

MEMORIALS

FOR

HOWARD WHEELER
(1873 – 1931)

RAMSEY COUNTY BAR ASSOCIATION

AND

JUDGE RICHARD A. WALSH

MARCH 26, 1932

MEMORIAL
OF
THE HONORABLE HOWARD WHEELER.

A few months ago the members of this Bench were deeply shocked by news of the sudden death of The Honorable Howard Wheeler, a member of this Court. On the second of September, 1931, while apparently in full vigor of life, he received the only summons that no one can resist or disobey. His answer is recorded in the only court that is really supreme.

In paying a tribute of honor and respect to his memory, it is not the purpose at this memorial to indulge in exaggerated eulogy – a thing that would be been distasteful to him were he a witness to it – but rather to record a simple biography and to briefly but sincerely comment on his life and character.

Howard Wheeler was born in St. Paul on December 11, 1873. He lived therefore a few months less than fifty-eight years. He was a son of James Wheeler and Joan Roberts Wheeler. Both of his parents were natives of Ireland. They came to St. Paul early in life, and were married here in the St. Paul Cathedral.

Howard was one of seven children. He received his preliminary education in the schools of St. Paul and his collegiate and professional education at the University of Minnesota, where he graduated from the College of Law in 1895. Thereafter, for twenty-seven years, he practiced law at the bar of this County. His professional career was distinguished by fair and upright dealing, by fidelity to every trust, by uniform courtesy and consideration for his fellow members of the Bar, and by a willingness to give generously of his time and professional effort on behalf of the poor and unfortunate, from whom little or no financial compensation

could be expected. His professional record is in every respect honorable and a credit to his name,

In 1900 he was elected to the Assembly, the Upper Chamber of the City Council of St. Paul. Two years later he was reelected, and he served in all four years in that body. He then declined further nomination.

On October 1, 1903, he married Anne Long, of Toronto, Canada, a member of a distinguished family of that city. To them were born three children, all now living.

Beginning on May 20, 1913, he served for three years as a member of the Library Board of St. Paul, having been appointed, to succeed the late John P. O'Brien at the latter's death in 1913. He derived a great deal of pleasure and satisfaction from his service on this board.

In January, 1922, he was appointed Judge of the Probate Court of Ramsey County, on the death of the late Honorable Edmund W. Bazille, the appointment being made by Governor Preus. In the fall of 1922 he was reelected to the office for a four-year term without opposition, and in 1926 was reelected for another term of four years, again without opposition. In 1930 for a third consecutive term, he was reelected without opposition. The fact that no opposition was ever offered to his reelections to this office is a distinct tribute both to his personal popularity and to his success in filling the office. From the beginning he was by unanimous acclaim conceded to be precisely the right man for the office. It is as Judge of the Probate Court that he is best known to many members of the Bar. In that office he rendered great service to the County. The zeal with which he devoted himself to the duties of the office was remarkable. He was very sensitive to his responsibility, and spared no effort to discharge it faithfully. It probably would be no exaggeration to say that no judge ever tried harder or succeeded better in being right upon all matters that came before him for decision. His constant concern was to be sure that no one having an interest to be protected in his Court should suffer an injustice at his

hands. It is only those who have been somewhat intimately in touch with his work who fully realize the painstaking efforts he always made to guard against mistake, fraud or imposition, to protect estates from false or excessive claims, and to safeguard the interest, however small, of all parties within his jurisdiction. Notably in the matter of proceedings for the commitment of the insane was he scrupulously exacting in the investigation of every case, lest a commitment should result from misjudgment or from unfounded charges made for selfish purposes.

One of his particular qualifications for judicial office lay in his broad knowledge of men and affairs. He was a good Judge of human character and motives and quick to penetrate any false pretense or subterfuge, and particularly severe in the exposure and condemnation of offenses in that respect. Seldom was he imposed upon. The appreciation by the Bar of his performance as a Probate Judge was formally testified to while he was still on the Bench. At a dinner tendered in his honor on March 8, 1928, he was presented by the County Bar Association with a testimonial which conveyed to him in strongest terms its recognition of his excellence as a Probate Judge and its admiration of the able and efficient manner in which the business of the Probate Court was being conducted.

Upon the retirement from the District bench of Judge Grier M. Orr in November, 1930, Judge Wheeler was appointed to fill that office by Governor Christianson, and therefore he never entered upon the term as Probate Judge for which he was chosen at the November election that year. His experience on the District bench was less than a year. Even in that short time he won the full confidence and approbation of the Bar. His uniformly sound judgment, good sense, independence, and impartiality gave assurance that he was capable of filling his position on the District Bench to the complete satisfaction of the Bar and of the general public.

A word about his personal attributes and character. He was above all else honest and sincere. He was candid, frank and outspoken. With him there was no dissimulating or equivocating. He was extremely intolerant of all manner of sham, affectation and

hypocrisy. Possessed of a buoyant spirit, a genial disposition, and an abounding wit and humor, he was an excellent entertainer and a delightful companion. He was a man of strong friendships — friendship that meant more than mere sentiment and good will. No one who had occasion to prove his friendship ever found it to fail in the test. His time, his influence, if need be his money, were always bestowed upon his friends with greatest liberality. He was sympathetic, generous and charitable. Intensely attached to his family, he maintained a home life that was quite ideal.

He has gone to join the great majority in the silent beyond. But even the world's greatest agnostic, in the presence of the death of one whom he loved, could not but say:

“From the voiceless lips of the
unreplying deed there comes no word; but in the
night of death hope sees a star and listening
love can hear the rustle of a wing.”

In the passing of Howard Wheeler his widow and children have lost a devoted husband and father; this community has lost a valuable citizen; this Bench has lost an upright Judge.

March 26, 1932.

 /s/ Michael J. Doherty

 /s/ Charles S. Kidder

 /s/ George W. Morgan

 /s/ Asa G. Briggs

Committee,
Ramsey County Bar Association

Memorial Presented by
Judge Richard A. Walsh,
March 26, 1932, in Honor of
Hon. Howard Wheeler,
Deceased.

As successor to Howard Wheeler, I respectfully desire to submit the following brief memorial:

MEMORIAL

Judge Wheeler served this County with marked ability and distinction as Judge of Probate, before he was appointed a Judge of this Court. In this Court he succeeded Honorable Grier N. Orr, who retired on account of disability, after a long, faithful, honorable and distinguished service.

Judge Wheeler's ancestry were Irish, and his name Howard, was given him because his mother's name was Nancy Howard. His mother, Nancy Howard, was a first cousin of the late Archbishop Ireland. James Wheeler, father of the Judge, was a Minnesota Territorial Pioneer who came to Minnesota from California, overland, in the fall of 1857 to visit relatives here. He decided to remain and resided in the City thereafter until his death. The Judge's father and the Judge's uncle were for many years, in the early history of the City, contractors and builders, operating under the name of Wheeler Brothers.

Judge Wheeler was born in St. Paul in 1873, was educated in private and public schools of the City, was graduated from the Law Department of the University of Minnesota in the year 1889, was admitted to the Bar shortly thereafter and continued in the practice of his profession here until he was appointed Probate Judge by Governor Preus on February 1st, 1924. Judge Wheeler also served

as a member of the City Council of this City for two terms, from 1900 to 1904, and was a member of its Library Board from 1907 to 1911.

Judge Wheeler was endowed with a clear and logical mind, which enabled him to see the essential points of any matters submitted for his determination and to promptly and correctly dispose of them.

When appointed Probate Judge he was justly accorded a leading place among the members of the Bar of this City.

Judge Wheeler was not only an able Judge and a good lawyer, but was also a kindly, congenial companion and a loyal friend, always patient, kind and considerate. He was especially interested when a deserving citizen, however poor, requested his advice and counsel, and while Probate Judge was particularly solicitous that no injustice or wrong should be inflicted upon the widows and orphans whose interests were to be determined in his Court, and was ever solicitous to see that the rights of every person or party to any proceeding before him were carefully guarded and no injustice or wrong done, ever endeavoring to see that justice should be accorded to all concerned,

As a member of the District Court, Judge Wheeler, while he served for a comparatively short time, (he died on September 5th, 1931) yet showed the same ability to ascertain the facts involved in cases submitted for his determination, and to carefully ascertain and apply the law to the evidence, that he did while Probate Judge.

One of the notable cases tried by Judge Wheeler was the case of the State against Quinn (known as the Green Lantern Cafe case). Quinn was charged with Murder in the First Degree, was convicted and sentenced to Prison for life. *

* MLHP: The Supreme Court's opinions in State v. John Quinn, 186 Minn. 242, 243 N.W.70 (1932) (affirming murder conviction), and State v. John Quinn, 192 Minn. 88, 255 N.W. 488 (1934) (affirming denial of motion for new trial on grounds of newly discovered evidence), are posted in the Appendix, pages 9-21, below.

Judge Wheeler left him surviving, his wife, Anne L. Wheeler, whose maiden name was Anne L. Long. She was born in the City of Toronto and was a daughter of Thomas L. Long, a prominent citizen and builder of vessels for traffic on the Great Lake; one daughter, Nancy Beard, now residing in Baltimore, Maryland; two sons, Thomas L., a resident of the City of St. Paul and at present a student at the St. Paul College of Law, and Howard, attending a University in the East; three brothers, Thomas J. Wheeler, Manager, Swift & Company of Chicago, John H. Wheeler, Architect and Engineer of this City, and Francis H. Wheeler, employed by the City, residing In St. Paul; two sisters, Agnes Wheeler, a School Teacher it City schools, and Celestine Wheeler, in religion, Mother Annetia of St. Agatha's Conservatory.

It is difficult to find language to properly express the loss to this Court resulting from Judge Wheeler's death. He had not reached the point where his greatest usefulness as a member of this Bench had been developed. His career was suddenly terminated, leaving his work unfinished, but such work as he had done was well and credibly performed.

Judge Wheeler's body lies in Calvary Cemetery, where rests many of our honored dead.

APPENDIX

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STATE v. JOHN QUINN.
(186 Minn. 242, 243 N.W. 70)

May 27, 1932.

No. 28,881.

Homicide—murder in second degree.

1. The evidence sustains the finding of the Jury that the defendant was guilty of murder in the second degree.

Same—self-defense—burden of proof.

2. The burden of proving self-defense is not upon the defendant. If upon the whole testimony, that of the state and that offered in self-defense, there remains a reasonable doubt of the defendant's guilt, there must be an acquittal; and so the court charged the jury.

Criminal law—instructions as to testimony of accomplices.

3. The evidence was not such as to require a finding that one or more witnesses were accomplices; nor in the absence of a request was it such as to require an instruction upon the necessity of corroboration.

Same—facts admitted by defendant—cross-examination.

4. There was no error in the cross-examination of the defendant because it tended to subject him to prejudice on account of his associations and earlier career.

Defendant was convicted in the district court for Ramsey county of the crime of murder in the second degree after having been indicted for murder in the first degree. He appealed from the judgment of conviction, Wheeler, J. Affirmed.

Hoffman & Burke and *John De Courcy*, for appellant.
Henry N. Benson, Attorney General, and *Michael F. Kinkead*, County Attorney, for the state.

DIBELL, J.

The defendant was indicted for murder in the first degree. He was convicted of murder in the second degree. He appeals from the judgment of conviction.

1. The inexcusable or unjustifiable "killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed or of another, but without deliberation and premeditation." G. S. 1923 (2 Mason, 1927) §10068.

A killing is justifiable when committed "in the lawful defense of the slayer, * * * when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or in the actual resistance of an attempt to commit a felony upon the slayer." G. S. 1923 (2 Mason, 1927) §10089.

On March 19, 1931, about 10:30 in the evening, in the rear of the Green Lantern cafe on Wabasha street between Tenth street and College avenue in St. Paul, the defendant shot and killed Frank Ventress. He was indicted for murder in the first degree on April 10, 1931, along with one Frank Fay, his brother-in-law, who was not apprehended. After the killing he went to Canada, was arrested on May 1, 1931, and his trial was commenced in St. Paul on May 26, 1931. He claims that he killed in self-defense.

In the early evening the defendant was in a soft drink place at 985 West Seventh street owned by Harry L. Kremer. He had spent the day in Minneapolis with one Zip Royan, for whom he had worked two weeks past and who describes his business as that of a gambler. While at the West Seventh street place he received two or more telephone calls. He says that one was from his wife and that he made an appointment to meet her in an hour or so; and that one was from his brother-in-law, Frank Fay, who said something about having trouble with his wife and wanting him, Quinn, to go to

Minneapolis with him. He promised to come downtown. Kremer drove him to the vicinity of the Green Lantern cafe, a few minutes' drive from the Seventh street resort, where they met Fay. They finally walked north on Wabasha street toward the Green Lantern, and the defendant went into the lot in the rear for a purpose of his own, the lot being used to some extent for parking, perhaps largely in connection with the cafe into which there was an entrance. Kremer and Fay went in by the front or Wabasha street door. Ventress was there. There is evidence that he was of a quarrelsome disposition. He was accustomed to carrying a gun. He was a large man. He was something of a hanger-on at the place. The defendant approached the rear door from the outside. It opened, and he and Ventress faced each other. He knew Ventress by sight. He understood that he was quarrelsome and something of a gunman. It was dark. He says that Ventress applied a vile epithet to him and pulled a gun. He grappled with him, pulled the gun out of his hands, and after some struggling shot and killed him. He was asked and answered:

Q. "Now, at the time that you were confronted by Mr. Ventress there at the back door of the Green Lantern that evening and before you said you shot, why did you shoot?"

A. "Well, I was afraid."

Q. "Afraid of what?"

A. "Afraid he would kill me if I didn't."

According to Kremer, Quinn later in the evening said to Saph McKenna, who was in charge of the Hollyhocks, hereafter mentioned:

"I just shot a guy downtown. Saph said, 'What did you want to do that for?' He said, 'It was either a case of him getting me or I getting him, and I beat him to the draw.'"

He repeated this several times in similar language. He made some suggestions as to an alibi which would care for him and Kremer from 10 to 12.

It is in evidence that just shortly after, when in Minneapolis, Kremer, in telling what occurred at the Green Lantern cafe, said:

Q. "What statement did you make during the conversation held between Johnny Quinn, John Hurley, Sullivan, and yourself at the Sullivan home on the night of March 19th?"

A. "Well, as I remember I said that—I tried to tell Hurley how it happened.

Q. "You tried to?"

A. "Yes, and the way I seen it, and the way I thought I seen it, and I told him that when Quinn hit Ventress he sort of went down, and that as he fell I seen two shots fired, and I asked Johnny, or I asked Johnny, did you think he was going for a gun in his pocket, it looked to me that way, and he said yes, I thought so. So then we talked about his clothes and I says I used to live at the Biltmore, you throw the clothes in the furnace and get rid of them that way. We talked about the gun, and I said you might as well get rid of that gun because that is going to get you into trouble.

Q. "Did you tell him that, Harry?"

A. "Yes.

Q. "Did you make that statement about the gun?"

A. "I made the statement, yes.

Q. "Did or didn't you say, in the presence of Sullivan, Hurley, Mrs. Sullivan and Johnny Quinn, -that this was a clear case of self-defense, and Johnny had to shoot? * * *

A. "Yes, I did."

The defendant gives his account of the occurrence, and it is fair to state it:

Q. "And then when you got there what did you do?"

A. "We all three got out.

Q. "You and who else?"

A. "Royan and Kremer.

Q. "And where did you go to?"

A. "Lyceum Cigar Store, across the street.

Q. "Do you know whether or not Mr. Kremer went into the Lyceum Cigar Store with you?"

A. "I cannot state exactly—I am not quite sure about that.

Q. "Well, anyway you went into the Lyceum Cigar Store with Mr. Royan?

A. "Yes, sir.

Q. "What did you do after you got in there?

A. "Royan and I went in the back and Frank put on his hat and coat.

Q. "Then what happened?

A. "We walked out in the front. Frank Fay told me—asked me if I wanted to go to Minneapolis, he was having trouble with his wife, and I said I could not go, I have an appointment with my wife, and I had not eaten yet, let's go to Marge's and get some spaghetti.

Q. "Who do you mean by Marge?

A. "Mrs. Hurley.

Q. "That is your sister-in-law?

A. "Yes, sir.

Q. "When did you see Kremer, do you remember?

A. "Right in front of the cigar store, I remember walking out up to Marge's with him.

Q. "Then what happened?

A. "We walked as far as Tenth and Wabasha.

Q. "On what side of the street were you walking?

A. "That would be the west side.

Q. "And you went how far up?

A. "As far as Tenth and Wabasha.

Q. "Then what happened?

A. "At Tenth and Wabasha I said, 'You go and order some spaghetti, I will meet you inside, I am going in the rear to urinate.'

Q. "Did you leave them there?

A. "Yes, sir.

Q. "Then what happened?

A. "I went to the rear and urinated.

Q. "Then what happened?

A. "I started walking up towards the Lantern cafe, and as I got there the door opened up and there was a man standing there whom I knew, at the time, as Frank Van.

Q. "Then what happened?

A. "He had his hand like this here. He said to me, 'What are you

doing here * * *?' and at that he went to pull a gun. I grabbed the gun, turned it around, got the gun away from him.

Q. "Then what happened?"

A. "I hit him.

Q. "Where did you hit him?"

A. "I don't know, it seemed to me on the side of the head or top of the head.

Q. "Then what happened?"

A. "He staggered back about a foot or so, and I went back about a half a foot, he gave another lunge for me and knocked me down, and when he knocked me down he came towards me and reached like this here, and I fired.

Q. "How big a man was Frank Van?"

A. "Bigger than I was.

Q. "How often had you seen him before?"

A. "Four or five times.

Q. "Had you ever seen him carrying a gun?"

A. "I saw him one night getting a gun from behind the cigar counter.

Q. "Where were you when you saw him get the gun?"

A. "At the front door.

Q. "And where did he get this gun from?"

A. "Back of the cigar counter some place.

Q. "Do you know whether or not he worked there?"

A. "Oh, I knew he was a kind of a bouncer around there, self-appointed.

Q. "Did you hear of trouble that he had been having with reference to gun play before?"

A. "Yes, very pugnacious.

Q. "Had you heard of any episodes involving gun play in which he was involved?"

A. "Several times.

Q. "Now, Mr. Quinn, do you know the general reputation of Mr. Ventress in the community where you were located—did you know it at the time?"

A. "I knew he was very bad.

Q. "In what way—mention no specific case, but what was his reputation?"

Mr. Kinkead: "That question is answered. He said his reputation is bad.

Q. "In what way do you mean by 'bad,' not mentioning any specific case?"

A. "Well, he always carried a gun.

Q. "And what else?"

A. "Very quarrelsome.

Q. "Was there anything else—with reference to his general reputation?"

A. "A gunman and quarrelsome, that is about all.

Q. "Now, at the time that you were confronted by Mr. Ventress there at the back door of the Green Lantern that evening, and before you said you shot, why did you shoot?"

A. "Well, I was afraid.

Q. "Afraid of what?"

A. "Afraid he would kill me if I didn't.

Q. "When you fired that shot were you standing in an upright position or were you on the ground?"

A. "I was on the ground—one knee on the ground.

Q. "And you shot up?"

A. "I imagine at an angle, yes."

Harry L. Kremer and Harold J. White gave testimony more unfavorable to the defendant. Kremer says that Quinn received a telephone message while at his place on West Seventh street and wanted to be driven downtown. Quinn indicated, as Kremer says, that there was trouble downtown. He had been drinking in the last two or three hours. He claims that he was not greatly affected. Kremer says that as they drove down Zip Royan suggested to Quinn that if he had a pistol on his person not to use it, and Quinn replied that he would "take care of that"; and that Royan again suggested that he should not lose his head and if he had a pistol not to take it with him, and Quinn again replied he would "take care of that myself." Zip Royan denied it. The Kremer car was parked a block and a half away from the Green Lantern. They met Fay on the street. Kremer says that he said that he had had trouble with

someone, and Quinn said: "I'll take care of that, you go in the front way and order some booze, and I will be in the back when he comes out the back way. I will take care of him."

White testifies that he drove from Minneapolis in his car, reaching the Green Lantern shortly before the shooting, and parked back of the cafe. He was a fugitive from justice and had been found guilty or pleaded guilty of taking a bribe when a deputy sheriff. He claims to have witnessed an affray just shortly before the killing between Ventress, who was himself a large man, and another large man in the rear of the cafe. In the affray there was no shooting, and the men separated, one of them whom it is suggested was Fay, who said that he would get the other yet. It was a few minutes afterwards that Kremer's car came down with Quinn to Wabasha street. Kremer and Fay walked up the street to the cafe which was kept by Mrs. Hurley, a sister-in-law of Quinn and of Fay. Kremer says that Fay motioned Ventress to come to the rear, and when the door opened Quinn was there, the trouble commenced, and Quinn shot Ventress. White corroborates this testimony in part. He was in the back yard and saw part of the trouble going on and got excited and shot two or three times in the air with his own gun, and then started for Minneapolis in his car. Kremer and White were both in custody afterwards in charge of the police for a supposed connection with the killing. Naturally enough their interests were hostile to those of Quinn.

After the trouble Quinn fled the place and went to his apartment a few blocks away where he changed his clothing. Kremer drove around trying to find him but was unsuccessful and then drove to his own place on West Seventh street. Soon afterwards Quinn came in a cab. The police came but did not find him. A little later Kremer with Royan drove him to Minneapolis, where his mother and some other relatives lived. They stopped at the Hollyhocks, before mentioned, on the River Boulevard, where the talk between Quinn and Saph McKenna occurred. They went to Minneapolis and returned about midnight to his place. Quinn stayed with Kremer's brother-in-law that night.

The importance of the testimony of Kremer, which it may be noted was generally and specifically denied by Zip Royan, who had to his discredit a long list of minor convictions, is in showing a pre-meditated design and therefore murder in the first degree if the jury cared to take it so. To some extent the testimony of White, if given credit, supported this theory. Kremer told different stories and changed them from time to time when examined by the officers. He admitted that he told different stories. He was looking out for himself. The jury might have disbelieved him wholly but was not required to do so. It might have believed a part of his testimony and rejected other parts. We have not named all of the witnesses. Most of them came from the Green Lantern cafe or were on the way to it or from it. It is not understood that upstanding and wholesome witnesses, men or women, were much frequenting such a place. The state and the defendant had to take the witnesses who had some knowledge of the occurrence, and there is where they found most of them. But from the discordant and contradictory testimony of such witnesses courts and juries usually are able to find the facts with fair confidence. It cannot be said that the verdict of guilty of murder in the second degree is not justified. If the jury believed all that Kremer said and all that White said, it more likely would have found guilt in the first degree. It apparently did not believe it all; and in this connection it is noted that Quinn's own testimony, casting aside that of Kremer and White, was sufficient to justify the jury in believing him guilty of second degree murder.

2. In considering the self-defense which Quinn claims, it is to be in mind that the burden of proof was not upon him to prove that he shot in self-defense. If upon the whole evidence bearing upon the shooting and his claim of self-defense there remained in the minds of the jurors a reasonable doubt of his guilt they should acquit. *State v. McPherson*, 114 Minn. 498, 131 N. W. 645; *State v. McGrath*, 119 Minn. 321, 138 N. W. 310; 2 *Dunnell*, Minn. Dig. (2 ed.) §245a. And this the court explicitly charged the jury. The jury indeed might have found that the defendant was not guilty of murder in the second degree but was guilty of manslaughter in the first as an unjustifiable and unintentional killing without a design to effect death under the provisions of G. S. 1923 (2 *Mason*, 1927)

§10073. This alternative was submitted.

3. The defendant claims that Kremer and White were accomplices and that Quinn could not be convicted on their uncorroborated testimony. It does not appear as a matter of law that they were. The most that can be said is that the jury might have found one or the other so. No requested instruction bearing upon such a situation was requested, and none was given. The situation was not such as to make it error to fail to give such an instruction in the absence of a request. Kremer's testimony put him in an unfavorable light when he started down from his place with Quinn and went into the cafe with Fay and when he concealed Quinn after the shooting; but even if the corroboration rule applies, it could go no farther than make it necessary to instruct the jury on corroboration and to leave it to say whether his testimony which it chose to believe was sufficiently corroborated. There was quite sufficient evidence, apart from that of Kremer and White, to convict Quinn of second degree murder; and, as before observed, Quinn's testimony alone, admitting that he killed Ventress as he says he did, would sustain a verdict of under in the second degree; that is, a finding that the killing was not in self-defense.

4. The defendant claims that he was submitted to improper examination on the stand and a showing made of his prior associations which was prejudicial to him and unjustified.

The defendant was on the stand in his own behalf. He gave his history. He was borne at Belle Plaine in Minnesota. He had lived in Minnesota nearly all of his life. He was 32 years of age. He enlisted in the army in 1918. He was honorably discharged in 1919. He had contracted tubercular trouble in the war. He spent the next several years in the southwest because of tubercular trouble. He was in the Veterans Hospital in St. Paul in 1921. He occupied various positions until in 1925, when he moved to Chicago. There he was employed by a transportation company as a driver's helper for two or three years. He later engaged in the cafe business, continued therein until July 1, 1930, and in January, 1931, returned to St. Paul. He had some trouble in connection with his cafe because of liquor traffic. At

the time of the affray he was working for Zip Royan, the Minneapolis gambler, in his cigar store.

In the course of his examination the county attorney referred to his possible connection with the gangsters in Chicago. It was not established, and it was not pursued.

When the defendant went onto the stand and gave something of the history of his life, as it was proper he should, he could not object to unfavorable things being shown on cross-examination. It is quite clear that he was connected with unlawful liquor groups and familiar with their ways of doing. He could not become a witness, tell of things he thought favorable to himself, and insist that further he would be a stranger to the jury. His cross-examination was not carried so far as to be prejudicial error.

The case was submitted to the jury on a charge that was accurate and complete. It cannot be said that the defendant did not receive a fair trial. The verdict was not surprising, and there is nothing to justify urging that the jury went wrong. It might have found a higher degree of crime. It might have found manslaughter in the first degree. The verdict stands.

Judgment affirmed.

STATE v. JOHN QUINN.
(192 Minn. 88, 255 N.W. 488)

June 15, 1934.

No. 29,965.

Criminal law—new trial—newly discovered evidence—review.

An order denying a motion for a new trial on the ground of newly discovered evidence in a criminal case will not be reversed except for abuse of discretion.

Defendant appealed from an order of the district court for Ramsey county, Kenneth G. Brill, Judge, denying his motion for a new trial, on the ground of newly discovered evidence, after affirmance by this court of his appeal from a judgment of conviction for murder in the second degree. Affirmed.

Edmund Burke, for appellant.

Harry H. Peterson, Attorney General, *Roy C. Frank*, Assistant Attorney General, *Michael F. Kinkead*, County Attorney, *James Lynch*, Assistant County Attorney, and *Dwight N. Johnson*, for the state.

STONE, Justice.

Convicted of murder in the second degree, defendant appealed from the judgment, which was affirmed here. *State v. Quinn*, 186 Minn. 242, 243 N. W. 70. Later he moved for a new trial on the ground of newly discovered evidence, the latter consisting of statements made by one Harry L. Kremer contradictory of his testimony at the trial as a witness for the state. The facts will not be gone into again except to repeat that defendant admitted the fatal shooting of one Ventress, which he claimed was justified as self defense. Kremer's testimony was important but by no means all the evidence to support the verdict of guilty. Kremer's more recent sworn declarations, upon which the motion for a new trial is based, are to the effect that he was intoxicated at the time and that much of his important testimony was false.

The order denying the motion is accompanied by a memorandum which makes careful analysis, in fact and law, of the whole situation. It demonstrates the exercise of sound discretion. There can be no reversal unless abuse of discretion appears. *State v. Nelson*, 91 Minn. 143, 97 N. W. 652; *State v. Wheat*, 166 Minn. 300, 207 N. W. 623; 5 *Dunnell*, Minn. Dig. (2 ed. & Supp.) §7131. It is aptly observed, concerning the "principal ground of the motion" (the alleged intoxication of Kremer at the time of the murder and his consequent alleged ignorance of the "facts to which he testified") that, on the evening in question, "he was operating his place of business, playing cards, and drove his car downtown, drove it around downtown looking for Quinn, and back to his place of business and later to Minneapolis and back. If he was intoxicated, is there any reason to believe that his memory is better now than it was before or at the trial?"

State v. Klashtorni, 181 Minn. 203, 232 N. W. 111, 787, was a much stronger case for a new trial because of new evidence than is this. But we affirmed the order denying the motion. The forceful dissent was put in the main upon an unusually strong alibi. So the argument of the two dissenting justices is of no aid to defendant. The facts in *State v. Myers*, 154 Minn. 242, 191 N. W. 597, were for the defense vastly stronger than any here. The conviction of one defendant had been wholly upon the testimony of another, who promptly repudiated it in convincing fashion. In addition, there was the evidence of his wife that all along he had maintained the innocence not only of himself but also of his codefendant. Nothing of that kind is present now, for Kremer has taken an inexcusably long time to find out just how drunk he was on the evening that Ventress came to his death at the hands of defendant and just how much of his testimony was in consequence false. As far as the motion presents an issue as to the credibility of Kremer's statements, the decision below is binding upon us under such decisions as *State v. Upson*, 162 Minn. 9, 201 N. W. 913.

Order affirmed. ■

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