
The Witness: In Virginia, yes, sir, Midway Island.
The Court: Well, you live in this trailer park?
The Witness: No, sir.
The Court: You were just bringing the deer meat and skin by that night?
The Witness: Yes, sir.
The Court: As you walk down the witness stand, would you go by that plat of the trailer court and point out your recollection where the first fight took place and where
page 234] the second fight took place?
The Witness: Yes, sir, sure will.
Mr. Smith: May I ask him to mark it, Your Honor?
The Court: I think you should, yes, sir.
The Witness: (going to chart) All right, sir.
The Court: Where did the first fight take place?
The Witness: Right about in here (indicating).
The Court: Now, whose property is that on — well, just mark it, corporal.
The Witness: All right, sir. (Complying.)
The Court: And the second one?
The Witness: Well, the two fights, both of them were just about in the same area.
The Court: Both at the same place?
The Witness: Yes, sir.
The Court: Thank you very much.
The Witness: Yes, sir.
The Court: All right, thank you.

(Witness excused.)

Mr. Bagley: Mr. Wysingle.

Whereupon,

DAMON WYSINGLE, JR.,

was called as a witness by counsel for defendant, and having been first duly sworn, was examined and testified as follows:

Damon Wysingle, Jr.

DIRECT EXAMINATION

By Mr. Bagley:

page 235] Q. State your full name, please.

A. Damon Wysingle, Jr.

Q. What is your occupation, Mr. Wysingle?

A. United States Marine Corps, career.

Q. Where are you stationed?

A. Quantico.

Q. All right. And do you know Mr. Smith?

A. Yes, I do.

Q. Did you know him on June 12, 1964?

A. Yes, I did.

Q. And directing your attention to June 12, 1964, did you see Mr. Smith at that time?

A. Yes, I did.

Q. Did you see him in the trailer park?

A. Yes, I did.

Q. All right. Would you relate to the jury and to the Court what was the occasion of your being together that night?

A. Well, I was repairing my car and I was parked in his — next to his trailer, and —— that's all I was doing.

Q. All right What if anything, unusual occurred that night while you were there?

A. Yes.

Q. What?

A. The fight.

Q. Can you tell us what happened?

page 236] A. Well, I was cleaning my car, just like I said —

Q. Where was your car?

A. It was in between Mr. Smith's trailer —

Q. Can you show me where Mr. Smith's trailer is on this, can you tell me, are you able to recognize this?

A. Well, okay. You see, that (indicating) is the road that is going out —

Q. This is the road out (indicating)?

A. Yes. That is Mr. Smith's trailer, the second one there.

Q. This one (indicating)?

A. Right.

Q. Where would your car be?

A. In between.

Q. In here (indicating)?

A. In between those two trailers.

Q. In between these two (indicating)?
A. Yes, sir.
Q. All right, sir. Now, what time did you arrive here?
A. I had been there practically all afternoon.
Q. With Mr. Smith?
A. Yes, sir.
Q. What did you do there?
A. Nothing, other than work on my car.
Q. You worked on your car?
page 237] A. Right.
Q. All right. Now, did there come a time when some other people arrived there?
A. Yes, sir.
Q. Other Marines?
A. Yes, sir.
Q. And who were they, if you recall?
A. Mr. Adam and Dave Rosen, David Roseman, or Rosen, something like that.
Q. Corporal Rosen, would that be it?
A. Right.
Q. Do you know where he is now?
A. All I know is his orders read, when he left here, for Japan.
Q. All right. Now, what if anything, unusual occurred after Adam and Rosen arrived?
A. Well, another car drove up and —
Q. Another car drove up after them?
A. Right.
Q. All right. Where were you at that time?
A. I was at the rear of Adam's car.
Q. All right.
A. Looking at some deer meat.
Q. All right. Can you tell me here where Adam's car would have been?
page 238] A. Should have been right there, by the —
Q. In this area (indicating)?
A. Right, right there by the tongue of Mr. Smith's trailer.
Q. Is this (indicating) the tongue of the trailer here?
A. Right.
Q. All right. And then another car came up, you say?
A. Yes, sir.
Q. What, if anything, happened then?
A. Two men got out.
Q. What, if anything, did they do?

Damon Wysingle, Jr.

A. One man was real large, a real large guy, a huge guy, and he asked Mr. Smith something about his kid's ball and all of a sudden there was a fight, the big man threw a punch.

Q. Who did what, if you remember?

A. The big man threw a punch at Mr. Smith.

Q. Did he hit him?

A. Yes, sir.

Q. What, if anything, did Smith say?

A. I don't remember the exact words that was said. I think he said, "What for?" or something like that.

Q. Well then, what if anything did you do at that time?

A. I stepped back out of the way.

Q. All right. Now, was there another man who came, too, in this other car?

page 239] A. Yes, sir.

Q. What, if anything, did he do?

A. If I recall correctly, he made the statement, "Don't nobody move, or I'll shoot," or something like that.

Q. So what did you do?

A. I stayed right there.

Q. You didn't move?

A. No, sir.

Q. All right. Now, where were you — right by this car — the Adam's car that was pulled up here (indicating)?

A. Yes, sir.

Q. All right. Now, when did you leave?

A. Mr. Smith ran to his trailer afterwards and then the big man went across the street by a volley-ball court that was set up and Rosen and I, and I think Adam, I am not sure, because I was a little bit upset — anyone threatened with being shot, you are not going to stay there.

Q. You were somewhat frightened?

A. Yes.

Q. All right.

A. So I left. I went between the trailers.

Q. You went between these trailers (indicating)?

A. I think so.

Q. Did you come back at any time?

A. Yes, sir, I did.

page 240] Q. Did you see any more fights?

A. We stood over by the trailer and we heard —

Q. Which trailer, now?

A. In between that second one which is Mr. Smith's and the one where that diagram of the tree is.

Q. In here (indicating)?

A. Yes, sir.

Q. All right.

A. And we heard another noise, such as a scuffle, and then Rosen and I walked out towards the road, towards the main road there. I think it is Old Triangle Road, something like that.

Q. You and Rosen just headed out this way, (indicating)?

A. Yes, sir.

Q. So you didn't see any second altercation between Mr. Moore and Mr. Smith?

A. No, sir.

Q. I see. All right. When did you come back, or did you come back?

A. We came back after we saw the — you know, the — I think it was either the sheriff or the ambulance, I am not sure which one it was, and we started walking back towards the trailer then.

Q. All right. Now, while you were between these trailers (indicating), did you hear anything, did you hear

page 241] anyone yelling or saying anything?

A. I heard someone say, "Come out, I'll kill you," or something to that effect. I can't remember the exact words.

Q. Do you remember anything said about a gun?

A. Yes, somebody said, "Get my" — he told this — how did he say it, now? There was a woman involved, he told a woman to get his gun.

Q. Do you remember hearing that?

A. Yes, sir.

Q. You don't know who said it?

A. I don't.

Q. All right. You were where at this time, in between the trailers here (indicating), at this time?

A. Yes, sir.

Q. Now, when was it, then, that you heard this scuffle, was it after you heard about the gun, or before?

A. Let's see. About the gun was afterwards.

Q. It was after the first scuffle; then you say you heard a second scuffle?

A. It was after the second scuffle.

Q. That you heard something about a gun?

A. Yes, sir. Sir, the first time I heard something about a gun was when the smaller man said, "Don't move I'll shoot,"

but there was no word about a gun but if he was going to shoot, there must have been a gun.

page 242] Q. All right. Now, do you know what Mr. Smith was doing during the time you were there on this day?

A. Do I know what he was doing?

Q. Yes.

A. Well, playing volley ball, I think.

Q. Was that in the early evening, earlier in the evening?

A. Yes, sir.

Q. And I understand that you were working on your car most of the time?

A. Yes, sir.

Q. I see. Now, when was your car moved from there?

A. (No response.)

Q. Was it moved that night?

A. I moved it that night, yes, sir. When everyone had left, I moved the car.

Q. What time would you say that might have been?

A. Well, I don't know. It was late.

Q. Can you tell me just exactly how your car was parked?

A. It was back into the —

Q. It was back in (indicating)?

A. Yes, sir.

Q. I see. The front of it, the front end was sticking out?

A. Yes, sir.

page 243] Q. And was it close to this trailer (indicating) or to this trailer (indicating)?

A. I would say it was closer to the one on the left.

Q. Closer this way here (indicating)?

A. I would say so.

Q. All right.

The Court: For the record, you are speaking of the first trailer in line with the *secone* one?

Mr. Bagley: Yes.

By Mr. Bagley:

Q. For the record, was it closer to the first trailer on this diagram — it would be closer to this first trailer, is that correct?

A. If I remember correctly, yes, sir.

Q. All right. Was any part of the car on the road here (indicating)?

A. No, sir, none of my car was on the road.

Q. All right. Was it completely backed in, where the front end was even with the trailer?

A. I can't remember that, sir, but I can remember it wasn't on the road.

Q. No part was on the road?

A. No, sir.

Q. Did you at any time hear anyone yelling that they were going to get somebody, or kill somebody?

page 244] A. After the first scuffle the two men that got out of that car that stopped in the middle of the street walked across the street and they were talking real loud, shouting threats.

Q. Well, what type of threats, do you remember, were they?

A. (No response.)

Q. Were they cussing or just threatening?

A. Yes, they were cussing, there was profanity, and he said something about, "I'll kill him," or something like that. I don't know which man said it, the large man or the small man, I don't know who said it.

Q. And you were still between the trailers?

A. Yes, sir.

Q. All right, thank you.

CROSS-EXAMINATION

By Mr. Smith:

Q. Corporal Wysingle, did you live in the trailer park at that time?

A. No, sir.

Q. How come you were in there working on that particular day?

A. Mr. Smith and I are military acquaintances, sir, and the man has mechanical capabilities, and I needed help.

Q. You were just down by his home, working on your car and he was helping or supervising, is that it?

A. Well, sir, he did some work, and we both did some work, and I was cleaning up.

page 245] Q. But you do recall that your car was backed in between these three trailers, the first and second trailers?

A. Yes, sir.

Q. And you don't recall how far back in, but no portion of your car was standing out into the street?

A. It wasn't in the street, sir.

Q. Do you recall whether or not any *othe* car had pulled in on an angle at any time?

A. I *wouldn's* say an angle, sir. I would say that — well, half on the road and half off.

Q. Like this (indicating)?

A. No, sir.

Q. Like this (indicating)?

A. Yes, sir.

Q. I see. And that was Corporal Adam's car that brought the deer meat, isn't it?

A. *y*es, sir.

Q. Now, when the conversation took place about a ball, the big man hit Mr. Smith on one occasion, and that was the end of that fight, was it not?

A. Yes, sir.

Q. And where did Smith go?

A. He dropped the bucket and said something and went to the trailer.

Q. You don't know what he said?

page 246] A. No. No, sir — and I was looking to get hit, too.

Q. Did you see him come back out of the trailer at any time?

A. No, sir. All I heard was a sound, that's all.

Q. All right. You didn't see any portion of the second scuffle at all?

A. No, sir.

Q. And at that time you were up here, between 2 and 3, or 3 and 4?

A. Two and three.

Q. With Corporal Rosen?

A. Yes, sir.

Q. Could you hear anything that Smith may have said when he came back out before you heard this second scuffle?

A. I don't remember hearing anything.

Q. How long between the first and second scuffle, do you know?

A. I don't know. I would say maybe five minutes, maybe — I don't know. I don't remember.

Q. You and Corporal Rosen stood up there between the two trailers, during that period of time?

A. Yes, sir, because I wanted to get my car and get out of there when that scuffle was over.

Q. You were plotting how to get out?

A. Yes, sir.

page 247] Q. And you did have time to discuss plans and procedures at that time?

A. There was no plan, sir, just that Rosen didn't have a ride, and my car was blocked in.

Q. The only thing that you know about the second one is the discussion, what you heard, you didn't witness any part of it?

A. No, sir.

Q. You didn't witness any part of the fight?

A. No, sir.

Q. You and Rosen walked on out towards Triangle Road, out of the park?

A. Yes, sir.

Q. And how long have you known Mr. Smith?

A. I think it is about '61, sir.

Q. Do you know whether or not he was pretty good at jujitsu fighting or wrestling?

A. Well, it is a sport, sir, and the man likes that sport.

Q. He does like it?

A. Yes, sir.

Q. Have you ever seen him perform?

A. Very little, sir.

Q. Have you ever performed with him?

A. Not actually, just a few blows, maybe.

page 248] Q. Was he able to — would you say from what you know that he was adequate at the sport?

A. He was capable of giving a few pointers to me, sir.

Q. How about Karate?

A. Karate I don't know.

Q. Do you know whether or not he knew anything about it?

A. No, sir. All I know about it is Judo, that is all I was interested in.

Q. He could give you a few pointers if he wanted to?

A. Well, not very much, I'll say, I never asked very much, I more or less keep to myself, I don't ask too much.

Mr. Smith: All right, that is all.

Mr. Bagley: One question.

By Mr. Bagley:

Q. This was brought out in cross, I believe you said Mr. Smith dropped the bucket when he was hit?

A. Yes, sir.

Q. He had the bucket in his hand?
A. He had, whatever that — the pail that the deer meat was in.
Q. I see. When he was struck?
A. Yes, sir.

Mr. Bagley: All right.
The Court: Thank you, sir.

(Witness excused.)

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page 264] PROCEEDINGS

The Court: Mr Bagley, are you ready with your next witness?
Mr. Bagley: Yes, sir. Mr. Chaffin, please.

Thereupon,

JAMES E. CHAFFIN,
was called as a witness by counsel for defendant, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION — resumed

By Mr. Bagley:
Q. State your full name, please.
A. Sergeant James E. Chaffin.
Q. What is your occupation?
A. Marine.
Q. Where do you reside?
A. Quantico-Triangle Trailer Park.
Q. Are you stationed at Quantico?
A. Yes, sir.
Q. You were sworn yesterday as a witness, were you not, sir?
A. Yes, sir.
Q. I remind you that you are still under oath.
A. Yes, sir.

James E. Chaffin

Q. Do you know Mr. Smith?

page 265] A. Yes, sir.

Q. Directing your attention to the 12th of June 1964, where were you at that time?

A. I was sitting outside my trailer, on the patio.

Q. And did you have occasion to observe anything unusual on that night?

A. Yes, sir. A bunch of the people up there were playing volley ball, they were drinking beer up there and having a good time —

Q. Where, if you would look at this diagram, approximately where do you reside?

A. I am on the left-hand corner down there about 125 feet away from where they were playing ball there.

Q. I see, and would that be down in this vicinity (indicating)?

A. Right in there, yes, sir.

Q. And for the record, I am pointing to the left side of the diagram that is on the easel here. Now, just what did you observe, Sergeant?

A. Well, I looked up there and I saw Mr. Moore had a rifle over his head, he was hollering and screaming like a wild man or a crazy man or a drunk or something.

Q. Where was he approximately when you first saw him?

A. Well, to the best of my knowledge, Mr. Moore was standing this side of the trailer (indicating).

page 266] Q. Which trailer, sir?

A. That one on the right there (indicating).

Q. This side (indicating)?

A. Just right there below the courts where they was playing volley ball there.

Q. Over here (indicating)?

A. On your right, sir.

Q. Over here (indicating)?

A. Up a little bit, now.

Q. Here (indicating)?

A. Right in there.

Q. All right. That is where you saw Mr. Moore?

A. Yes, sir.

Q. With the rifle?

A. His wife was trying to take the rifle away from him.

James E. Chaffin

Q. His wife was?

A. Yes, sir, but she couldn't do very much with him because he was such a big man.

Q. Did you go up there at any time?

A. Yes, sir, I went up there to see if I could locate my son. When a man had a rifle in his hand anything could happen, I didn't want my son to get hurt noway.

Q. All right. Did you find your son?

A. No, sir, he wasn't nowhere around there.

Q. Then what if anything did you do?

page 267] A. Well, sir, I looked and I saw blood pouring out of Mr. Moore's back. So Mr. Lacey, another gentleman, took Mr. Moore and sit him down in the chair —

Q. Excuse me, "Mr. Lacey," would that be Lacey Dry?

A. Yes, sir.

Q. All right.

A. And sit him down in the chair. And they laid the 22 rifle down the side of the chair.

Q. Would this indicate the chair (indicating)?

A. Yes, sir, that's the chair.

Q. This is the general vicinity of the chair? (indicating).

A. Yes, sir.

Q. Do you remember which way the chair was facing?

A. It was facing toward the trailer, up that way (indicating.)

Q. I see.

A. And the blood was still pouring out of Mr. Moore's back. And another Marine, he was the last one in here yesterday, him and I tried to get Mr. Moore — lay him down on his stomach to put a pressure on the wounds. There are certain pressure points on a man's body where you can manage to slow down the blood.

So we got Mr. Moore down on his back — on his stomach, rather, and we hollered for a blanket and a sheet. We put the blanket over Mr. Moore because he was going into

page 268] shock. Once a man goes into shock, it won't be long before the man kicks the bucket.

Q. All right.

A. So we put the blanket over the man and took the sheet, made a bandage out of the sheet and put it over the wound.

At that time the ambulance come up and we helped to assist

the ambulance driver put a heavier compact bandage on the wound. Then we loaded Mr. Moore in the ambulance and the ambulance drove away.

At that time the sheriff came up. Well, when the sheriff came up he started asking questions. He got my name and I went over there and picked up the rifle, the 22 rifle.

Q. Where was the rifle?

A. The rifle was still in the same place besides the chair.

Q. Beside the chair?

A. Yes, sir. I picked up the 22 rifle, it was a single shot bolt action. I jerked the chamber open, something flew by my face — so I had it opposite — against the light, there is a big floodlight there, I took it over there and give it to the sheriff, the sheriff put it in the back seat of his car.

He went over to Mr. Smith's house and we knocked on the door. Mr. Smith came outside.

Q. Did the sheriff ever go in the house, if you recall?

A. I can't remember as to whether he did or not.

Q. All right. Now, let me ask you about this rifle.

page 269] When you first saw the rifle, did I understand you to say that Mrs. Moore was trying to get it from him?

A. Yes, sir.

Q. From Mr. Moore?

A. Get it away from Mr. Moore.

Q. All right. Now, was anyone else doing anything with Mr. Moore while he was sitting in that chair?

A. There was one other, there was one man that had a piece of thin bandage, trying to stop the blood but he didn't know what he was doing.

Q. Who was that man, do you know?

A. I don't remember the man's name. He was in here yesterday as a witness.

Q. All right. What was Mrs. Moore doing, if anything?

A. Pouring ice water down the man's throat.

Q. Whose throat, now?

A. Mr. Moore, giving him cold water, a drink of cold water — worse thing you can do when a man is going into shock, give him ice water.

Mr. Smith: If Your Honor please, I don't think this man is

qualified to testify as an expert. I've let him go a long way, but to tell us what the worse thing to do for shock, and all like that, unless he is qualified as a medical expert — I think his testimony should be stricken.

The Court: Well, I won't strike the evidence but page 270] I don't think it bears on the main issue here.

Mr. Bagley: All right.

By Mr. Bagley:

Q. Then what happened, what if anything happened after the sheriff left?

A. Well, everybody was just talking there, and that's about it.

Q. Now, how long had you known Smith?

A. Between four and five years. He is in my outfit.

Q. In the Marine Corps?

A. Yes, sir.

Q. Have you ever known him to be violent?

A. Not to my knowledge, not as a Marine.

Q. All right. How long have you lived in this trailer park or had you, on the 12th of June?

A. I had been there about a year, sir.

Q. About a year?

A. Yes, sir.

Q. Do you know how long Mr. Smith had been living there?

A. No, sir, I have no idea. Mr. Smith lived there before I did.

Q. He did?

A. Yes, sir. I lived in another place before I bought my trailer but I worked in the outfit where I knew Mr. Smith.

Q. Let me ask you this, Sergeant: When you page 271] came up here (indicating) from your trailer, who were the other people there, if you can recall? You mentioned Mr. Dry and Mrs. Moore and Mr. Moore.

A. I don't know all those people, sir, because I don't associate with them, I stayed in my own place.

Q. Did you see any of them around here yesterday?

A. Yes, sir, all the witnesses in here, I recognized them.

Q. And they were in this vicinity (indicating)?

A. Yes, sir, they were all playing volley ball.

Mr. Bagley: I believe that is all, sir.

James E. Chaffin

CROSS-EXAMINATION

By Mr. Smith:

Q. The first you saw of Mr. Moore he had a rifle over his head, hollering and screaming?

A. Yes, sir.

Q. Acting like a drunkard?

A. Yes, sir.

Q. And you turned around and saw blood squirting out —

A. He was facing me when I walked up there, sir.

Q. And when you walked up there you found out he had been wounded?

A. Yes, sir.

Q. All right. Now, you say Smith has never been violent insofar as you know as a Marine?

A. Not as a Marine, sir.

page 272] Q. Not as a Marine. You don't know him socially, do you?

A. No, sir. As a Marine I know him, when he was in the Marine Corps.

Q. And you knew him on duty and —

A. Yes, sir.

Q. And he discharged his duties?

A. As a Marine.

Q. And beyond that you don't know anything about him at all?

A. Not as a civilian, I don't, sir.

Q. Do you know anything about his desire or like for the sport of ju-jitsu?

A. Well, not that — I don't think.

Q. Have you ever seen him wrestle or play around while on duty, ju-jitsu?

A. No, sir. Not in the Marines, you don't do it while you're on duty.

Q. Did you ever see him use a bullwhip?

A. No, sir.

Mr. Smith: All right, that's all.

Mr. Bagley: That is all.

The Court: Do you want Sergeant Chaffin excused?

Mr. Bagley: We might want to use him later.

The Court: All right. Could you wait outside?
The Witness: Yes, sir.

page 273] (Witness retired from the witness stand.)

Mr. Bagley: Mrs. Harteis, please.

Thereupon,

JOYCE IRENE HARTEIS,
was called as a witness by counsel for defendant, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bagley:
Q. Will you state your full name, please ma'am.
A. Joyce Irene Harteis.
Q. All right. And what is your occupation? Are you a housewife?
A. I am a waitress.
Q. And where do you reside?
A. You mean where we live?
Q. Yes.
A. Fredericksburg.
Q. All right. Do you know Mr. Smith here?
A. Yes, sir.
Q. Directing your attention to the 12th of June of this year, 1964, did you reside elsewhere at that time?
A. Yes, sir.
Q. Where at?
A. Triangle Trailer Court in Dumfries.
page 274] Q. And did anything unusual occur on that date in the trailer court?
A. Yes, sir, this was the day of the stabbing.
Q. Would you tell us what occurred and where you were?
A. On this night?
Q. Yes, that particular night, June 12.
A. A lot of us neighbors was *altogether,* we was over there on this other side from our trailer playing volley ball —

Joyce Irene Harteis

Q. Which one of these, can you recognize this (indicating)?
A. Looks like our trailer.
Q. Is this your trailer here (indicating)?
A. Yes, sir.
Q. All right. Now, where were you at the time these unusual things began to happen?
A. Over here on the other side.
Q. On this side (indicating)?
A. Hu-hu.
Q. Would you tell the Court and jury here what you observed?
A. Well, this station wagon — a guy came up and brought Tom some deer meat.
Q. Yes.
A. So this other car pulled up behind him and Mr. Moore and Mr. Lesheski — I didn't know them or anything, I had never seen them before —

page 275] Q. But you saw them get out of the car?
A. Hu-hu. And Mr. Moore went around the car. Tom was holding the deer meat in a yellow pail and Mr. Moore, he hauled off and punched Tom and Tom fell back.
Q. Did you hear any words between them?
A. I didn't — there was something said, but I don't know what it was until they come back over on the other side and, you know, somebody says, somebody said, "That guy just hit Tom" —

Mr. Smith: Now, if Your Honor please —

By Mr. Bagley:
Q. Did you see that?
A. What?
Q. Did you see the striking?
A. Yes, sir. Mr. Moore struck Tom.
Q. He hit Mr. Smith?
A. Hu-hu.
Q. What happened. Did anybody fall down?
A. No, I didn't see him fall, he just went back.
Q. If you can remember, at that point, what did you do if anything?
A. I just stood over there and I said to my husband, I said,

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"Beck, I think that guy is drunk over there," I says, "Maybe you better go call the police."

And my husband said, "No, just stay out of it, it's none of your business."

page 276] So then Mr. Moore and that other Lesheski come back, come over there and he was rattling off —

Q. Who is that?

A. Mr. Moore.

Q. What, if you recall, what kind of things was he saying?

A. Why, he was cussing, cursing, and he said something about Tom was supposed to have his kid's ball.

Q. All right.

A. And he was showing how he was supposed to be kicking it around, you know —

Q. Did anybody say anything about a gun?

A. Yes, sir.

Q. Who was that?

A. Mr. Lesheski did.

Q. And when was that?

A. That's when — Mr. Moore, he started over for Tom's trailer, you know, he said, he says, "I'll just lay him" — he said something about Tom's bullwhip, you know —

Q. Who said that?

A. Mr. Moore did. He says, "I'm not afraid of him," or something. And Mr. Lesheski says, well, he says, "Wait a minute, man. I got a gun." He says, "I got a gun."

Mr. Moore says, "I don't need a gun, I can kill him with my bare hands like that."

Q. Then what if anything did you see happen?

page 277] A. Well, after that, well, Mr. Lesheski went over — well, Mr. Moore went over to Tom's trailer and —

Q. Was this the first time or the second time?

A. This was the second time.

Q. I see. And what was Mr. Moore doing?

A. He was, you know out there hollering, and what he was doing was just fat-mouthing, I call it.

Q. Fat-mouthing?

A. I guess he was more or less inviting Tom to come out, you know.

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Q. Did he call him to come out?

A. Yes, sir.

Q. Mr. Moore did—do you remember what he said?

A. No, I don't remember the exact words, sir.

Q. And then when Mr. Moore went across—

A. Mr. Lesheski went over to him, he said, "Wait a minute, man, I'll get my gun," and he opened his car door and that's when Wilma, Mrs. Cowart and I and Lacey, Dry we went off to the middle of the road near the car and he says—he opened his car door and looks in, —

Q. Did you see him?

A. Yes, sir, and he looks in and my husband—he says, "I got my gun, you know" and come back out from the car, like, he just swung around with his hands behind him and my husband hollered "Get over here," and I says,

page 278] "No, he doesn't have a gun, he's just funning."

Q. You said that to your husband?

A. Hu-hu.

Q. All right. Now, was that the first time that Moore went over there or the second time?

A. That was on the second time, that was just before Tom come out of his trailer — I don't know how many minutes or anything, you know.

Q. Did you hear Mr. Moore say anything about a gun at any time?

A. No, sir.

Q. Did you ever see a gun?

A. The only time I seen a rifle was when Mr. Moore was coming from his trailer along the side way there with his rifle down, staggering.

Q. Where was that, in here somewhere (indicating)?

A. Yes, down along the side.

Q. This side (indicating)?

A. Yes, sir. That is when I drove Mr. Lesheski's car up to—

Q. You moved Mr. Lesheski's car?

A. Yes, sir.

Q. Why did you do that?

A. Well, there was a lot of traffic and I thought somebody

might as well move it out of the way because they
page 279] couldn't get around him.

Q. You mean traffic was trying to get through, is that it?

A. Yes, sir.

Q. And what did you do with his car?

A. Well, it was sitting right there—

Q. Where was it sitting, here (indicating)?

A. Somewheres along in there. And I moved it on up where this trailer is here (indicating)—

Q. This trailer (indicating)?

A. Hu-hu.

Q. For the record, you are indicating the trailer here on the right of the diagram?

A. Yes, sir.

Q. And you moved it out there?

A. Yes, sir. Well, I moved it—there was two empty spaces and I moved it next to these friends of ours, next to their trailer, and then I went into their trailer.

Q. Did you pull the car off the road?

A. I pulled it to the side, the right side.

Q. What if anything did you do after that?

A. I went into these friends of ours, in their trailer.

Q. Where?

A. Where I parked the car on the right side.

Q. I see. And when was it that you saw Mr. Moore with the rifle?

page 280] A. When I was taking the car I seen him walking along.

You see, what happened, after the knifing and everything, this friend of ours, he's a corpsman in the Army, I went in there to ask him to please go down and look at Mr. Moore, I said, "A couple of guys got stabbed down there," and I say "How about going down and looking at them," because he knows pretty much what he's doing. So he went down there.

Q. But when you saw Mr. Moore, was he by Mr. Smith's trailer or where?

A. When I seen him he was just walking down, he was near Mr. Smith's trailer—

Q. Walking down this side of the diagram, this side of

Joyce Irene Harteis

A. So everybody could hear him.

Q. And how long after, if you remember, how long after he came back from Mr. Smith's place over here where you all were (indicating), how long after that was it when Mrs. Moore came down?

A. It wasn't too long, but I couldn't tell you,
page 284] I don't know, somebody went down there—well,
I don't know whether somebody came down there and got her, went to her trailer and got her, you know, and told her her husband was down there, because—I mean, I had met Mrs. Moore a couple of times before then, but—

Q. Had you ever seen Mr. Moore before?

A. No, sir, that's the first time I ever seen him.

Mr. Bagley: I think that is all.

CROSS-EXAMINATION

By Mr. Smith:

Q. Your husband told you to stay out of it and you stayed out of it, is that right?

A. Yes, I was nosey, I guess.

Q. Now, Mrs. Harteis, I believe you stated that you remarked to your husband that you think this guy was drunk, somebody better call the police?

A. I say that he seemed to be drunk, you know, he was raving and everything.

Q. Was that after he had had his first encounter with Mr. Smith, that is, after he had hit Mr. Smith?

A. Yes.

Q. Where did Mr. Smith go then after he got hit?

A. As far as I know he went into his trailer.

Q. Now, how long after he went in his trailer was it before you saw Mr. Smith again—was that the ten or twenty
minutes that you referred to?

page 285] A. Something like that.

Q. So he was in his trailer, as far as you know, for ten or twenty minutes, he wasn't even around, wasn't participating in conversation or anything?

A. Mr. Smith?

Q. Yes.

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A. No, sir.

Q. And Mr. Moore during all of this period of time was fat-mouthing, I believe you called it, is that right?

A. Yes, sir.

Q. Typical drunk, wasn't he?

A. Yeah, he seemed to be.

Q. Even trying to get your husband to agree that something was right, smacking him on the shoulder pretty hard, and all like that and your husband treated him just like he was a drunk and agreed with him, isn't that right?

A. Yes, sir. He told him, my husband says, "You're right," he wasn't going to argue with him.

Q. Now, Mrs. Harteis, when was it that you saw this Lesheski says, "I've got a gun," and go to the car and reach in like he had a gun, was that when Mr. Moore and Mr. Smith were involved in their initial altercation or their initial fight?

A. No. Mr. Moore went over to Mr. Smith's trailer and Lesheski said, "Wait a minute," he says, "Wait a minute, don't worry," or something, he says, "I got a gun."

page 286] Q. Where was Mr. Smith then when Mr. Moore had gone over there?

A. He was in his trailer.

Q. Now, had you seen, or did you see Mr. Lesheski go to the car at any time during the first fight between Mr. Moore and Mr. Smith?

A. The first?

Q. That's right.

A. When Mr. Moore struck him?

Q. When Mr. Moore hit Smith.

A. No, sir.

Q. Did you at any time see Lesheski go to the car then?

A. No, Lesheski come back over to where all the people were.

Q. I see. That was just a one-lick fight, the first one?

A. Yes.

Q. And Smith went on to his trailer and was fat-mouthing, I mean—

A. Mr. Moore.

Q. Excuse me — strike that — Mr. Moore came back over fat-mouthing off, as you put it?

A. Yes.

Joyce Irene Harteis

A. Yes, sir.

Q. Now, where was your husband sitting or standing at that particular time?

A. He was over by Mr. Dry's trailer.

Q. And Mr. Dry's trailer is down in this vicinity (indicating), is it not?

A. Yes.

Q. This is the volley ball court (indicating) and Mr. Dry's trailer is right here, is it not?

A. Yes.

Q. And the Lesheski car was somewhere up in this vicinity (indicating), wasn't it?

A. Well, as I remember it, it was right about near Tom's trailer, right in there.

Q. This (indicating) is Tom's trailer?

A. Yes.

Q. And it was right in here (indicating)?

A. Yes.

Q. And had you walked from this area (indicating) over to the car—

A. Yes, when Mr. Lesheski went over to his car and opened it he says, "I got a gun," and that's when Wilma and I and Mr. Dry walked out in the road.

page 291] Q. And which direction was Mr. Lesheski's car headed? Was it this direction or back this way (indicating)?

A. Well, it was—

Q. Or was it this way (indicating)?

A. Yes, sir.

Q. Which door did Mr. Lesheski walk to and open up?

A. The driver's side.

Q. The driver's side of the car. And where were you standing then in relation to the car at the time that he opened the driver's side and got out and had his hand behind him?

A. We was right there by the end of his car.

Q. Would that be at the left rear corner, you were back there at the left rear corner of this car and he was here (indicating) going into the driver's side of the car and the car was heading in this direction (indicating) and your husband was back here (indicating) and this is Tom Smith's trailer, isn't that right? (Indicating).

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A. Yes.

Q. Where was Mr. Moore at that particular time?

A. He was going over to Tom's trailer.

Q. He was going in this direction (indicating)?

A. That's right.

Q. Was Tom anywhere in this vicinity (indicating) at the time?

A. No, sir.

page 292] Q. Now, when you told your husband back here that he was just funning, that he didn't have a gun, did you say it loud enough for him to hear you?

A. Everybody heard me—well, see, when he hollered and he said, "I got a gun," everybody scrambled, you know how—and when he went out there I says, "He's just funning, he doesn't have a gun."

Q. All right. You hollered it back to put everyone at rest, didn't you?

A. Yes.

Q. And it didn't frighten you, did it?

A. No, not when I found out.

Q. When you found out that he didn't have a gun you shouted back the remark back and you weren't frightened, is that correct?

A. Hu-hu.

Q. You mean you were not frightened?

A. No.

Q. Now, I believe you stated that you did not hear Mr. Moore say anything about a gun.

A. No, sir.

Q. And when Mr. Lesheski said, "Wait a minute, I got a gun," what was Moore's comment about it?

A. He says, "I don't need a gun, I'll kill him with my *bar* hands."

page 293] Q. "I'll kill him with my bare hands"—and where was Mr. Smith at the time?

A. He was in his trailer.

Q. In his own trailer. All right. Now, when did you see Mr. Moore with a gun—

A. When did I see Mr. Moore?

Q. When did you see him with a gun?

A. When I was taking the car down the road there I seen

him walking with his rifle, he was staggering. This was after the knifing.

Q. Did you see the knifing?

A. Yes, sir.

Q. Who knifed who?

A. Well, see, what I seen of it was Mr. Moore went to grab Tom like this (indicating).

Q. I see.

A. And when he did, I just seen Tom's hands reach around him, that's all I know.

Q. And then what did Mr. Moore and Mr. Smith do?

A. Well, they both started scuffling on the ground.

Q. They went down to the ground, didn't they, they started scuffling, and that time what did you do?

A. What did I do?

Q. Yes.

A. I went back over to the other side of the trailer park.

page 294] Q. When did you move the car?

A. It was—well, it was afterwards.

Q. After you found out that someone had been wounded, you moved the car so as to open it up for the traffic that you knew had to come in?

A. Well, somebody said, "Call the ambulance," and somebody said that they called the cops, and there was other people coming in the trailer park and with everybody else there, nobody could get around, so I jumped in and moved the car.

Q. I see. But you had actually seen the scuffle when Mr. Moore put his arms around Mr. Smith and Mr. Smith was working with his hands and then they went to the ground—and did you see blood at that moment?

A. Not at that moment.

Q. How soon afterwards did you see blood?

A. Well, when I went out to move the car, when Mr. Moore was walking back, I seen—somebody said they got knifed, you know, and I seen blood, a trail of blood, he was trailing blood on the way—

Q. Where was Mr. Moore going when he was trailing blood?

A. When he was coming back to Tom's trailer.

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Q. But by that time he was coming back to Tom's trailer—and is that when he was carrying a rifle?

A. Yes, sir.

Q. Tell us how or show us how he was carrying a rifle.

page 295] A. He had it to his side (indicating).

Q. Down to his side?

A. He had it—

Q. Was it dragging on the ground?

A. I don't know if it was dragging the ground. It was dark and—

Q. Was it down?

A. It was to his side (indicating).

Q. And how was he walking, would you describe for us how he was walking?

A. He seemed like he was staggering.

Q. Did he fall down at any time while he was walking there?

A. I didn't see him fall.

Q. You didn't see him fall at all. But he had already been involved here (indicating) and he had been up to his trailer—and is this his trailer (indicating)—this (indicating) is Mr. Smith's?

A. Yes.

Q. Now, would this be his trailer (indicating)?

A. Yes, sir.

Q. And he had already been involved here and he had been up here and the next time you saw him he was staggering, holding a rifle down to his side, and he was walking back in this direction (indicating)?

page 296] A. Yes, sir—well, see, then when I took the car, like I said, I went into these friends' trailer and I said, "How about going down there and looking, a couple of guys got stabbed and maybe you can help them."

Q. "A couple of guys" got stabbed? Did you see them both get stabbed?

A. Well, I didn't—I knew Mr. Lesheski got stabbed, because he come over to Wilma's trailer and blood was streaming out of his side.

Q. But this time when Mr. Moore got stabbed and Mr. Lesheski got stabbed, that was in your opinion ten or twenty

minutes after Mr. Moore had hit Mr. Smith when Smith had the deer meat, held it in a bucket?

A. Approximately, I couldn't swear to the exact time.

Mr. Smith: I think that is all.

REDIRECT EXAMINATION

By Mr. Bagley:

Q. Mrs. Harteis, when you and Mrs. Cowart went over to the car, to Lesheski's car, were you on the side closest to the vacant lot or on the other side of the car—the driver's side or the other side?

A. On the driver's side.

Q. You both were on the driver's side?

A. Right at the back-end of it.

Q. In other words, were you standing beside

page 297] Mr. Lesheski or even with him?

A. No, sir, we was right at the back bumper.

Q. Of the left side of the car?

A. Of the driver's side, hu-hu.

Q. And did you see him when he told somebody that he had a gun?

A. He told Mr. Moore, he said, "Wait a minute, I got a gun."

Q. Do you know whether he threatened anyone with the gun?

A. No.

Q. At that time were there any other men present?

A. Over by Tom's trailer?

Q. Yes.

A. There were some others, I guess friends of his that brought the meat, was right around there—I don't know. I didn't pay much attention, if there was any other men, no.

Q. What did these men do when Lesheski said he had a gun?

A. They took off, run around somebody's—I think around Tom's trailer or Mr. Coffey's trailer.

Q. All right. Then on this particular occasion we are discussing when Mr. Smith asked you about the bullwhip, did you see a bullwhip at any time on this night?

Joyce Irene Harteis

A. If he had—well, I will tell you like this, see.
page 298] It was dark. I didn't have my glasses on, he come out of his trailer and he had something in his hand. That is all I can say.

Q. Did you hear a whip crack at any time?

A. Yes, I heard a crack, but that—

Q. But you didn't see him crack it—and this was on this very same night?

A. I heard Mr. Moore say something to Tom that he had it, he said, "He's got that d-a-m-n bullwhip," or something.

Q. That's what Moore said?

A. Yes.

Q. And how long was it after that that Mr. Moore went back across—was it about that point that he went back across there?

A. No, he was standing there when — I guess he was, or something, when Tom come out of his trailer and he said something about the whip, this was all about the same time.

Q. And was it then that Mr. Moore went back across the street—and was Lesheski with him when he went back across the street?

A. You mean, after the knifing?

Q. No, I mean this—

A. Before?

Q. When he came out with the whip.

A. Well, Tom didn't come out with the whip
page 299] until this—until it all happened and started, you know, scuffling.

Q. There were two different scuffles, weren't there?

A. Well, all I seen was the first one when Mr. Moore socked Tom and the next one was when the knifing was. I only seen two of them.

Q. Now, when was it that you saw the whip, that is what I am trying to clarify.

A. Oh, that was when Mr. Moore went back over there to Tom's trailer when Tom come out.

Q. I see.

A. And he said something about the whip.

Q. I see, all right. Now, did I understand you to see, Mrs. Harteis, that when you went to this car, that Mrs. Cowart

and Mr. Dry—

A. Well, Mrs. Cowart and I went and Mr. Dry was behind us.

Q. He was behind you. Now, where, if you recall, was Mr. Dry when the second altercation took place, the second fight took place, do you know?

A. I don't know, sir. As far as I know, he went back over to the trailer.

Mr. Bagley: All right, that is all.

Mr. Smith: That is all.

The Court: Mrs. Harteis, in your earlier testimony you said that after the first fight when Tom went
page 300] back to his trailer—did Mr. Moore call to Tom to come out?

The Witness: Yes.

The Court: Do you recall just what he said?

The Witness: I don't recall the exact words.

The Court: Was it in a quiet voice, a normal voice, or a loud voice?

The Witness: Well, it was in a loud voice.

The Court: From where you stood do you think that Tom could have heard it in his trailer?

The Witness: Yes, sir. His windows were open and it was warm out.

The Court: And subsequently Tom, Mr. Smith, did come out?

The Witness: Yes, sir.

The Court: And do you recall what, if anything, he said at the time he came out?

The Witness: He come out and he said something but I don't know what he said.

The Court: All right.

Mr. Smith: And that is the time that Mr. Moore said, "You got that d-a-m-n bullwhip?"

The Witness: Yes, sir.

The Court: Thank you.

(Witness excused.)

Harvey James Harteis

Mr. Bagley: Mrs. Harteis, would you ask your
page 301] husband to come in, please?

Thereupon,

HARVEY JAMES HARTEIS,

was called as a witness by counsel for defendant and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bagley:

Q. Would you state your full name, please.

A. Harvey James Harteis.

Q. What is your occupation?

A. Marines.

Q. Where do you reside?

A. Right now I live in Fredericksburg.

Q. Where did you live on June 12, 1964?

A. Triangle Trailer Court.

Q. All right. And did anything unusual occur at that trailer court that day that you recall?

A. Yeah, there was a stabbing.

Q. Would you tell us at about what time this was?

A. Why, it was in the evening, it was dark out.

Q. What did you observe that was unusual?

A. Well, a couple of cars pulled in and Mr. Smith there, he called over and asked him if he had his deer meat and—

Q. Was that to the people in the first car that he said that?

page 302] A. Yeah, it was a station wagon. And then this other car pulled up, just a matter of seconds between them, and I figured that it was some more buddies, you know—

Q. Yes.

A. And then somebody yelled that there was a fight over there. And—

Q. Did you see any of that?

A. No, I didn't see none of it, actually, the cars were pretty near blocking the view pretty well.

Harvey James Harteis

Q. Where were you at this time?

A. Well, I was where this chair is setting—

Q. Up here (indicating)?

A. Yes. We had a net stretched across there.

Q. A volley ball net?

A. Yes, and I was playing volley ball there.

Q. I see. All right. Then after this car pulled up, what did you see?

A. Well, Mr. Smith went over to the car, to the green station wagon and that's when somebody said there was a fight over there.

Q. Did you see anybody get out of the second car?

A. Yeah, a couple of men got out, big men—one was big and one was average size.

Q. Did you ever see Mr. Moore on that night?

A. Yes, he got out of the blue car.

page 303] Q. I see. And did you ever see him any closer than that?

A. Yeah, after I reckon he went over to where Mr. Smith was standing and I don't know what he done there and then he came back over across the street.

Q. What if anything was he doing that you saw when he came back across the street?

A. Why, he come back over there and me and Mr. Dry—and there was a group of people around there, but he seemed to know Mr. Dry there, he was talking to him, and he come up and shook my hand and he was very loud—drunk, I would say. And he kept mumbling something, I didn't pay no mind to him because I get irritated by him.

Q. He irritated you?

A. Yes, sir, he punched on the arm a couple of licks, but I figured he was a drunk man and I just let him go his way.

Q. Now, what, if anything happened after that?

A. Well, he kept blabbing around and I kept trying to ignore he was getting on me —

Q. How big a man was he?

A. Well, he stands as big as me, anyway and he outweighs me, I reckon, he is mighty big.

Q. How tall are you?

A. I'm about six three.

Harvey James Harteis

Q. And he was bigger than you?

page 304] A. Yeah, I'd say he was.

Q. All right. What, if anything, happened then after he was there?

A. Why, he kept blabbing around and he went back across the road and that's when I said—I started drinking my beer again and that's when—one young boy come back over again and he had a cut on his side—

Q. Do you know what that fellow's name was?

A. Lesheski, I think it was.

Q. All right. And then did Moore come back?

A. He come back, why I couldn't say how many minutes difference in time, but he come back and somebody sat him in the chair.

Q. I see.

A. And had a rifle laying down beside him.

Q. You remember seeing the rifle?

A. Yes, I did, because Mr. Lesheski picked it up. And he opened the chamber to see if there was a round in it, which there wasn't, I didn't see a round in it.

Q. Lesheski picked it up?

A. Yes.

Q. Or someone else?

A. Lesheski picked it up.

Q. *Die* Lesheski do anything about it?

A. Why, he picked it up off the ground. It were

page 305] laying—well, the chair is sitting here (indicating), it was laying there (indicating) and I walked up aside him and he picked it up and it was a bolt action, he opened the bolt and looked in and I looked in with him and there was nothing in it.

Q. Now, do you know whether anybody had checked this rifle before that?

A. I don't have any idea.

Q. All right. Now, at this point was Mr. Moore in the chair?

A. Yes.

Q. I see. Were you observing when Mr. Moore went across over to Mr. Smith's trailer?

A. No, I didn't pay no mind to him after that, I just sat down and was drinking my beer.

Q. Now, who else was in this group if you recall?

Harvey James Harteis

A. Well, there was quite a few — my wife, brother and Mr. Dry — why, there was quite a few.

Q. Quite a few people. And where was Mr. Dry in connection with—

A. Why, I couldn't say what exact spot, I just know he was in that general area.

Q. But he wasn't sitting or talking with you, Mr. Dry?

A. No, I don't recollect if he was or not, I couldn't swear to it.

Q. Well, did you do anything at all during this

page 306] period or were you just sitting there drinking beer?

A. I run my brother off and made him go into the trailer with my neighbor's little children.

Q. All right.

A. And that one man, that Lesheski, I think it was, say he had a gun, and that's when my wife told me that he didn't, which I — I ain't no brave man, I wasn't going to find out, and I tried to run my wife away so if there was anything she wouldn't get hurt.

Q. I see. Then, do you remember anything else about it?

A. No, nothing.

Q. Did you do anything to help Mr. Moore at any time or—

A. Well, I held his head there after he was setting there in that chair, somebody said, "Hold his head," so I held his head, it kept flopping back.

Q. Was Mrs. Moore there?

A. I couldn't tell you.

Q. You don't recall whether she was there or not?

A. I never seen the woman before until that night and I just couldn't tell you, I never seen Mr. Moore before that night either.

Q. You hadn't seen him before that night?

A. That's right.

Mr. Bagley: That's all.

The Court: Mr. Smith.

page 307] CROSS-EXAMINATION

By Mr. Smith:

Q. You say your wife told you that Mr. Lesheski did not

Harvey James Harteis

have a gun?

A. I believe she did.

Q. And were you about here (indicating)?

A. I was over about near that—well, near that dotted line by the bottom of that picture there.

Q. Down here (indicating)?

A. Over a little bit. That would be a patio there.

Q. On the patio here (indicating)?

A. Right about there.

Q. And where was she when she told you he didn't have a gun?

A. Right out in the middle of the road, watching.

Q. Watching the man; and did she holler that back so that you could hear her?

A. She was out in the middle of the road and I sort of heard the man say he had a gun, and I was going out to get her out of there and—

Q. And she hollered back that he didn't have a gun?

A. Yes.

Q. All right. Now, you say that Moore, the big fellow that appeared to be drunk, came over and shook your hand?

A. Come over and shook my hand and I felt his
page 308] muscle and he said, "I am strong, ain't I?" And
I says, "You are."

Q. You realized he was drunk all the way through, didn't you?

A. Well, I figured he was pretty drunk.

Q. It was pretty obvious to everybody around there that he was drunk and—

A. Well, I would think so.

Q. And so you just agreed with him in practically anything he said and—

A. I tried to amuse him. If he wanted to fight with me I would have helped him, I reckon, but I wouldn't—

Q. He was obnoxious, wasn't he?

A. Yes, he was.

Q. And big, to go along with it, and real real drunk?

A. He was drunk. He could stand up but he was drunk.

Q. Now, Sergeant Harteis, how long was it between the time that this man first arrived and they said there was a fight on the other side of the car, and the time that the second

fight, the stabbing, took place?

A. Oh, ten or fifteen minutes, if that long.

Q. Somewhere in that vicinity, then?

A. Could be.

Q. You all had a chance to come back over here (indicating) and you were drinking beer and this fellow was—

A. Well, I never did leave until I went out into

page 309] the middle of the road to get my wife away and she did come back a little bit and then she was standing there and I gave up and I sat down and I drank my beer.

Q. Sergeant Harteis, have you ever seen a bullwhip used in that vicinity?

A. Yes. Mr. Smith sort of practiced with one.

Q. Did you ever seen him use it when he was mad or in an argument with anyone else?

A. I believe he did hit a man out there one night.

Q. Your wife was watching through the window—you were watching television and you heard it, didn't you?

A. Yeah.

Q. Do you know who that man was?

A. Well, I think his first name is Bill, I don't know his last name.

Q. Coffey?

A. I don't know, could be. I don't know his name.

Q. And Mr. Smith was *made* on that occasion, was he not?

A. He seemed to be.

Q. And what was he doing with the whip?

A. It looked like he snapped that man a couple of licks on the legs, and the man was holding a baby.

Q. What stopped it, do you know?

A. Mr. Smith throwed down the bullwhip and it hit my automobile and I went outside and looked at the

page 310] car because I just had got the car, to see if it dented it any, which it didn't, and Mr. Smith said, "Come on, I'm going to beat you up," or something to that effect.

Q. Who did he say that to?

A. To that Bill Coffey.

Q. How long was this before Mr. Moore became involved?

A. Oh, hell—excuse me—

Q. Just Marine talk. Go ahead.

A. I wouldn't recollect the exact date but it was a few days in between there.

Q. A few days in between?

A. I wouldn't say how many.

Mr. Smith: That's all. Thank you.

REDIRECT EXAMINATION

By Mr. Bagley:

Q. Corporal, you say you went out into the road to get your wife. Was that when she told you this man didn't have a gun?

A. Well, when I was going out toward there she says, "The man don't have a gun," and I says, "I don't care, come on, let's get out of here before you get shot or someone gets hurt," and she told me to go call the police and I said it ain't my problem.

Mr. Bagley: All right, thank you. That is all.

The Court: Thank you.

page 311] Thereupon,

MARTIN THOMAS SMITH,

was called as a witness by counsel for defendant, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bagley:

Q. What is your full name?

A. Martin Thomas Smith, sir.

Q. And you are the defendant in this case?

A. Yes, sir.

Q. What is your occupation?

A. I work for Cablevision in Fredericksburg, sir.

Q. On June 12, Mr. Smith where did you live

A. I lived at the Quantico-Triangle Trailer Courts, Lot 23-A.

Q. All right. Will you relate to the jury what occurred

on that night?

A. Approximately 9:30, sir, we finished playing volley ball—

Q. This is the volley ball playing area (indicating)?

A. In that general area, yes, sir.

Q. Let me ask you, have you measured these distances between these trailers (indicating)?

A. Yes, I have, sir.

page 312] Q. And have you a chart of this area?

A. Yes, I did, sir, I had a complete three by five chart made.

Q. At this time I would like to bring in another chart for you to identify if I may—

The Court: Would you show the chart to Mr. Smith first?

Mr. Bagley: Yes, sir, certainly.

Mr. Smith: Your Honor, I have seen the chart and I have no objection to it being brought in.

The Court: May I see it?

Mr. Bagley: Yes, sir. It's rather large.

(Conference between Court and counsel at the Bench, defendant being present and within hearing, and without the hearing of the jury and reporter, following which the proceedings were resumed within the hearing of the jury as follows:)

The Court: For the record, this will be marked as Defendants Exhibit No. 1 for identification.

(The chart referred to was marked Defendant's Exhibit 1 for identification.)

The Court: Mr. Bagley, you might as well point out to the jury that this chart is the reverse in direction from the other chart.

Mr. Bagley: Yes.

Mr. Smith: I would like to have the other one

page 313] exposed at the same time.

Mr. Bagley: All right.

(Discussion regarding placement of charts referred to.)

By Mr. Bagley:

Q. Mr. Smith, will you tell the Court and the jury as far as

directions are concerned how this compares to the other chart? Is this reversed or—

A. This chart is reverse to the one we had been using, in that the street goes from the bottom to the top of the chart.

Q. On that one over there (indicating)?

A. On the smaller one which inverted would be from the top to the bottom on this one (indicating). The court is in a horseshoe and the street is one-way.

Q. All right. Now, will you start by telling the jury what happened on the night of June 12th, at or about 10:00 o'clock?

A. Well, actually, as I said, approximately nine-thirty we finished playing volley ball and we were standing around. Approximately a quarter of ten one of the guys said, "Let's get a six pack," which was fine, and we all pitched in some change—

Q. Six pack of beer, is that it?

A. Yes, sir. We were all sitting around, hot and sweating.

Q. Will you talk towards the jury?

page 314] A. And shortly before ten o'clock the guys got back and I was opening all the beer—

Q. What guys got back?

A. Well, the guys that we had been playing volley ball with.

Q. I see.

A. And I had just opened mine when Mr. Rosen, who has presently been transferred to Japan, came walking approximately where the one-way sign is (indicating), around the trailer court and—

Q. Approximately around in here (indicating)?

A. Yes, sir, followed by Corporal Adam's station wagon and I hollered, "Hey, Dave,"—his name is David Rosen, and I said, "Did you get my deer meat?" And he says, "Yeah, we got it in the car."

Q. All right.

A. So he come over and I shook hands with him and said, "Good evening."

And I directed Mr. Adam to park his wagon where the truck shows, and we walked over behind the station wagon—

Q. Is this Adam's station wagon here?

A. Yes, sir, it is. He pulled over in front of my trailer. And Mr. Rosen and myself walked up to the back of the trailer.

Q. Who else was there at this time?

page 314-A] A. Corporal Wysingle, sir.

Q. Corporal Wysingle?

A. Yes, sir, was standing—this is where all of us was stand-

ing at the time, Adams was standing just beside the tailgate. Wysingle was standing beside him—

Q. Does this represent, this "A," does this represent where Adams was standing?

A. Yes, sir, the initials are the person's name—

Q. This code indicates the names?

A. Yes, sir, it does.

Q. And what is on this chart is as you recall?

A. Well, all the measurements, sir, I measured with a tape.

Q. You measured those with a tape?

A. Yes, sir. The objects on there aren't to scale, as far as the cars and so forth and so on; but the distances are all accurate.

Q. All right. Then, what does this distance here (indicating) represent?

A. That's the distance from the corner of my patio to the area on Mr. Dry's patio where the people were standing.

Q. That is—

A. It is 61 feet from the point of the arrow.

Q. All right.

A. To the corner of Mr. Dry's trailer.

page 315] Q. Of Mr. Dry's trailer?

A. Yes, sir.

Q. All right, and that's where the automobile was parked (indicating)?

A. Yes, sir.

Q. Now, whose automobile was that?

A. The car belonged to Mr. Wysingle, sir.

Q. I see, and it was at this time pulled in forward or backwards?

A. It was forward, sir, there's a tree right there where the front of the car is, the bumper was pulled up right to the tree.

Q. This tree here (indicating)?

A. Yes, sir.

Q. All right. Then when Rosen came there what, if anything, happened after that?

A. About the time that we had just loaded the tailgate, Mr. Lesheski's car pulled up. Well, I disregarded it because there were quite a few cars going through the trailer park and stopping and so forth and I didn't pay any attention to it.

Q. What were you doing at this time?

A. Well, I was reaching in the trunk of the car and I pulled out a bucket with the deer hide in it.

Q. In the trunk of the car—

Martin Thomas Smith

A. Trunk of the station wagon.

page 316] Q. In the station wagon?

A. Yes, sir. The hide was in the bucket. And I pulled the bucket out. And I told him, I said, "Wait a minute, let me set this over by the steps," and my steps are nine feet from the corner of that patio.

Q. Now, wait a minute—

A. Where the solid arrow touches the corner of the patio. My name is written across the patio. My *streps* are exactly nine feet from the corner.

Q. Nine feet from this corner here (indicating)?

A. Yes, sir, from the corner of the patio.

Q. All right. You are talking about the steps—

A. Yes, sir.

Q. —on the trailer from the left here (indicating)?

A. Yes, sir, which is my trailer.

Q. On the Commonwealth's chart?

A. Yes, sir.

Q. All right.

A. I had gotten approximately half the distance from the edge of the patio to the steps when I heard someone holler, "Hey, you." And I turned around, I said, "Me?"

He said, "Yeah, you, where's my kid's ball?"

I said, "Huh?"

He said, "Where's my kid's ball?"

And I says, "Look, Mister, I don't know any-

page 317] thing about any kid's ball."

And he said, "I saw my kid's ball here this afternoon."

Q. Had you ever seen this man before?

A. No, sir, I didn't know who he was. And I told him, I says, "Look, there's a half a dozen balls laying right there," I says, "underneath the trailer," I says, "there's another half a dozen across the street," I says, "wait a minute, I'll ask my wife," I says, "I don't know anything about these balls of these kids around here, what belongs to these *kings* around here," and I had just turned around, I had turned to my left when he swung and he caught me in the shoulder—

Q. You mean he struck you on the shoulder?

A. Yes, sir, it glanced off and caught me on the ear and on the side of the head, and I just started to step forward, which is the only reason I didn't fall—

Q. What did you do then?

A. I fell forward and I caught myself because I was stepping

forward as he hit me.

And I spun around and I says "What are you doing?" I says, "What's the matter, you crazy?"

And he started screaming, "Come on, I want to fight, I want to fight."

So I sat the bucket down by the steps, or shortly before the steps, I was almost to the steps, and I sat the bucket down. And I says, "What's the matter with you?"

page 318] So he kept screaming he wanted a fight, he wanted a fight. And I don't recall exactly what I said but it was something like, "Well, if you want to fight, let's go," and then he started to dig in his pocket—

Q. Well now, just exactly what did he do?

A. He started reaching in his pocket, he had on dungarees or blue jeans and he said, "I'll cut your heart out."

A. I said, wait a minute, fellow, you don't know what you're doing," I says, "Don't pull a knife."

And he says something about, "I'll show you—

Q. Was there any other man there at this time?

A. Yes, sir. There was Mr. Lesheski, he was there, he had just gotten out of the car.

Q. All right.

A. I mean, you know, he was still standing right by the car. He had gotten out shortly after Mr. Moore—but I didn't pay any attention to him.

Q. You didn't pay any attention to Lesheski?

A. No, sir—not yet. And he kept digging in his pocket and I says, "Let me tell you something, big fellow, you come over here with that knife and I'll take it away from you and I'll cut your damn guts out."

Q. All right.

A. I said, "Don't bring no knife over here," I says, "Just get away from me, leave me alone."

page 319] So then Mr. Lesheski jumped in the car, and I didn't pay particular attention to him until he moved—I know what he did, he was in my line of vision, I more or less shifted a glance, and he jumped in the car and he came out of the car with his hand behind him and he says, "I'll shoot the first one that moves." I was about two steps from my door and I moved and I—I jumped inside the trailer.

Q. Now, where was Moore at this time?

A. Moore? As soon as Moore hit me, he ran back towards Lesheski's car, he didn't stay there in the yard, as soon as he hit me and I spun around, he ran back out in the road.

Martin Thomas Smith

Q. When was it that he reached into his pocket?
A. After he got back out in the road.
Q. All right—where? By the car?
A. Yes, sir.
Q. All right. Now, if you remember where were your friends at this time?
A. When Moore first hit me *there* were standing at the end of the station wagon.
Q. This (indicating) represents where they were when Mr. Moore first struck you?
A. Yes, sir. When I first got there, that's where they all were standing.
Q. All right.
A. Now, as Moore came after me, he shoved
page 320] Rosen out of the way and Rosen went over by Adam's and Wysingle's—
Q. Was this when Lesheski's automobile first drove up?
A. Yes, sir.
Q. When Moore knocked Rosen out of the way?
A. Yes, sir. Rosen was standing in the way, and that's where the dotted line goes through Rosen.
Q. This dotted line (indicating)?
A. From the car, sir.
Q. This dotted line (indicating)?
A. Yes, sir. Through the "R," that is the path, the approximate path Mr. Moore took, or that he traveled.
Q. All right.
A. And Rosen went over by Adams and Wysingle and the three of them was there, but I don't know exactly—
Q. This "W" indicates, as far as you know, where Adams and Wysingle were at this time?
A. Yes, sir. Wysingle moved back.
Q. All right.
A. More or less back by the car—they moved back towards the other one, which would be more or less in front of the trailer.
Q. All right.
A. They had been standing at the corner of the trailer.
Q. All right. Now, you said that after Lesheski said he had a gun, you went into the trailer?
page 321] A. Yes, sir.
Q. Do you have any idea what, if anything, happened to Adams or Wysingle or—
A. I don't know, I went right to the front window and I

hollered, "Hey, somebody call the police."

Q. All right—right at that time?

A. Yes, sir. And I didn't hear any answer and I hollered, "Adams, hey, Adams"—I didn't holler, you know, I said it, but it was quietly, that I called Adams, because I figured if he had a gun he was going to shoot hearing my voice, and I didn't holler loud enough for anybody to know where it was, but loud enough so that I thought Adams and them was still standing there. And I called him, I said, "Adams, call the police, a State trooper or somebody," and I didn't get any answer.

Q. You don't remember your exact words, do you?

A. No, sir, I remember telling him to call the police.

Q. All right. And when you went back in the trailer, what did you do?

A. That's the first thing I did. Then from there I went into the back of the trailer.

Q. Now, how were you dressed when this first occurred? What did you have on?

A. I had on a—

Q. Did you have a shirt?

page 322] A. No, sir.

Q. No shirt—how about trousers?

A. I think I had shorts on, I'm not positive, but I usually wear shorts in the summertime.

Q. All right. Okay. Then you went in the trailer?

A. Yes, sir.

Q. And you tried to get someone to call the police. Then what did you do?

A. I went to the back of the trailer. My wife was just getting ready to take a bath. I says, "Look, there's been a fight," I says, "I wish you'd get dressed and stay with the children," I said, "If anything happens, don't come outside," you know. She said, "What's wrong?"

I says, "I don't know," I said, "This guy wants to fight me," I said, "I don't know what's wrong with him," I said, "I think he's drunk."

Q. All right.

A. And she asked me something else but I don't remember what it was.

Q. Then what did she do, get dressed or something?

A. My wife jumped into shorts and a blouse, I believe, and she came out in the kitchen, and I was sitting on the couch, I had shut all the curtains in the trailer.

Martin Thomas Smith

I told her, I says, "Where are my shoes and socks?" And I think she said my shoes were under the couch and she got my socks and I got dressed.

page 323] And while I am doing this Mr. Moore keeps screaming that he's going to kill me, he's going to kill the s.o.b., and "I'm mad" and "I want to fight—"

Q. Was he cussing at you?

A. Yes, sir, and he was calling me a coward and telling me to come out and fight him.

And I think my wife says, "Why don't you go outside?"

I said, "Look, I don't want to fight the man, he's drunk." I said, "I don't want anything to do with him."

And then he started saying he was going to shoot and I heard him holler, "Mary"—I don't know exactly what, but I heard him holler, "Mary, get my rifle."

And I said, "Oh, no." And she said, "What's matter?"

And I says, "This nut is going to shoot me."

And she said, "What for?"

And I said, "I don't know what for. How am I supposed to know? I don't even know the guy."

Q. This is when you were talking to your wife in the trailer?

A. Yes, sir. So I told her, I says, "Look, go back in the"—well, I'm not sure—but there is a living room, kitchen, and the children's bedroom and I said, "Look, go back in there and keep the kids back there." I said, "If this guy's going to shoot, I don't want you or the children to get killed."

Q. Were the children asleep at this time?

page 324] A. Yes, sir, as far as I know they were, they were still asleep.

Q. All right.

A. I didn't want them to—

Q. All right, and so you told her to go back to the children?

A. Yes, sir, I told her that, I said, "Now, stay in the house with the kids," I said, "Don't come outside."

Q. Can you tell the jury what was in your mind at this time?

A. This guy was going to shoot me, and I had three little children in there.

Q. How old were your children?

A. Five, four and two. And I fought right in this courtroom to get my children—this is my second night.

Q. All right.

A. And—

Q. Well, you didn't go through any court proceeding in this

court, did you?
A. No, sir.

Mr. Smith: If Your Honor please, I don't know that that is relevant or material at all.
The Court: I don't believe it is relevant to what we have here.

The Witness: Well, anyway I had to fight to
page 325] get my children and I did get them.

By Mr. Bagley:
Q. All right.
A. And I love my children and I didn't want anything to happen to them.
Q. All right. Now, what did you have on your mind at this particular time?
A. The fact that this man was going to kill me, because he stated it quite clearly a number of times and—well, how long can one man stand and be told that he's going to be killed before he begins to believe it?
Q. Was that what was in your mind?
A. Yes, sir.
Q. Then what did you do?
A. Well, I was more or less pacing back and forth, I didn't know what to do.
And I heard him holler, "What's that s.o.b., I'll kill him." And someone said, "He's in his trailer." And then he says, "I'll shoot the s.o.b."
So I was over in the corner by—I've got a desk there with all my tools and stuff, and I just reached down and grabbed my hunting knife and I started out the door when I realized that this guy had a rifle. Any my bullwhip was lying just beside the couch, so I just reached—

Q. You realized he had a rifle?
page 326] A. Yes, just as I was getting ready to go out the door. Well, you can't say how your mind is going to work. I knew that the guy had been telling his wife to get his rifle. I mean, all of this didn't take a long time, it happened pretty quickly.
Q. Did you think he had a rifle?
A. Yes, sir, I did.
Q. All right.

Martin Thomas Smith

A. Because I remember him telling his wife, "Mary, get my rifle," and saying that he was going to shoot me. So I assumed that he had gotten his rifle, or how was he going to shoot me?

So I dropped down and just picked my bullwhip up on the way out. I stepped out the door and I jumped off the steps onto the patio and I shook it loose and when I did I popped it, you know, when you shake it loose—

Q. Then what did you do?

A. Pardon?

Q. What did you do with it then?

A. Well, I looked across the street and Moore hollered something about—I believe it was Mr. Moore—he hollered, "There he is," or "There's that s.o.b.," or something.

And I saw that he didn't have the rifle, so I just threw it behind me.

Q. Why did you take the whip out to begin with?

page 327] A. I don't have any guns or anything around the house, and I figured if he did have this rifle, that there was a chance that I might be able to take it away from him with the bullwhip.

Q. Now, why did you leave the trailer at all?

A. Because I thought he was going to start shooting at me in the trailer.

Q. All right. Then what else happened when you got outside?

A. Well, when I went outside, he was still hollering, and I told him, I says, "Look, big fellow, take your knives and your guns and your friends and leave me alone, get away, stay away from me."

And he said something else and I told him, I said, "Well, if you want to fight with knives," I said, "I have one, too," and I said, "I am ready to use it," I said, "if I have to." And he came charging across the street—

Q. Do you remember that these were your exact words at the time?

A. No, but it was pretty close.

Q. All right.

A. I don't remember what my exact words were.

Q. Where were you when you made that statement?

A. I was standing just off the steps, I had just stepped

off the steps.

Q. Off the steps of your trailer?

page 328] A. Yes, sir.

Q. Here (indicating)?

A. Yes, sir. I was on the patio.

Q. In this area (indicating)? On this patio, is that right?

A. Yes, sir, I was on the patio. You see, the car was parked right on the edge of the patio.

Q. Where, if you remember, was Mr. Moore at that time?

A. He was across the street. Everyone was across the street. Everyone was across the street.

Q. By "everyone" you mean—

A. That I knew of. Now, I don't know where Rosen, Wysingle and Adams were.

Q. All right. What happened then?

A. Mr. Moore came running across the street. And I didn't see Mr. Lesheski then. And I'm more or less dropped into a crouch.

Just before he got to me my wife comes out the door and I half spun around, and when I did, I caught the full weight of him against my chest—he ran right into me, he was going to run me down, and I imagine he would have, but I fell against the car, or we fell against the car. And —

Q. This would be the—you were then in this area where you fell against it (indicating)?

A. Yes, sir.

page 329] Q. What part of the car, do you remember?

A. Against the back fender, sir.

The Court: Which car was it?

The Witness: Mr. Wysingle's car, sir, the one—

By Mr. Bagley:

Q. The one parked here (indicating)?

A. Yes, sir.

Q. Between the trailers?

A. Yes, sir.

Q. And what took place then?

A. Mr. Moore grabbed me around the shoulders (indicating) and he hugged me and—well, you never know what's going to go through your mind—

Martin Thomas Smith

Q. Well, what went through your mind?

A. It was that the man smelled very strongly of sweat and alcohol. And—

Q. And what was your position, physical position when he had hold of you?

A. I was pinned back against the car and he was banging on me.

Q. Was he banging on the car?

A. Sir?

Q. Back to the car?

A. Well, let's see—my right side was pinned against the car, and he kept hitting me.

page 330] Q. Where?

A. On the face and on the body, you see, he had me back like this (indicating) and when he hit me I fell back like that and then he grabbed me, he held me and he was hitting on me.

Q. How did he have you when he grabbed you?

A. Around the top of the body. He had me pinned against him. And—

Q. Do you remember anything about that?

A. Yes, sir. It flashed in my mind that—his cigarette pack was in my ear and I was thinking, "I don't use this kind"—I mean, just like that (snapping fingers), you think of these things.

And then he spun away from me and I saw Lesheski briefly and a hand was coming toward my face and I turned my head and I got struck right here (indicating), which was just superficial and healed pretty quick, three or four days later it had healed up.

And I got scratched here (indicating). And then Mr. Moore moved away from me and when he did I jumped between him and the car—

Q. Between him and what car?

A. Between him and Mr. Wysingle's car, in other words, I went along the car. And he stepped towards the patio.

And I didn't know whether Lesheski had jerked

page 331] him away or what, but I ran around between him and the car, went out into the street around Adam's station wagon and he started to follow me—

Martin Thomas Smith

Q. How do you mean around Adams, around this way (indicating)?

Q. Yes, sir.

Q. Yes, sir.

Q. All right.

A. And he started to follow me and he got—I was in the front of the wagon, I just piled off to the front and he was—

Q. Here (indicating)?

A. Yes, sir. Well, to your left a little bit, the other way.

Q. Over here (indicating)?

A. Right about there. When Mr. Moore was about at the back of the station wagon, I think he fell against it and when he did I heard my wife hollering. I jumped in front of the station wagon, and it shows it on the Commonwealth's chart, I jumped over the tongue—

Q. Over here (indicating)?

A. Yes, sir.

Q. You mean the tongue of the trailer?

A. Yes, sir. I went around Mr. Wysingle's car to where it says "TV Antenna" and I grabbed my wife out from underneath Mrs. Moore.

Q. That would be over here (indicating)?

page 332] A. Yes.

Q. And who was over here?

A. My wife and Mrs. Moore.

Q. And what were they doing?

A. They were fighting.

Q. And you just pulled your wife out from under Mrs. Moore?

A. Yes, sir. And I told her, I said, "I told you to stay in the house, now get in the house," and I went in the house with her.

Q. Yes, sir.

A. And I shut the door and I threw the knife on the table. And I turned the light on. And picked it up and I told my wife, I says, "Somebody's hurt."

So I looked out the window and then I saw people over in that same area again, and there was no one around my trailer and then I heard Mr. Moore, and I don't recall what he was saying, but I—I turned the light off.

And he came walking along my patio from the back to

front towards the street and I stood there at the door and watched him.

He walked past and he went back over across the street and again I hollered, "Will somebody please call the police?"

Because I saw the rifle in his hand. I said, "Somebody is going to get hurt." And—

page 333] Q. Did you realize that you had cut him at that time?

A. No, sir, I didn't.

Q. You didn't realize you had cut him?

A. No, sir, I didn't.

Q. Now, how long did this entire fight or scuffle with him last?

A. A matter of a couple of minutes, sir.

Q. And what was the time interval, if you can recall, between the time that he hit you and the time that he came back across after you?

A. I guess about ten minutes.

Q. About ten minutes?

A. About that, approximately.

Q. All right.

A. I didn't even know that Mr. Lesheski had been wounded until my hearing when he said he grabbed the knife and pulled it into him.

Q. Until the preliminary hearing?

A. Yes, sir.

Q. You did know Lesheski was cut?

A. No, sir. Someone said he had been cut, I *sayd,* "Well, was it serious?" And he said, "I don't know, I just heard he was cut."

Q. You didn't know that he had been cut at all?

A. No, sir. Some people said that he had, some

page 334] said that he hadn't, so I just took it with a grain of salt, I didn't know definitely until the hearing and then I heard that he had pulled it into him.

Q. Had there ever been any—well, right at this point, what happened after you went back in your trailer and you saw Mr. Moore walking by with the rifle?

A. I hollered again, "Will somebody please call the police?"

Q. You didn't holler to anybody in particular?

A. No, sir. I hollered out the window again *bedause* when

Martin Thomas Smith

I jumped over the tongue and the GI cans, someone was there, someone was standing there, and I didn't know who that was either until my hearing, when I found out it was Mr. Adams. He said, "Yeah, I remember you jumping over that," and—

Q. Do you know how Mr. Moore got cut?

A. No, sir. I can give an assumption but I don't know exactly how he got cut.

Q. Well, in your position—what actually caused Mr. Moore to get away from you, do you remember?

A. I don't know, sir. When—well, I assume Mr. Lesheski jerked him out of the way, because he didn't—well, it didn't seem like he was going to let go. But he spun around this way (indicating) away from me and I saw Lesheski's hand and I turned my face and I got caught in the face. Then Mr. Moore moved that way (indicating) away from me, and when he did I just spun around and went between page 335] him and the car and ran out into the street.

Q. Now, can you tell the jury why you didn't hit Mr. Moore on your initial contact?

A. I didn't want to fight the guy. I didn't know him. I didn't know why he was hitting me, why he had hit me. Then as soon as he hit me he ran back away from me and I wasn't going after him, I wasn't looking for trouble and I just took it for granted he was just another loudmouthed drunk And actually I wouldn't have paid any more attention to it or—

Q. When you went out, did you have it in your mind that you were going to cut him?

A. No, sir. But I figured if he was going to come over there and start shooting at me, at least I wanted something to defend myself with.

Q. All right. You told Moore, talked to Moore, you said something to him, didn't you, when you came back out?

A. Yes, sir. I said something about, "Take your knives, your guns and your friends and go away and leave me alone."

Q. What was he doing and saying at that time?

A. He was standing across the street hollering that he was going to kill me, going to shoot me and hollering, why didn't the dirty coward," or something "come out?" And he kept talking.

And I got scared enough that I figured he was going to start

Martin Thomas Smith

shooting and I—I just couldn't stay in the house
page 336] any longer, I had to go outside.

Q. All right.

A. I didn't want to, but I didn't feel that I had any choice.

Q. You thought you had to—

A. Yes, sir, I didn't feel that I had any choice but to go out.

Q. How do you think, from your participation with him, how do you think that Mr. Moore got the stab wound?

A. I think when Mr. Lesheski jerked him away from me—I was already pinned against the car—and threw him back against the car, I think Mr. Moore fell on me. I don't know this for sure, but I think that's how he got stabbed. There is a deep scratch on the *carn,* on the fender, it's a '59 Chevy.

Q. On Wysingle's car?

A. Yes, sir.

Q. The deep scratch on it. What would that be caused by, do you know that?

A. It could have been done by the handle of that knife, sir, which is also made of steel.

Q. All right. But do you remember any conscious effort on your part to put this knife in this man's back?

A. No, sir. It didn't last long enough to think about doing anything, and—I didn't try to stab him.

Q. Would you have tried to stab him?

page 337] Mr. Smith: I object to this "would you" business—a self-serving declaration.

Mr. Bagley: What?

Mr. Smith: It is a self-serving declaration at this time. When you ask a question, "would you"—

The Court: I will permit the question, Mr. Smith.

The Witness: If I would have tried to stab him—

Mr. Smith: I object. What is the question?

The Court: Rephrase the question.

By Mr. Bagley:

Q. I said, "Would you have stabbed him had you had the opportunity?"

Mr. Smith: I object to that question, Your Honor.

The Court: I will permit the question, Mr. Smith.

By Mr. Bagley:

Q. Would you answer the question, Mr. Smith?

A. I don't know. I imagine I could have had the opportunity to stab him if I really wanted to, even though he held me that close, I think I could have got the knife around in front of him if I wanted to, I am pretty sure I could have, even as I could have cut him as I went in, if I wanted to stab him, I think I could have. I couldn't have stabbed him in the back because—

Q. You don't remember—

The Court: The question was would you, not could you.

page 338] Mr. Smith: He has already answered it.

Mr. Bagley: All right.

By Mr. Bagley:

Q. Now, where did you have the knife?

A. In my hand.

Q. How were you holding the knife?

A. Like this with the blade up this way (indicating).

Mr. Bagley: For the record may we indicate, Your Honor, to show that he is holding the knife with the blade away from his thumb and forefinger—

By Mr. Bagley:

Q. Is that correct?

A. Yes, sir.

Q. All right. Now, when did you first put the knife in your hand?

A. Before I went outside, sir.

Q. Before you went outside?

A. Yes, sir.

Q. All right. Now, what position were you in, can you tell the jury what position you were in when the knife entered Mr. Moore's body?

A. Well, if it entered it when I think it did, I was against the car, pinned against the car.

Q. And how did he get on the knife, if you know?

A. I don't know, sir.

page 339] Q. Is that when the fight broke up?

A. I guess it did, sir. He moved away from the car, and I assume that this was when he got stabbed.

Q. Do you remember any conscious effort on your part to stab Mr. Moore?

A. No, sir.

Q. Or Mr. Lesheski?

A. No, sir.

Q. And how long did this scuffle last?

A. I'd say just a couple, two or three minutes. It didn't last long.

Q. Did it last that long, ninety seconds?

A. It may have.

Q. All right.

A. It was just a short period of time.

Q. All right. 120 seconds?

A. It was just a very short time, a couple of minutes, if that long.

Q. All right. Now, are you trained in the use of a knife?

A. I wouldn't say I was an expert with a knife.

Q. And do you know anything about ju-jitsu?

A. No, sir, I don't. I know nothing of ju-jitsu.

Q. Well, what—are you trained in some other form of self-defense?

page 340] A. I played judo overseas as a sport. I also studied Karate.

Q. You have studied Karate?

A. Yes, sir, but in neither one do I hold any degrees at all. I have never been registered in any of them and I play it as a sport.

Q. All right. Explain judo. What does that mean, actually?

A. Well, you use the term "playing judo" because judo is the gentle art and we use the term "playing" it, when you match against another opponent. And there are 40 throws that are used in judo, but you study for a long time, before you come to those forty throws you have to learn many exercises—proper falls and things of this nature before you actually learn the throws.

Q. Have you ever studied any ju-jitsu?

A. No, sir, I haven't. Ju-jitsu is a deadly art and I've never

studied it at all. I've never been exposed to ju-jitsu.

Q. All right. Now, what were your duties in the Marine Corps?

A. I was in motor transport, sir, and I was also a qualified instructor.

Q. In what?

A. I taught twelve military subjects.

page 341] Q. Well, were any of those subjects self-defense?

A. Hand-to-hand combat.

Q. Hand-to-hand combat—what does that mean?

A. Well, hand-to-hand combat is the unarmed combat against either a man armed or unarmed, unarmed combat, the use of your hands against various types of weapons against another man with bare hands.

Q. And you have taught this?

A. Yes, sir.

Q. All right. Now, how long did you serve in the Marine Corps?

A. I was in the Marine Corps a total of eight and a half years, sir.

Q. And you have been discharged from the Marine Corps?

A. Yes, sir, I am, September 17.

Q. Of what year, 1964?

A. Yes, sir.

Q. All right. Now, were you honorably discharged?

A. Yes, sir, I was.

Q. All right. You are married?

A. Yes, sir.

Q. What is your education and background?

Mr. Smith: Your Honor, I am going to object to that. I don't see that that is relevant and material.

Mr. Bagley: Not relevant?

page 342] The Court: I don't see that it has any relevance but I will permit the question to be answered.

Mr. Bagley: I am trying to give the man's background, if Your Honor please, to the jury.

The Court: Go ahead.

Mr. Bagley: What is your—there has to come a time, I assume, when I can offer this evidence.

Martin Thomas Smith

Mr. Smith: I will withdraw the objection.

By Mr. Bagley:

Q. What is your educational background?

A. I went to the tenth grade in school. I completed high school in the Marine Corps and I studied other subjects on my own—History, English—

Q. All right. Now, you say you have three children?

A. Yes, sir.

Q. You are married?

A. Yes, sir.

Q. Is your present wife the mother of these children?

A. No, sir, she isn't.

Q. You are divorced from your first wife?

A. Yes, sir, I am.

Q. You are. All right. Now, how long have you resided here in this trailer park?

A. I've lived there a year.

Q. A year?

page 343] A. December of 1963.

Q. December 1963?

A. Yes, sir.

Q. Now, I am sure that the Court and jury are interested in this incident that has been testified to regarding the whip with Mr. Coffey. Will you tell us what that was all about?

A. Yes, sir. I taught Mr. Coffey how to use the bullwhip.

Q. You taught him how to use the whip?

A. Yes, sir, I did.

Q. Can you tell us what actually was taking place the night that it has been testified you used the whip on Mr. Coffey?

A. I didn't use the whip on Mr. Coffey. Both of us had been drinking pretty heavily that night, there was just he and I, laughing and joking and carrying on, and—I don't recall. He had said something and I was mad but I wasn't—I wasn't real *made,* I was irritated.

And I don't recall what it was that he said and I called him and I hollered at him, I said something about his big mouth and I was popping the whip around him, and he said, "Wait a minute," and—

Q. When was that, do you remember?

A. I don't remember exactly. I think it was about—ap-

proximately a week before, the very early part of
page 344] the week of June 12.

Q. All right.

A. But anyway, I threw the whip down to the side—and I don't recall what it was that he said—

Q. Speak up now.

A. I don't recall exactly what it was that he had said, but I said, "If you want a fight, put the baby down, don't stand there holding the baby." And he wouldn't put the baby down.

So my wife came out and said, "Come on, dear, let's go home." So I said, "All right," and we went on back home.

Q. Is that when you threw the whip down?

A. No, I threw it down before that.

Q. All right.

A. And so the next night I went—I went next door, I got a hold of him and I asked him, "Hey, what did you say last night?"

And he said, "I don't know." And we started laughing, you know, we thought it was funny—because we had worked together before with the bullwhip.

Q. This was the night after?

A. Yes, sir. And—well, as a matter of fact, we worked together that night. We used to work out together—a bullwhip is extremely good exercise for your arm.

Q. All right.

page 345] A. Which is why I started playing with it.

Q. Did you strike Mr. Coffey with the bullwhip?

A. No, sir, I didn't. A bullwhip will cut you.

Q. Pardon?

A. A bullwhip will cut you. It will cut you.

Q. You didn't intend to cut him?

A. No, sir.

Q. All right.

A. I mean, I've known Bill ever since I moved here, even before I got married, we've been friends a long time.

Q. All right.

Mr. Bagley: Indulge me a moment, Your Honor, please.

(Pause.)

Martin Thomas Smith

By Mr. Bagley:

Q. One thing, Mr. Smith. Do you remember when Deputy Hardisty came over?

A. Yes, sir. Deputy Hardisty and Sergeant Van Dam.

Q. Tell us what occurred.

A. Came over to the house—

Q. Sergeant Van Dam came over?

A. Yes, sir. Nick knocked on the door and said, "Smitty."

I said, "Yeah, Nick."

He said, "Come on out."

I said, "Is there a policeman with you?"

A. He said, "Yeah, right here."

page 346] So I went outside and Deputy Hardisty, he said, "Are you Mr. Smith?"

And I said, "Yes, sir, I am."

He said, "Did you just have a fight with a man across the street here?"

And I said, "Yes, sir." And then I believe he asked me, "Where is the knife?" And I said, "In the house."

Q. "Where is the knife?"

A. Yes, sir. And I said, "Won't you come in?"

So he came in the house and I asked him if he would like to have a cup of coffee and he said, "No, I'll have to take you down to the J.P.'s office and arrest you."

I said, "Yes, sir."

He said, "Is this the knife you used?"

I said, "Yes, sir, that is the knife."

Then he started to pick it up and I said, "Do you want this?" And I tore off a paper towel and handed it to him and he said, "Yes."

Q. All right. Now, did you go to the Justice of the Peace, then?

A. Yes, sir. And Sergeant Van Dam came down.

Q. This knife here, will you tell the jury whether this is your knife?

A. Yes, it is, sir.

Q. Now, what kind of a knife is it, if you know?

page 347] Is it a government issue?

A. No, sir, the knife is a Naval survival knife. It *belonted* to a friend of mine. He had broken the point and I had a new point on it, and I had reconditioned it for him

and he said, "Since you did such a nice job, go ahead and keep it, I've got several knives." So I just had it laying around the house, had it upon my desk.

Q. All right. You made a statement, did you not, at the Justice of the Peace's office?

A. Yes, sir, I did. At the time I was pretty upset about everything.

Q. This statement was made pretty close to the time of this event, wasn't it?

A. Yes, sir, it was. I left a great deal out of it because my mind was in a turmoil but I did attempt to make a statement.

Q. All right. Your statement was made voluntarily, was it not?

A. Oh, yes, sir. Mr. Hardisty pointed out my rights and he read—so that on one slip of paper I wrote my statement on, that had my constitutional rights on it.

Q. Yes, all right.

A. Sergeant Van Dam was there.

Q. Sergeant Van Dam was at the Justice of the Peace's office?

page 348] A. Yes, sir. I called him and he came down and posted my original bond.

Q. I see.

A. And then I called Mr. Hunter and he also came down.

Q. Mr. Hunter?

A. I've known Mr. Hunter for quite a few years.

Q. Mr. Hunter, now, is who?

A. He owns the trailer park, Mr. Cecil Hunter.

Q. All right. Now, had you and Mr. Moore or Mrs. Moore ever had any discussion about this ball before?

A. No, sir, they had never approached me.

Q. Did you know anything about a ball?

A. No, sir. The only thing I knew anything about was their dog.

Q. Their dog?

A. Yes, sir.

Q. What about their dog?

A. About a week or about three weeks before this happened there was a little puppy walking around the trailer park with a broken leg and I asked my wife, I said, "Who does this dog belong to?"

And she said, "I don't know, I think some people up the street."

I said, "Well, go and ask them if they mind if I"—well, I asked her, I said, "Well, aren't you going to take

page 349] care of this dog's leg?"

And she said that the woman who owned it —

Q. No, what did you do, don't tell us a lot of what somebody else said.

A. Well, she went and asked the woman that owned the dog and—

Mr. Smith: I object unless he was present when she was talking to her.

The Witness: I set the dog's leg.

By Mr. Bagley:

Q. You set it in a splint, the dog's leg?

A. Yes, sir, and the dog healed.

Q. All right.

A. There were a few words about that. Not between me—

Q. Not between you directly with any of these people?

A. No, sir.

page 350] Q. All right. And did you have any other contact other than that with Mr. or Mrs. Moore?

A. No, sir, I didn't even know what Mr. Moore looked like, I didn't even know who he was. He worked day and night.

Q. All right. On the matter of the use of the whip, did you learn that in the Marine Corps?

A. No, sir, it is just something I picked up.

Q. All right. And the use of the knife, you had some training in that?

A. Well, I had a friend of mine who isn't an expert, either, but he knows a little about knife fighting, and he showed me a little about it. And then I have seen a lot of demonstration. When I was overseas I used to go watch all the demonstrations.

Q. Did you ever use the knife in actual combat?

A. No, sir. I have never been in combat.

Q. Did you ever use a knife in a fight with a man?

A. No, sir.

Q. At any time in your life, up to this point?

A. Not that I recall, sir, no.

Q. You would recall it if you had been in one?

A. I have been in fights, but I didn't have a knife.

Q. I see. All right. Now, when Mr. Moore came over here (indicating) the second time, did he say anything to you?

A. Well, yes, sir, he was hollering at me, but I don't recall what he was hollering, exactly, but he was holler-
page 351] ing something to the effect that he was going to kill me.

Q. Were you looking at him when he hit you?

A. No, sir. I wasn't looking at him either time that he hit me, neither the first nor the second time.

Mr. Bagley: All right. I think that is all.

The Court: Mr. Smith, I think we will take a recess at this time. I will call a recess for ten minutes.

(Thereupon, a recess was taken.)

The Court: Mr. Smith.

CROSS EXAMINATION

By Mr. Smith:

Q. Mr. Smith, can you recognize this?

A. Yes, sir.

Q. What is it?

A. It's a bullwhip.

Q. Is that your bullwhip?

A. Yes, sir.

Q. Is this the one that you were questioned about, sir?

A. Yes, sir.

Q. Now, you said you had worked out with Mr. Coffey with this whip?

A. Yes, sir.

Q. And had been teaching him the art of using that whip?

A. Yes, sir, as much as I know.

Q. And I believe Mr. Bagley asked you if this
page 352] was any part of your Marine training and I believe you said this was just something that you picked up.

Martin Thomas Smith

A. Yes, sir.

Q. How long have you been practicing the art of using the bullwhip?

A. Only about a few months, a couple of months.

Q. But you had gotten proficient enough in it that you could snap it over a person's head as you did over Mr. Coffey's head and around him?

A. Yes, sir.

Q. And I believe you said that you took that with you when you went back out of your trailer that evening because you figured if the man had a rifle that you could disarm him?

A. That is right, sir.

Q. Now, how would you disarm me if I had a rifle and you had the bullwhip? Tell us what you would do and how you would disarm me, attempt to disarm me.

A. Just swing it and wrap it around the barrel of the rifle.

Q. You would wrap it around the barrel of the rifle and jerk it out of my hand, is that it?

A. I would try to jerk it to the side, sir.

Q. All right. And you could likewise wrap it around an individual, can't you?

A. Yes, sir, you could.

page 353] Q. And by wrapping it around an individual, it wouldn't inflict a wound or cut him, as you said it could do, but if you got the end of it on him, that's when you get the sting and the hurt, don't you?

A. It doesn't have an end on it, sir.

Q. Well, that's a knot of some type, isn't it?

A. It is approximately a 12-inch piece of leather that hangs off the end of it.

Q. You mean there were 12 more inches that—

A. No, sir. You can see this part here (indicating), it is 12-inch—what they call a tongue.

Q. I see.

A. This in itself would probably no more than raise a welt, just like a belt would do.

Q. Is this the condition it was in when you had it that night?

A. Yes, sir.

Q. The tongue had been snapped off, broken off?

A. Broken off.

Q. But you still could wrap this instrument around my

body pretty much, couldn't you? Around my hand or something like that?

A. Yes—I don't know about your hand.

Q. Well, you could wrap it around my feet and jerk me off my feet right easily, couldn't you?

page 354] A. If I got close enough to you.

Q. That's what I mean. Now, you took it with you that night when you went back out and in addition to this you had your knife, had this knife (exhibiting) in your hand?

A. Yes, sir.

Q. And then you went back out of the trailer and stood on your porch. Now, as I understand it, there are steps or something from the patio—a small landing at the top?

A. Just the steps, sir.

Q. Just the steps. You came out of your trailer and you stood somewhere on the patio or on the steps, didn't you?

A. I was on the ground.

Q. On the ground. And at that time you had this whip, and you say you snapped it a couple of times?

A. I shook it loose.

Q. You shook it loose like this? (Indicating.) And you snapped it when you do that?

A. Yes.

Q. Now, the purpose of taking this out was to disarm this man if you had to, isn't that correct?

A. No, sir, it was to attempt to, try to.

Q. Attempt to. But then you chose to abandon this bullwhip. Now, why did you abandon it?

A. Well, I was scared before I went outside, when I got out I didn't know that he didn't have a rifle.

page 355] Q. But when you found that he didn't have a rifle, did you abandon the bullwhip?

A. Yes, sir, I just threw it down.

Q. Then you got rid of your bullwhip and you had only your knife, is that right?

A. Yes, sir.

Q. All right. Now, you were outside long enough to observe that this man did not have the rifle, didn't you?

A. He was standing in front of everyone else, sir, and it only took a glance.

Martin Thomas Smith

Q. I see.

A. I saw he didn't have a rifle or anything.

Q. But during that moment of glance you had uncoiled the whip *tomake* it ready if needed and then observing that you did not need it, you abandoned the whip and had only the knife, right?

A. Yes, sir.

Q. All this time you knew Mr. Moore was real drunk, as you put it, didn't you?

A. I knew that he was drunk, sir, I didn't—I am not a doctor. I don't know actually how drunk he was. I knew that the man was screaming and hollering and cursing and threatening to kill me. To the extent of how much he drank, I don't know, sir.

Q. I believe you said he was acting like a typical drunk.

page 356] A. No, I didn't, sir.

Q. All right. Well, what did he act like?

A. He was acting like a man who was looking for a fight, that was mad, that had been drinking.

Q. Now, this is after he had hit you, wasn't it?

A. Yes, sir, it was.

Q. Because at the time he hit you, I believe you stated that you were up on your patio and getting ready to go in the house with this bucket of deer meat, or hide, rather.

A. Yes, sir.

Q. And he came up from behind and said, "Hey, you," or something, and you turned around?

A. Yes, sir.

Q. So you were heading toward the house like this (indicating) weren't you?

A. Yes, sir.

Q. Now, then, if you were heading towards the house, you really didn't see him push Rosen out of the way, did you?

A. No, sir, I didn't say that I saw that. I said Rosen told me—

Q. Oh, I see, this is something—part of this is what someone told you, isn't it?

A. That's right.

Q. All right. So you didn't see that portion of it. And then

after he came through here (indicating)—this is
page 357] where Rosen and Smith and Adams and—
A. Wysingle.

Q. And Wysingle were (indicating) at the time that you were getting the deer hide out and before that time you don't know where Mr. Moore was?

A. No, sir.

Q. You don't know where he came from, do you, of your own knowledge?

A. Of my own personal knowledge I didn't see him sir.

Q. All right. So you don't know that this is correct, that is something that someone told you, right?

A. I saw him coming across this street.

Q. I thought you said the first you saw him or knew he was around was when he said, "Hey, you," and you turned around?

A. It was—as soon as he got out of the car.

Q. I see.

A. And he hollered.

Q. I see. All right. And you say Mr. Wysingle's car was pulled in, in this direction?

A. Yes, sir.

Q. Now, had—when Mr. Lesheski said, "I will shoot the first one that moves," had Moore already struck you?

A. Yes, sir, he had.

Q. And you were starting into the house at this time?

A. Yes, sir, when he went to the car and came
page 358] back out and said he was going to shoot, I had
come to my landing.

Q. All right. But Moore—I mean Lesheski had gone to his car and said something about a gun and that he'd shoot the first one that moved, and at that time you jumped in the house?

A. Yes, sir.

Q. Then Moore went on back across the street here (indicating) where people had congregated from the volleyball game, had he not?

A. I don't know where Mr. Moore went to.

Q. You didn't see him after that?

A. No, sir.

Q. But you could hear him?

A. Yes, sir.

Martin Thomas Smith

Q. Now, where was his voice coming from at that time?
A. From across the street.
Q. Over in this vicinity (indicating)?
A. Yes, sir.
Q. In the Commonwealth's picture here showing what amounts to a twin window in front of your trailer home, is that a correct portrayal as to the window location?
A. Yes, sir.
Q. And this is a picture window, like?
A. It is a big double window.
Q. All right. Now, at that time I believe you
page 359] said you turned out the light, did you not?
A. Yes, sir.
Q. And Moore—or, the crowd was over here (indicating) and you could hear Moore over in this area (indicating)?
A. Yes, sir.
Q. And you told your wife to secure the children, so to speak, and not to proceed with her shower, "there is a guy outside acting crazy, a drunk outside acting like he wanted to fight," or something like that?
A. Yes, sir, it was something like that.
Q. And your wife was obedient and listened to what you had to say and just stopped, did she not?
A. She stopped taking a bath, that's right.
Q. Now, during this period of time you were in your room, the door closed, the light off and secure, were you not?
A. The windows were open.
Q. The windows were open, but you were in there with the lights off and inside your own home with the door closed, weren't you?
A. Yes, sir.
Q. Mr. Moore at no time actually grabbed hold of the doorknob of your home, did he?
A. Not to my knowledge, sir.
Q. And do you know of your own knowledge whether or not the street lights which you have portrayed
page 360] here on your diagram (indicating), this street light, would that have been shining in so that one from the outside could have seen you inside this trailer, or were you in a position where they couldn't see you?
A. I was standing in the trailer. I don't know if anyone

could see me or not.

Q. But you turned out the lights to keep someone from seeing you, didn't you?

A. Yes, sir.

Q. And you stayed in there, you say, for ten minutes or more?

A. Approximately 10.

Q. And during this period, Moore and Lesheski and Dry and Harteis and his wife had arrived, and Cowart and all of them were on this other side of the street over here (indicating), by the volley ball court, were they not?

A. That is right.

Q. And there were still loud voices, conversation going on?

A. Yes, sir.

Q. And the only thing that you heard in that conversation was that "I will kill him," or "I'll shoot him," or something like that until you heard him say, "Mary, get my gun?"

A. That was shortly after I went in the trailer. I don't know exactly when but shortly after that I heard him.

page 361] Q. It was shortly after when he said, "Mary, get your gun," so there was quite a little difference after that, that elapsed before you came back out, wasn't there?

A. A few minutes, yes.

Q. And when you came out the trailer, Mr. Smith, didn't you realize Mr. Moore did not have a gun?

A. No, sir, I did not know.

Q. Could you see him at all?

A. I saw him when he came out in front of the crowd, yes, sir.

Q. Well, now, you were in the Marines and you know good and well that if someone was going to shoot someone with a gun, you can't get close enough to him with a bullwhip to defend yourself, don't you?

A. I was scared, sir. I didn't take time to stop and try to reason what this man was going to do.

Q. You didn't even reason with yourself, did you, Mr. Smith?

A. I don't think that there was enough time to sit down and reason it out.

Q. Well, wasn't there a safe place in your home, that you

were so afraid of all of that?

A. No, sir, it wasn't.

Q. Why not?

A. Because my children were in there.

page 362] Q. Well, your children were back in the bedroom somewhere on this side (indicating), were they not?

A. Yes, sir. To the left of the door.

Q. Right. And this is the bathroom?

A. No, sir. My bath is on the back on the other side of the trailer.

Q. I see. The children were right in here (indicating)?

A. Yes, sir.

Q. And you were afraid that this man might start shooting into your trailer?

A. Yes, sir.

Q. How about this part of the trailer here (indicating)? Is that the master bedroom?

A. Yes, sir.

Q. But you told your wife to go back in the room with the children, didn't you?

A. Yes, sir.

Q. So you really weren't afraid of them staying in the trailer if he shot in it, were you?

A. I was staying in the trailer — my door is in the front, I couldn't take them out of the trailer.

Q. I know, but you told your wife to go back to be with the children?

A. And stay with them.

Q. Because you didn't want her to get hurt?

page 363] A. To keep the children in there.

Q. That's right, you didn't want them to get hurt. So you felt as though she and the children would be reasonably secure inside the trailer, didn't you?

A. I thought it would be better if they were back there than in the front of it.

Q. Yes, sir. Well, didn't you ever stop to think it may have been better for you to have been back there if this man really started shooting?

A. No, sir. This is my home, this is my children's home.

Q. I realize that, Mr. Smith. And it was also Mr. Moore's

home right across the street, too, was it not?

A. Yes, sir.

Q. And you knew where Mr. Moore lived, didn't you?

A. Not at the time, sir. I found out.

Q. Well, didn't you find out where he lived when you had your business about the puppy?

A. All I knew, he was up the street, I didn't know exactly where he lived.

Q. Generally speaking in this trailer court, people mingle around among all the lots, isn't that right, and the privacy of the trailer park is within your own trailer, isn't that correct?

A. That is right.

Q. So that you were over here (indicating)
page 364] playing volley ball — what this amounts to is an empty lot and in between this and Mr. Dry's trailer here (indicating) and if you wanted to go down here (indicating) in between Mr. Coffey's — you went on around back through here (indicating) didn't you — everybody mingled all around in that area, didn't they?

A. Down in the lower part, yes, sir. Most of the trailers have fences from trailer to trailer and — I don't have a fence in my yard, they used to go through my yard quite often.

Q. But you would say the real privacy was inside the trailer?

A. Yes, sir.

Q. And after you went in, after this man Moore had hit you and you went inside and Lesheski had said something about getting a gun, you had called to Adams and you don't know whether or not he heard you, but you called, "Someone call the police."

A. Yes, sir.

Q. And all this time you knew Mr. Moore was drunk, didn't you?

A. Yes, sir, I knew he had been drinking, but I didn't know the extent he had been drinking.

Q. But didn't you tell your wife that there was some drunk outside who was going to shoot you and she asked you why and you said, "I don't know why, he wants to fight me," I think you said.

page 365] A. Yes, sir.

Q. She asked you why you and you said, "I

don't know why, just get back there with the children," isn't that right?

A. Yes, sir, words to that effect, maybe not the exact words.

Q. And your wife asked you to go outside, didn't she?

A. I don't recall exactly what my wife said.

Q. Didn't you say, "My wife said, 'Why don't you go outside?'"

A. No, sir, I don't think I did.

Q. You don't recall that in your testimony?

A. No, sir, my wife's telling me to go outside. I remember telling her if I went outside, "You stay in the house."

Q. You did tell her if you went out for her to stay in?

A. Yes, sir.

Q. And about ten minutes elapsed from the time that you got in the house until you did go outside with this bullwhip and that knife?

A. Roughly, sir.

Q. And you uncoiled the whip and snapped it and learned that he did not have a gun that you thought maybe he may have had?

A. Yes, sir.

Q. The sole purpose of taking this out (indicating) was to disarm him?

page 366] A. Yes, sir, if I could.

Q. Right.

A. At least I was going to try.

Q. Then when you first got out there the second time you went out, when you first got out and had the bullwhip. *did* Mr. Moore see you immediately upon your stepping out of your door, do you know?

A. I don't know if he did immediately or not, sir. I know that he did acknowledge that I was there.

Q. He did acknowledge you were there?

A. Yes, sir.

Q. Was that before or after you got rid of the whip?

A. I don't recall exactly, sir.

Q. But then you invited him or said to him, "If you want to fight with knives, I have one, too," didn't you?

A. Yes, sir, I told him that —

Q. Up to that moment Mr. Moore hadn't made any move to come back to you the second time, had he?

Martin Thomas Smith

A. I know that he came to the front of the crowd and he was still hollering —

Q. But he hadn't made any move to come across the street to engage you until you said, "If you want to fight with a knife, I have one, too," isn't that correct?

A. I don't know if he was coming across the street at that particular instant or not, sir.

page 367] Q. But you —

A. He was mingling in the crowd and he started coming towards me.

Q. What you are saying is, you didn't know what he was going to do. But I asked you had he started to come across the street until you invited him to come across the street?

A. Yes. He was headed in my direction.

Q. But he had come from the crowd, and you admit that you said, "If you want to fight with a knife, I have one, too?"

A. After I told him to leave me alone, that I didn't want any —

Q. Well, up until that time — you stepped out onto your steps or patio and he hadn't said anything more to you, had he?

A. No, just that he was going to shoot me.

Q. Well — but you found out that he didn't have a gun?

A. Yes, but I didn't know whether he had pulled a knife out of his pocket. I didn't know Mr. Lesheski didn't have a gun.

Q. Mr. Smith, from the time that you went into your trailer until you came back out of your trailer and got rid of your whip, Mr. Moore didn't do anything, make any act, he was only talking, isn't that correct?

A. Yes, sir.

Q. There was no overt act on his part to go in and try to get a gun, or you didn't see any gun?

page 368] A. No, sir. I don't know what he did.

Q. Well, you didn't see any act at all, did you?

A. No, sir, I didn't.

Q. And when you came back on the outside he was over here (indicating) mingling with your friends and his friends, was he not?

A. He was across the street, yes, sir.

Q. Still loud and boisterous and acting like a drunk?

A. Yes, sir.

Martin Thomas Smith

Q. Now, you say when he came at you, you only had the knife and — pick up that knife and show the jury how you had it when he came at you?

A. (Demonstrates).

Q. You had it just like that when he came at you.

A. Yes, sir.

Q. And you were up here (indicating) in the vicinity of your trailer somewhere, weren't you?

A. Yes, sir.

Q. And in the patio, and he came across and you had this knife. Where was the knife, right down here (indicating)?

A. About there, yes, sir.

Q. Just about in this position (indicating)?

A. Yes, sir.

Q. And was your left hand like this (indicating)?

A. Yes, sir, I dropped it —

page 369] Q. You taught hand-to-hand combat, hadn't you?

A. Yes, sir, I have.

Q. And you know that you take that knife like that (indicating) in your hand ready to grab, don't you?

A. Yes, sir.

Q. And then when somebody grabs hold of you — come here, Mr. Bagley, do you mind — in hand-to-hand combat and you are defending yourself and somebody grabs hold of you like this, you come across from the back like this, here, don't you (demonstrating)?

A. No, sir, you do not.

Q. You don't?

A. No, sir.

Q. If he grabs you, you don't do that?

A. No, sir.

Q. You get at him this way first?

A. If you grab hold of that knife, when Mr. Bagley pulls you, you are going to stab him right in the stomach.

Q. If he grabs and pulls you, yes.

A. Yes, sir.

Q. But you said that this man came up and had his hands up like this (indicating) first?

A. He threw his arm around me.

Q. He threw his arm around you — how? Like that (demon-

strating)?

page 370] A. Yes, sir, and he had my shoulders, and he was a pretty big man.

Q. And his cigarettes down in here (indicating) were in your ear, you say?

A. Yes, sir.

Q. And you got your knife behind you somewhere, didn't you?

A. Somehow, yes, sir.

Q. Got it behind you. Now —

A. He threw me back against the car.

Q. And it is your thought, your theory, that when he pinned you back against the car, I believe you said your right shoulder went against the car —

A. My right side.

Q. Right side — that when he threw you back against the car like this (indicating) and he was bear-hugging you, so to speak, you had your knife behind , behind him?

A. Yes, sir, I was against the car —

Q. And you think Lesheski at that time ran into your hand with the knife and that is the way Mr. Moore got his wound?

A. No, sir. I think when Mr. Lesheski threw Mr. Moore off of me, that he threw him back on the car.

Q. Well, now, did he spin you all around, did you spin — go around like this (demonstrating)?

A. No, sir, I did not spin around.

page 371] Q. Well, where was the knife? Did you ever turn loose of the knife?

A. No, sir. The knife was in my right hand.

Q. It was always in your right hand?

A. Yes, sir.

Q. You never did lose possession of it?

A. No, sir.

Q. All right, Mr. Smith. You admit that at no time did you get rid of this knife, at no time did you lose control of it?

A. I lost control as soon as the man hit me, sir, I lost control of the entire situation from there, he was shaking me like a dog shakes a rat.

Q. Weren't you real, real mad and —

A. No, sir, I wasn't mad, I was scared.

Q. All right. Now, I believe you said that you didn't know

that Lesheski got cut until the next day.

A. Yes, sir — well, I knew when I got home that night, and talked with my wife, she said Lesheski said he had got cut.

Q. Now, after you got hand to hand with Mr. Moore and he got his arm around your neck and you all were back against the car and Lesheski pulled him off you, it is your theory then that Mr. Moore got stabbed when Lesheski pulled him off because he in effect fell back on the knife and the knife was against a solid object, isn't that right, the car?

A. Yes, sir, the car.

page 372] Q. And he pulled him back on it, he just fell on it like that in some manner?

A. That's the way I think it happened.

Q. And at that moment you still didn't know that anyone had been stabbed or cut?

A. No, sir, I didn't.

Q. But the fight stopped right then, didn't it?

A. Within a few — a few short seconds afterwards.

Q. Did Mr. Moore at any time go to the ground?

A. No, sir.

Q. But I believe you stated that you were in a crouched position, somewhat like this (demonstrating)?

A. I had been standing about like that.

Q. When he came towards you, you went into a crouch?

A. Yes, sir.

Q. And this is part of hand-to-hand combat, isn't it?

A. Yes, it is.

Q. To go into a crouch?

A. Yes, sir.

Q. I just wanted to see if they still teach it the same way they used to. And then Mr. Moore stopped, all within a matter of seconds, you say, after Lesheski pulled him off; and Lesheski stopped at that same moment, did he not?

A. At that time, sir, like I said, I was pinned against the car. Mr. Moore — I was trying to bat his hand

page 372-A] away with my left hand, I remember that, because he kept hitting me, he was hitting me all over the face and body, he didn't hurt me, but he was hitting me. And I remember when Mr. Moore moved to the right I went flat against the car (indicating) and then as soon as he came up I pushed myself like that (indicating), and ran be-

tween him and the car to get away from him, and that's when I ran around Adams' station wagon.

Q. You ran around behind the station wagon, but by that time Moore had given up any and all pursuit, hadn't he?

A. He kept coming after me, all the way to the end of the station wagon.

Q. Moore kept on coming after you?

A. Yes, sir. When I ran away from him, I don't know whether he spun around or which way he spun or turned, or just came straight, but I know when I got there in front of the station wagon, I looked around, and he was still coming after me.

Q. Do you know where he went?

A. No, I don't know where he went, sir.

Q. How long after this happened did you make these measurements?

A. It was the following week, sir.

Q. Did you at any time notice any trails of blood around in this vicinity? (indicating).

A. Yes, sir.

page 373] Q. Where did this trail of blood go?

A. It led up the street.

Q. From your patio, around out here (indicating), and up to Mr. Moore's house, didn't it?

A. I didn't go all the way to Mr. Moore's house, but I noticed it —

Q. Here (indicating), right in this area?

A. Initially, and it went up —

Q. Down here where there is this breaker, I believe you called it is — did Mr. Moore go down there one time?

A. I don't know, sir.

Q. Did you notice a large pool of blood there(indicating)?

A. Yes, sir. There was blood on Mr. Adams' car. There was a few spots of blood in the street, like I said, but I didn't go all the way to Mr. Moore's trailer, but I know there was puddles of blood.

Q. So it was after Mr. Moore and Mr. Lesheski got cut that you ran around Mr. Adams' car and you say Moore was after you?

A. Yes, sir.

Q. And you came on back this way (indicating), and went into the house?

A. No, sir, I went around Mr. Wysingle's car.

Q. Back around this way (indicating)?

page 374] A. No, sir. The other way.

Q. This way (indicating).

A. Yes, sir.

Q. And stood in this area, and then you came back —

A. No, sir. I grabbed my wife and *retracted* my steps around Mr. Wysingel's car.

Q. I see.

Your wife and Mrs. Moore were fighting?

A. Yes, sir.

Q. And you dragged her out and went into the house?

A. Yes, sir.

Q. Now, I believe your testimony was that you turned the lights on then, didn't you?

A. I flipped the kitchen light on, yes, sir.

Q. And where is the kitchen located in your trailer?

A. Right at the door.

Q. Right here?

A. That's the living room. And that's the bedroom.

Q. Here (indicating)?

A. No, sir. Right at the door.

Q. Right at the door. You flipped the light on then. Now, you weren't worried about him shooting into the trailer then?

A. I only flipped it on for just a few seconds. Then I believe I heard him and turned it back out. Then I shut

page 375] all the windows.

Q. It that when you told your wife that somebody had been hurt?

A. Yes, sir. I saw the knife and I told her, "someone's been hurt. I looked out the window and I didn't see where anyone was hurt.

Q. Mr. Smith, is it your testimony to this jury that this knife went into this man's body and, as far as it must have gone in, you didn't realize that it had gone into him?

A. No, sir. If you look at that knife — I don't know about it now, but it was very sharp.

Q. It is still real, real sharp, isn't it?

A. I don't know, sir.

Martin Thomas Smith

Q. Well, you tell us whether or not you think it is real sharp.

A. Well, it's got pretty rusty, it is considerably dull over here (indicating).

Q. But it was good and sharp, wasn't it?

A. Yes.

Q. And you just laid it down on the table there and said, "Someone's got hurt," and then you asked again, "Someone please call for help," isn't that right?

A. Yes, sir, I did.

Q. And then I believe you said the next day someone told you that Lesheski had been cut and you just took it

page 376] with a grain of salt. What do you mean by that?

A. No, sir. My wife told me that night, she said Lesheski said he had been cut. So I talked to some other people, "was he cut?" Some of them said "I don't know." Some of them said, "No," and others said, "Yes," I think so.

Q. And so —

A. I didn't know whether the man had been cut or not. And then at my hearing he testified that he grabbed at the knife and tried to jerk it away from me and stuck himself in the side, when I had my initial hearing.

Q. You, in response to one of Mr. Bagley's questions, I believe you stated that, "I didn't want to fight just another loud-mouthed drunk." What did you mean by that?

A. No, sir, I didn't want to fight. I said that I didn't want to fight him, that is, as far as I was concerned he was just another drunk. And I worked at the NCO Club and I've handled a lot of drunks and I have never had any trouble with them to the point where I had to use any physical violence to restrain them.

But this man, I think, was more mad about something than drunk, because I talked to him, I tried to reason with him when he first hit me, that's why I didn't fight him, he didn't want to hear anything I had to say, all he wanted to do was fight.

Q. Well, after you found out you couldn't rea-

page 377] son with him, you were in your house, you didn't know what happened, did you, you had to go back outside again, at that time, didn't you?

A. (After pause) I don't understand the question.

Martin Thomas Smith

The Court: Repeat the question, Mr. Smith.

By Mr. Smith:

Q. You owed no duty to him or your family or anyone else, any duty to go outside and become involved with this drunk again, did you?

A. I don't understand what you mean, sir.

Q. Well, after — you attempted to reason with him when he first hit you, didn't you?

A. Yes, sir.

Q. And you couldn't, could you?

A. No, sir.

Q. And so you went in the house, and you didn't owe him any duty to go back outside, did you?

A. Well, I went into the house because I was scared, when that man said he had a pistol.

Q. All right. Now, Mr. Bagley asked you if you would have stabbed him, and I believe I objected to his question and you said —

The Court: Mr. Smith, could you wait? I notice that one of the jurors is on the verge of nodding, so I will ask if any of the jurors would wish a recess at this time. If one page 378] of the jurors should end up by falling asleep, we might have to do this all over again some day.

I might ask if — I am not mentioning any names, I don't wish to, but if anybody notices a fellow juror on your side should be nodding, if you would just give him a nudge, I would appreciate it.

Would you go ahead, Mr. Smith.

By Mr. Smith:

Q. I believe Mr. Bagley asked you would you have stabbed him and I objected. The answer you gave was "I don't know." What do you mean by you don't know whether you would have stabbed him?

A. Well, sir, I don't know if you've ever been in a fight with a man with a knife before, and I've never had to defend my life in this manner and I don't know what I would do, but I don't think anybody else could say what they would do under the same circumstances.

Martin Thomas Smith

Q. Mr. Smith, did you have to defend your life at that moment?

A. Yes, sir, I felt that I did.

Q. Weren't you inside your trailer?

A. Yes, sir, I was.

Q. And wasn't Mr. Moore 60 and some feet way from the corner of the patio to your trailer?

A. Yes, sir, he was.

page 379] Q. And hadn't he been over here (indicating) 10 minutes since the time he had struck you in the first instance?

A. Yes, sir.

Q. And didn't you go back outside and tell him that you had a knife and if he wanted a fight you were ready now?

A. Yes, sir, I did.

Q. I believe you said that you — that there is a difference between Judo and Ju-jitsu?

A. Yes, sir, there is.

Q. One is a sport and the other is a lethal art, so to speak?

A. Yes, sir.

Q. Now, with judo, do you now throw people, is it not a type of wrestling?

A. Well, I guess you could classify it as that, sir.

Q. Well, it is a manner of defense, is it not?

A. *Wel,* it can be used as a defense.

Q. Is this what in some places they teach women to defend themselves with?

A. No, they teach women an art known as yubiwaza, which is a combination of art.

Q. What is karate?

A. Karate is also unarmed defense.

Q. *Unerned* defense?

A. Yes, sir.

page 380] Q. It's a means of defending yourself against someone else who may attack you?

A. Yes, sir.

Q. And you do not have arms, weapons, that is?

A. Yes.

Q And you say that you have practiced the sport of judo and studied karate?

A. Probably, yes, sir.

Q. Do you enjoy participation in those two activities?

A. Well, I enjoy playing judo, yes, sir, it's very healthful.

Q. And do you enjoy the art of practicing karate?

Martin Thomas Smith

A. I studied karate mostly for the physical exercise. It is rather strenuous.

Q. And that was the same purpose of using the bullwhip?

A. That, too, was a form of exercise, yes, sir.

Q. Now, on the occasion in which you were using the bullwhip when Mr. Coffey was present, you do admit that you got mad, didn't you?

A. Yes, sir, I was mad.

Q. And he had the baby in his arms?

A. Yes, sir.

Q. You were snapping this whip over his head and around his feet?

A. Yes, sir.

page 381] Q. But you deny that you hit him — excuse me — wrapped it around him?

A. I don't recall wrapping it around him. I may have, sir. But if I did, I didn't hurt him because I asked him the night *before,* "Did I slip and hurt you?" And he said, "No."

Q. But when you wrap it around a person, you don't intend to hurt, but you intend to confine or else pull them off their feet or tie their arms in or something like that, don't you?

A. Not necessarily, sir.

Q. But it isn't — you don't cut them by wrapping it around them, do you?

A. I don't recall wrapping it around him.

Q. But you say you may have?

A. I may have, yes, sir.

Q. And you were mad at the time?

A. Yes, sir, I was.

Q. And he was afraid at the time, wasn't he?

A. I wouldn't say he was petrified, I'd say he was probably a little scared, he didn't know what was going on.

Q. And you had been practicing with this whip a couple of months, you say, by that time?

A. Yes, sir.

Q. And you were both real — both of you had plenty to drink?

page 382] A. Yes, I believe we had.

Q. And then you told him, "Put the baby down, if you want to fight?"

A. Yes, sir.

Q. But he wouldn't put the baby down, would he?

A. No, sir.

Q. Why did you want to fight your friend?

Martin Thomas Smith

A. I don't recall exactly what it was, sir, but he said something and it made me mad.

Q. Mr. Smith, are you easily provoked into a fight?

A. No, sir, I am not. I live by certain principles, sir.

Q. Well, were you — how much beer had you had to drink on the night — how much beer had you had to drink on the night Mr. Coffey had said something to you that made you mad?

A. We had been drinking whiskey, sir.

Q. Whiskey. How much had you had to drink?

A. I don't know exactly how much we had to drink but we had quite a few drinks.

Q. But you were reasonably drunk on that occasion, were you not?

A. I wouldn't say I was, I wouldn't say I was drunk, sir. I wasn't staggering around or anything.

Q. Let me put it this way. Did you have control of your faculties, did you know what you were doing when you did all this?

page 383] A. Well, I remember everything I did, yes, sir.

Q. All right. Now, the night Mr. Moore got stabbed, you all chipped in and got some beer after playing volley ball?

A. Yes, sir.

Q. How much beer did you have?

A. I just opened my can of beer when Dave came up. I believe I took one swallow before I set it down. I was acting as bartender, opening all the beer.

Q. But on the night when you were popping the whip around Mr. Coffey, and you may have wrapped it around him, you said you were mad but you weren't real mad. How about the night Mr. Moore got there, were you really mad?

A. I wasn't mad at all, sir.

Q. The night Mr. Moore was there you weren't mad at all?

A No, sir. He didn't make me mad at all.

Q. At no time were you mad, all the time you were cool and deliberate?

A. No, I wasn't cool and deliberate. I'd say I was scared.

Q. Well, were you cool?

A. Well, I don't know how a man that was scared could be very cool. I was excited but I wasn't mad. As I remember, I was shaking because I didn't know what this man was going to do.

Martin Thomas Smith

Q. You had full control of your faculties, did
page 384] you know what you were doing?

A. No, sir. I was running back and forth in the house and I didn't know what to do, I couldn't think of what to do.

Q. And you were afraid, but not afraid enough to stay inside?

A. I was more afraid of him shooting and hitting one of my children than I was going outside and taking a chance on getting hurt myself, rather than my children.

Q. So you really weren't afraid of getting hurt, then, were you?

A. Yes, sir, I was, but I was less afraid of getting hurt than I was my children getting hurt. I mean, if someone was going to get hurt, I'd rather it be me than my children.

Q. But during this approximately ten minutes that you were in the trailer there, all that was going on outside was a drunk running off at the mouth, so to speak.

A. I didn't know that to be a fact, sir. All I knew, there was a man out there that kept saying that he was going to kill me, he was going to kill me, he was going to kill me.

Q. But you didn't see him do or take any steps or make any act in preparation for that at all?

A. No, sir, I didn't see him —

Q. Did you hear him say he could do it with his hands?

A. No, sir, I didn't.

Q. Now, when Mr. Hardesty got there, Deputy
page 385] Sheriff Hardesty, by that time you realized that one or both of these individuals had been cut, didn't you?

A. I knew that someone had been wounded, sir.

Q. Could you see from your trailer window Mr. Moore out there (indicating) in the street, or Mr. Moore in this chair (indicating) with people working around him?

A. I didn't look, sir.

Q. You didn't look out there at all?

A. No, sir. I saw the lights.

Q. Where did you go, then, Mr. Smith, in the trailer, that you didn't look?

A. I was sitting on the couch there and I was scared and I was worried because I didn't know what had happened but I knew that someone had been wounded, I didn't know how serious.

Q. Now, I believe during the course of — excuse me, when

Mr. Hardesty came in, you say you offered him a cup of coffee?

A. Yes, sir.

Q. Were you drinking coffee at that time?

A. My wife had made me a cup of coffee.

Q. You were just sitting there having a cup of coffee?

A. No, sir, I was walking back and forth before Mr. Hardesty got there, I was pacing the floor, I didn't know what was going on.

page 386] Q. By that time you knew that you had hurt someone didn't you?

A. Yes, sir. And I couldn't very well go outside, I mean — I instruct in first aid, I am a qualified ambulance attendant, I got the equipment in my home, and I wanted to go outside but I couldn't. I had taken care of quite a few people in the trailer park who had gotten hurt.

Q. Why couldn't you go outside, Mr. Smith?

A. I had just been in a fight with this man, sir, and the fact that someone was wounded —

Q. But he needed a competent man to help him at that time, didn't he?

A. Yes, sir — and after the man tried to kill me, do you think he would have let me work on him? It would have only made things worse if he was wounded seriously.

Q. Well, was it that you didn't go back because you really didn't care or —

A. No, sir, I did care. Human life is very precious to me.

Q. And Mr. Moore, I believe you said, worked every day and day and night sometimes?

A. Yes, sir.

Q. Didn't cause anybody in the trailer park any trouble at all, did he?

A. Not that I know of, sir. I didn't — I had

page 387] heard a few things about him, but I don't know these to be facts.

Q. And these you only heard since he has been dead and gone, isn't that right?

A. Yes, sir. Since that evening.

Q. Yes, since that evening, since he was wounded.

A. Yes, sir.

Q. And up until that time you had never seen him, even though you had lived in the trailer park for how long?

A. I had lived there since December, I bought the trailer and moved in in December.

Q. How long had he lived there, Mr. Smith?

Martin Thomas Smith

A. I don't know, sir.

Q. So really there had been nothing to call your attention to him or his attention to you other than the fact that he knew you had a bullwhip, didn't he?

A. I guess he did, sir. I don't know whether this was hearsay on his part or whether he actually saw me with it.

page 388] Q. Didn't you testify he said something about the bullwhip when you came back outside with the whip?

A. No, sir, I didn't.

Q. I must have been mistaken. But did you ever see him with the whip tantalizing anyone or —

A. Mr. Moore?

Q. Mr. Moore, or acting anyway out of—

A. To the best of my knowledge, I had never seen him before, sir. I don't know why the man came after me.

Q. But you say he worked day and night?

A. To the best of my knowledge, yes, sir.

Q. You don't know why he came after you, but you do know that he was drunk at the time and you told your wife that you didn't know why but the man was drunk, isn't that right?

A. I didn't realize how drunk he was until he grabbed me the second time—and he stunk.

Q. You smelled the smell of sweat and the smell of alcohol, didn't you?

A. I did, sir.

Q. And at that time you still hadn't gotten that knife in him, had you?

A. Not to my knowledge, sir, as far as I know, no. All I know is that I felt like I was being smothered, and the man kept hitting me.

page 389] Q. But you had told him, "If you want to fight, I got a knife too?"

A. I told him if he come over there with his knife and his gun, I said I, too, had a knife and knew how to use it.

Q. But you knew he didn't have gun, didn't you?

A. No, sir, I didn't.

Q. Well, you —

A. I only knew that he *didnt'* have a rifle, and I don't have that much confidence in my ability with a short bullwhip like that to try to take a pistol away from a man.

Q. But you really weren't afraid of a pistol then because you advised him to come over with his knife and his gun —

Martin Thomas Smith

A. I told him to take his knives and his guns and his friends away and leave me alone.

Q. Before that you had, but he didn't leave and he didn't have to move out of that area, did he?

A. He was coming across the street when I told him.

Q. Now, I believe you stated that you came and walked out here and snapped the whip and had the knife in your hand and you hollered to him, "Big boy, take your friends and your knives and go home and leave me alone?"

A. Yes, sir, he had started through the crowd and was coming over towards me and I told him, I says, "Look, stay away from me," I says, "don't come over here with your knife, I have one also and I know how to use it."

page 390] Q. But then subsequently to that you invited him to come on, "If you want a fight, come on, I got a knife, too?"

A. I said something like that, sir.

REDIRECT EXAMINATION

By Mr. Bagley:

Q. Mr. Smith, your condition at this time and when Deputy Sheriff Hardisty came over, would you say it was about the same as your condition right now?

A. Yes, sir.

Q. Are you restraining yourself now?

A. Yes, sir.

Q. Are you scared?

A. Yes, sir.

Q. All right. Now, you say that — let me ask this. Did you see, were you looking at Mr. Moore when he hit you the second time,

A. No, sir, I was not.

Q. All right. Now, how big are you?

A. I stand about five feet eight and a half, sir, and weight about 150 pounds.

Q. All right. How big in comparison to you was Mr. Moore?

A. Mr. Moore was a big man and he —

Q. Was he taller?

A. Yes, sir, he was taller than me and he was page 391] broader than me and he was heavier than me.

Q. All right. Now you said, I believe — let me ask you this. Was there some blood on Corporal Adams' car?

Martin Thomas Smith

A. Yes, sir, there was.
Q. Where was it?
A. On his right rear fender, back fender.
Q. At this point (indicating)?
A. Yes, sir.
Q. All right.
A. Right there.
Q. And that was the direction that you took around the car, isn't that correct?
A. Yes, sir.
Q. Where was Moore when you got to that point?
A. He was coming after me, sir.
Q. Did you see Moore stop at that point?
A. When he hit the end of the car, I proceeded on around it and I — I don't know, whether he stood up or pushed himself away from the car and started coming after me — that's when I ran around the front of the car and jumped over the tongue of the trailer and I ran and I grabbed my wife and pushed her in the house.
Q. You grabbed your wife over here (indicating)?
A. Yes, sir.
Q. All right. Now, did you at any time make any
page 392] attempt with this knife (exhibiting) to slash with it with Mr. Moore?
A. No, sir, I didn't have time to do anything.
Q. Either before or after he bodily struck you?
A. I didn't have time, really. You see, it wasn't a fight, it was a mad rush and the man hit me and I hit the car, it wasn't —
Q. The man hit you with his whole body?
A. Yes, sir.
Q. What happened at that point? Did he shove you back?
A. Slammed me up against the car.
Q. Against the car?
A. Yes, sir.
Q. All right. Now, at that point where was your knife?
A. Well, when you fall, your natural reaction is to throw your arms back (demonstrating).
Q. Well, is this what happened?
A. Yes, sir. I was spread out on the fender.
Q. Now, will you show me right here, if you don't object, what we were trying to demonstrate with Commonwealth attorney a minute ago?

A. Yes, sir.

Q. Now, is it — am I supposed to understand that Moore came at you like this (demonstrating)?

A. This way (demonstrating) and I come back against the car and he had me down like this (demonstrating).

page 393] Q. He had you down like this (demonstrating)?

A. Yes, sir, and he was hitting me, and then Lesheski shoved him back like that (demonstrating) and he moved away, and I went between him and the car.

Q. Do I understand that —

A. Around the wagon.

Q. All right. Do I understand this, that back over here (indicating), do I understand that you were spread-eagled, that you were —

A. I *feel* against the car.

Q. You fell against the car. Do I understand then that Lesheski came in and got, pulled Moore away?

A. Yes, sir.

Q. You feel that it is possible that Moore went back this way (demonstrating)?

A. Yes, sir.

Q. And then is this when the fight stopped?

A. Yes, sir. When he moved away, just like that (demonstrating), I ran around between him and the car.

Q. And is it your testimony that you feel that your knife was back against the car?

A. Yes, sir, there is a deep scratch in the car.

Q. What part of the car?

A. Right on this part of the fender there (indicating).

Q. Is that this side (indicating)?

page 394] A. Wysingle's car, yes, sir.

Q. All right. Now, is it your recollection that at that point is when Moore left you?

A. Yes, sir. He sprang away from me, moved away from the car.

Q. All right.

A. And I just ducked under and ran behind him.

Q. Now, when Moore first came at you, he hit you with full force like this (demonstrating), is that correct?

A. Yes, sir, hit me with his body.

Q. All right.

A. Like this (demonstrating).

Martin Thomas Smith

Q. With this part of his body (indicating), ran right into you? Is that it?

A. And I fell back against the car, he pulled me down like that (demonstrating) and he was beating me, I remember trying to move his hand away and —

Q. Do you remember what you were doing with your right hand?

A. I was just — I was leaning against the car and I guess it was like this (demonstrating).

Q. Now, Mr. Dry testified that you had your knife like this (demonstrating). Did you at any time have the knife held — for the record, I am holding the knife with the blade down away from my smallest finger — did you at any time have the knife this way that you can recall?

page 395] A. No, sir, it's not long enough to change the knife around in my hand or anything else —

Q. In other words, you had your knife this way (demonstrating)?

A. Yes, sir.

Q. Like this (demonstrating)?

A. Yes, sir.

Q. All right. Now, at no time did you have an opportunity to switch it around and hold it this way (demonstrating)?

A. No, sir.

Mr. Smith: If your Honor please, he is leading him.

Mr. Bagley: I did not mean to be leading, I am just trying to clarify it.

By Mr. Bagley:

Q. Then you feel — well, what do you think happened when Mr. Lesheski came between you and Moore — just what we demonstrated, is that correct?

A. Yes, sir. I think he tried to dig me in the eyes, because I remember seeing a hand coming at my face and it went like that (indicating) and I got dug right here (indicating), alongside my face. And then —

Q. That was Lesheski?

A. A split second before Mr. Moore fell back against the car.

Martin Thomas Smith

Q. All right. Now, do you remember feeling any
page 396] pain yourself?

A. Not at that time, sir.

Q. On your body?

A. Not at that time, but after it was over, the side of my face hurt (indicating), my chest and shoulders hurt and my legs were all bruised and ached, but at the time, it happened so quick, I mean, I didn't feel anything.

Q. Do you remember anyone kicking you?

A. No, sir, I don't remember it. It happened so fast. But I know that I ached for a week afterwards, I could hardly walk.

Mr. Bagley: I think that is all.

RECROSS-EXAMINATION

By Mr. Smith:

Q. Mr. Smith, you were demonstrating up here like this (indicating). As I understand it, you had your knife in your hand similar to this (demonstrating)?

A. Yes, sir.

Q. And when you were demonstrating up here with Mr. Bagley, you stated that Moore came after you with full force and knocked you against the car like this (demonstrating)?

A. Yes, sir.

Q. And you had Mr. Bagley up here — (addressing Mr. Bagley) Do you mind?

Mr. Bagley: With a knife?
page 397] Mr. Smith: No. (Laughter)

By Mr. Smith:

Q. You had him up here like this (demonstrating) and he had his hands up around you and you were sort of down?

A. He had his left hand —

Q. And you were back up against the car?

A. I was.

Mr. Bagley: He had his left hand down there (indicating).

By Mr. Smith:

Q. Didn't you go with your hand like this (indicating)?

Martin Thomas Smith

A. No, sir, I couldn't reach over him.

Q. You couldn't reach around him like this (indicating)?

A. No, sir. He had me like this (demonstrating).

Q. And you think what happened is when Lesheski pulled him back around, he got him like that (indicating)?

A. Yes, sir.

Q. And then you went between Moore and the car, didn't you?

A. Yes, sir. Mr. Moore stepped away. And I just —

Q. How did Lesheski get cut?

A. I don't know, sir. From my hearing, I understand from Mr. Lesheski, he stated that he saw the knife and he grabbed it and pulled and stabbed himself.

Q. Well —

page 398] A. I don't know that he did it, but that's what he said.

Q. You were back here against the car like this (demonstrating), you say. When Moore first hit you, he hit you in this area and you were back up against the car, according to your testimony, all the time, because Lesheski pulled him around, and your theory is that it went in his back and that when Moore stepped away you went around the car in this direction (indicating)?

A. Yes, sir.

Mr. Smith: That is all. I have nothing further.

Mr. Bagley: No further questions.

The Court: Thank you.

(Witness excused.)

Mr. Smith: Your Honor, may I offer this, the bullwhip?

The Court: Any objections?

Mr: Bagley: If it is relevant I have no objection.

The Court: The whip will be received as Commonwealth's Exhibit No. 8.

(The article referred to was marked Commonwealth Exhibit 8 for identification and received in evidence.)

The Court: Mr. Bagley, do you have further witnesses?

Mr. Bagley: No. At this point, Your Honor, the defense rests.

page 398-A] The Court: The defense will rest. Will there be evidence in rebuttal, Mr. Smith?

Mr. Smith: None, Your Honor.

The Court: That is the end of all the evidence?

Mr. Smith: That is correct.

The Court: Gentlemen of the jury, the case is over as far as the evidence is concerned. The next step in the proceeding will be for the Court and counsel to get together and consider instructions of law for the case.

This usually takes quite a bit of time and I am going to recess the court, the jury, until 2:30, and the Court and counsel will work on the instructions during that time and try to get lunch at the same time. We may not be ready by two-thirty but we will try to. The jury will be in recess for lunch until 2:30 and I will ask you again not to discuss this case.

(Whereupon, at 1:00 o'clock p.m., the jury was excused. Whereupon, the Court and counsel retired in chambers to prepare instructions to the jury, in the presence of the defendant and the reporter.)

page 399] (Thereupon, at 4:45 o'clock, p.m. the proceedings were resumed in open court, within the hearing of the jury, as follows:)

INSTRUCTIONS OF THE COURT TO THE JURY

The Court: Gentlemen, I should apologize to you for the instructions taking so long. I have never been able to explain to anybody's satisfaction why it does take so long, but it always *do*, and we have to labor with it until we get through. I will now read the instructions of law for this case. There are quite a few of them and some of them are lengthy, so I ask you to bear with me.

The court instructs the jury that one of four verdicts may be found under the indictment in this case. If the evidence in the case so warrants.

1. Murder in the second degree; 2. Voluntary manslaughter; 3. Involuntary manslaughter; or, 4. Not guilty.

The Court further instructs the jury that murder in the second degree is when one person kills another person un-

lawfully and maliciously but not deliberately. Voluntary manslaughter is when a person unlawfully kills another person without malice but under sudden excitement and heat of passion; that involuntary manslaughter is where one person when engaged in a lawful act negligently causes the death of another person.

If you should find the defendant guilty of murder
page 400] in the second degree you shall fix his punishment by confinement in a pentitentiary for not less than five nor more than twenty years. If you should find the defendant guilty of voluntary manslaughter you shall fix his punishment by confinement in a penitentiary for not less than one nor more than five years. If you should find the defendant guilty of involuntary manslaughter you shall fix his punishment by confinement in a penitentiary at not less than 1 nor more than five years or, in the discretion of the jury, by a fine of not exceeding $1,000 or confinement in jail not exceeding one year, or both; and if you find the defendant not guilty you shall say so and no more.

I will add orally that, as you know by now, in Virginia the jury not only makes a finding of whether the defendant is guilty or not guilty but if it makes a finding of guilty, then proceeds and decides what punishment shall be imposed within the limts prescribed by the Court and by the law.

The Court instructs the jury that murder is when a person of sound mind and discretion unlawfull kills another with malice aforethought, express or implied. It will be observed that the essential ingredients of murder as defined is malice and there may be either express or implied malice. Express malice does not mean necessarily malice expressed in words or is defined to be when the act is done with a sedate and deliberate mind and formed design, which condition of
page 401] the mind and formed design being a mental condition and not ordinarily susceptible of other kinds of proof, may be evidenced by the external circumstances attending the execution of the act and need not be any special duration before the act of killing. Implied malice is where the law implies malice from the act itself from which death ensues; for instance, where one without any sufficient provocation at the time and without warning kills another, malice is presumed from the want of provocation.

The Court instructs the jury that every homicide in Virginia is presumed in law to be murder in the second degree.

It is not required for the Commonwealth to show a motive or reason for the killing. In order to reduce the offense to manslaughter or excusable homicide, the burden of proof is upon the defendant.

The Court instructs the jury that when the Commonwealth has proved the commission of a homicide and has pointed out the accused as the criminal agent, then it may rest its case and unless the accused shows circumstances of justification, alleviation or excuse, a verdict of murder in the second degree will be warranted. If the evidence so offered by the accused is shown to be false and is insufficient to cause the jury to have a reasonable doubt as to his guilt, the case so made by the Commonwealth is not overcome and a verdict of second degree murder is still warranted.

The Court instructs the jury that no provoca-
page 402] tion can render a homicide justifiable or even excusable. The lowest grade to which it can reduce homicide is manslaughter, and if the accused killed the deceased suddenly without any, or without considerable provocation, the law implies malice and the killing is murder. In the absence of proof to the contrary malice may be implied from the deliberate *us* of a deadly weapon when used in a manner calculated to take the life of another human being.

The Court tells the jury that bare fear that a man intends to commit murder or other atrocious crime, however well grounded, unaccompanied by any overt act indicative of any such intention, would not warrant killing the party by way of prevention. There must be some overt act indicative of immediate danger at the time.

The Court instructs the jury that you are the sole judge of the credibility of the witnesses and the weight to be given their testimony and that in determining their credibility and the weight to be given their testimony you may take into consideration their manner of testimony, their demeanor upon the witness stand, their relationship if any to the parties, their apparent prejudice and bias if any, and their apparent interest if any in the outcome of the trial.

The Court further instructs the jury that if you believe that any witness has knowingly testified falsely as to any material fact, then you are entitled to disbelieve all
page 403] of such witness' testimony if in your opinion the witness' testimony is wholly unworthy of belief.

The Court instructs the jury that a doubt engendered by

sympathy or a dislike to accept the responsibility of convicting the defendant is not a reasonable doubt. The law does not require proof amounting to absolute certainty nor proof beyond all possibility of mistake. If after having carefully and impartially heard and weighed all the evidence you reach the conclusion that the defendant is guilty with such degree of certainty that you would act upon the faith of it in your own most important and critical affairs, then the evidence is sufficient to warrant a verdict of guilty. If you do not reach such conclusion then your verdict should be not guilty.

The Court instructs the jury that every homicide in Virginia is presumed in law to be murder in the second degree; that in order for the defendant to reduce the offense to manslaughter he must show that the killing was done under sudden excitement and heat of passion.

If the jury believe that there was sufficient provocation to create this sudden excitment and heat of *pashion* but that the provocation was then abated and there had been a sufficient cooling time for the defendant to overcome such passion, then the offense cannot be reduced to manslaughter.

The Court instructs the jury that where the plea of self-defense is relied upon in a trial for murder the law is
page 404] that the plea of self-defense is not available to a party unless he was without fault in bringing about the difficulty and in any case the necessity relied upon to excuse the killing must not arise out of the defendant's own misconduct.

The Court instructs the jury that if you find that there had been a disagreement between the deceased and the accused and that the deceased had beaten or struck the accused on an occasion prior to the time of the fatal injury, and if you further find that the accused had sufficient time to cool from any anger or feeling occasioned by such beating and that he did then become the aggressor, then the accused, Martin Thomas Smith, cannot avail himself of such previous beating or striking as a plea of self-defense in this case.

In order for the killing to amount to murder in the second degree, although it is not necessary for the Commonwealth to prove wilfulness, deliberation and premeditation, it is incumbent upon the Commonwealth to prove that the defendant acted with malice and unless you believe from the evidence beyond a reasonable doubt that he did act with malice you cannot find the defendant guilty of murder in the second degree.

Involuntary manslaughter is the killing of one accidentally,

contrary to the intention of the defendant following the prosecution of some unlawful but not felonious act, or in the unlawful performance of a lawful act, accompanied by such carelessness or recklessness on the part of the defendant as is incompatible with a proper regard for human life.

page 405] The Court instructs the jury that if from all the evidence taken together there is reasonable doubt whether, one, the defendant stabbed Blaine Moore intentionally or, two, whether such stabbing was accidental and unaccompanied by any such recklessness or carelessness by the defendant as would be incompatible with a proper regard for human life then you must find the defendant not guilty.

If you believe from the evidence that the defendant at the time of the stabbing was without fault on his part and was being attacked by the deceased and, further, that he reasonably feared death or serious bodily harm to himself at the hands of the deceased, then he had the right to stand his ground and if necessary kill his assailant, and if you further believe this to be the situation in the instant case, you shall find the defendant not guilty.

When a person reasonably apprehends that another intends to attack him for the purpose of killing him or doing him some serious bodily harm, then such person has a right to arm himself for his own necessary self-protection and in such case no inference of malice can be drawn from the fact that he prepared for it.

A person has the right to use reasonable force and if necessary to kill another who manifestly intends and endeavors by violence to commit a felony on him, provided that such intention or endeavor are not the result of the de-

page 406] fendant's own misconduct.

The malice necessary to constitute a crime of murder may be either express or implied. The word "malice" in the foregoing definitions of murder is used in a technical sense and includes not only anger, hatred and revenge, but every unlawful and unjustifiable motive. It is not confined to ill-will to any one or more particular persons but is intended to denote an action flowing from a wicked or corrupt motive done with an evil mind and purpose and wrongful intention. Where the act has been attended with such circumstances as to carry in them the plain indication of a heart regardless of social duty and deliberately bent on mischief. Therefore, malice is implied by law from any wilful, deliberate and cruel act against another, however certain.

The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary

element of the offense charged against the defendant. It is not sufficient that the jury may believe his guilt probable or more probable than his innocence. Suspicion of probability of guilt, however strong, will not authorize the conviction, but the evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defense, and unless you believe page 407] upon a consideration of all the evidence before you that guilt of the defendant has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find the defendant not guilty.

The burden resting upon the Commonwealth to prove guilt of the defendant beyond a reasonable doubt does not require that such guilt be proven beyond every imaginable, conceivable or possible doubt, but only beyond a reasonable doubt. The jury must limit its consideration to the evidence introduced and you are not to go outside the evidence nor must you entertain doubts which are speculative or conjectural, and if upon a consideration of all the evidence you are satisfied of the guilt of the defendant beyond a reasonable doubt, then you shall find him guilty.

Unless you believe from the evidence beyond a reasonable doubt that the death of the deceased resulted from criminal violence on the part of the defendant, you must find the defendant not guilty.

The defendant is presumed to be innocent of the offense of which he is charged and this presumption of innocence goes with him throughout the entire case and applies at every stage thereof and is sufficient to require you to find the defendant not guilty unless and until the Commonwealth, upon whom the burden rests, proves his guilt beyond a reasonable doubt; and the Court further tells you that it is not suffi- page 408] cient that facts and circumstances proved — I assume the word "are" belongs in there, gentlemen.

Mr. Smith: Which one is that, Your Honor?

The Court: Instruction P. If you wish to comment on that, could you come up to the Bench, please?

Mr. Smith: I have no comment, Your Honor.

Mr. Bagley: Which one is it?

The Court: Instruction P, the fourth line from the bottom after the word "circumstances."

(Thereupon Court and counsel conferred at the Bench, with the hearing of the jury and of the reporter, following which the proceedings were resumed within the hearing of the jury, as follows:)

The Court: Gentlemen, the last part of that instruction I will re-read as follows:

The Court further tells you that it is not sufficient that the facts and circumstances proved be consistent with the guilt of the defendant but *there* must be inconsistent with any reasonable hypothesis consistent with the innocence *or* the defendant.

Are you ready to argue the case, Mr. Smith?

Mr. Smith: Yes, Your Honor.

(Thereupon, there followed closing argument by both counsel following which, at 6:00 o'clock p.m., the jury retired to consider their verdict.)

page 409] (Thereupon, at 9:37 o'clock p.m., the jury returned to the courtroom and the following proceedings were had in open court:)

The Foreman: Your Honor, as elected foreman of this jury, I have a question on the part of one of the jurors concerning one of the instructions. That instruction is Instruction F which states, "If you believe" —

The Court: Would you wait a minute, please, until counsel get their copies?

The Foreman: Instruction F, which reads:

If you believe from the evidence that the defendant at the time of the stabbing was without fault on his part and was being attacked by the deceased and, further, that he reasonably feared death or serious bodily harm to himself at the hands of the deceased, then he had the right to stand his ground and if necessary kill his assailant; and if you further believe this to be the situation in the instant case you shall find the defendant not guilty.

Now, the question that the member of the jury has in his mind and that he hopes that the Judge can clear for him or shed some light on is:

Does the fact that Mr. Smith came out of the trailer and invited Mr. Moore onto his property constitute a fault on the part of Mr. Smith?

page 410] The Court: I am sorry that I have to tell you that I cannot answer your question. The decision

as to facts and findings are entirely up to the jury. I have no right as the Court to characterize any particular act as either being good conduct or as being misconduct. That is the function of the jury.

I think you will find that part of the answer is covered by one or two of the other instructions. But as the characterization of the conduct of both of them, I feel they come within the terms of the instructions and I am going to leave that entirely to the jury. I am sorry that I cannot help you.

The Foreman: Thank you.

(Thereupon, at 9:40 o'clock p.m., the jury retired from the courtroom.)

(Thereupon, at 11:37 p.m. the jury returned to the courtroom and the following proceedings were had in open court:)

The Deputy Clerk: Gentlemen of the jury, have you reached a verdict in the case before you?

The Foreman: We have.

The Deputy Clerk: Is this your unanimous verdict?

The Foreman: Yes, sir.

The Deputy Clerk: I now read:

"We, the jury, in the issues joined in the case of
page 411] *Commonwealth* versus *Martin Thomas Smith,*
find the defendant *guilt* of voluntary manslaughter and sentence the defendant to two years in the penitentiary."

"Signed, B. Hawkins, Foreman."

The Court: Mr. Smith, will you stand, please?

(Defendant complies.)

The Court: Based on the verdict of the jury in this case, the Court will find you *guilt* of voluntary manslaughter and will sentence you to serve two years in the State Penitentiary.

Gentlemen of the jury, thank you very much for the job you have done.

(Whereupon, at 11:40 o'clock p.m., trial in the above-entitled cause was concluded.)

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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