

214 VA436

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 730322

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 6th day of August, 1973.

JERRY HARGRAVE, also known as JERRY HARGRAVES and JERRY JUNIOUS HARGRAVES

Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA

Defendant in error.

From the Circuit Court of the City of Petersburg
Oliver A. Pollard, Jr., Judge

Upon the petition of Jerry Hargrave, also known as Jerry Hargraves and Jerry Junious Hargraves, a writ of error and superse-
deas is awarded him to a judgment rendered by the Circuit Court of
the City of Petersburg, formerly the Hustings Court of the City of
Petersburg, on the 22nd day of September, 1972, 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.

* * * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 6th day of March, 1972.

This Court will authorize the reimbursement of court-appointed counsel for indigent defendants for the necessary out-of-pocket expenses incurred by them incident to an appeal to this Court, including the necessary out-of-pocket expenses of such counsel (but not overhead expenses) in reproducing briefs and appendices (except in any case where the requirement of an appendix has been dispensed with); provided, however, that counsel will not be reimbursed for the cost of standard typographic printing, but will be reimbursed only for the cost of any other duplicating or copying process sanctioned by Rule 5:33.

A Copy,

Teste:

H. G. Turner,
Clerk

* * * *

VIRGINIA:

IN THE HUSTINGS COURT OF THE CITY OF PETERSBURG

COMMONWEALTH

v. Felony - Attempted Murder

JERRY HARGRAVE

Defendant

It appearing to the Court from an affidavit of the defendant and other evidence that the defendant intends to seek an appeal of his case to the Supreme Court of Virginia, and that he is financially unable to pay such costs or to bear the expense of a copy of the transcript of the evidence for an appeal, the Court, pursuant to the provisions of Section 17-30.1 of the 1950 Code of Virginia as amended in 1964, upon motion of Russell L. Watson, Jr.,

who is hereby appointed counsel for the defendant to represent him on his appeal, doth ORDER that the evidence be transcribed for such appeal and that all costs therefor be paid by the Commonwealth out of the appropriation for criminal charges.

ENTERED: October 5, 1972

Oliver A. Pollard, Jr.,
Judge

* * * *

RECORD

COMMONWEALTH OF VIRGINIA,
CITY OF PETERSBURG, To wit

IN THE HUSTINGS COURT OF SAID CITY

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Petersburg, and now attending the said court, upon their oaths, present that JERRY HARGRAVE on or about the Twenty-first day of June in the year Nineteen Hundred and Seventy-two in the said city, and within the jurisdiction of the said court, feloniously did attempt to maliciously, wilfully, premeditatedly kill and murder one Shirley Mae Gill, in that he, the said Jerry Hargrave, did wilfully, deliberately, premeditatedly and maliciously aim, discharge and shoot at the body and person of said Shirley Mae Gill with a deadly weapon, to-wit: a loaded rifle, while she, the said Shirley Mae Gill, was within about ten feet of him, the said Jerry Hargrave, and well within shooting range of said pistol, in the attempt and with the intent to then and there feloniously, wilfully, deliberately, maliciously and premeditatedly kill and murder her, the said Shirley Mae Gill, and did fail to commit the intended murder for the reason that the discharged load from said rifle failed to hit the said Shirley Mae Gill. And so

the Grand Jurors, upon their oaths aforesaid, do say that the said Jerry Hargrave in the City aforesaid, did attempt to kill and murder the said Shirley Mae Gill against the peace and dignity of the Commonwealth of Virginia.

Ruth M. Bailey Clerk

* * * *

In the Hustings Court of the City of Petersburg,
September 22, 1972

* * * *

This day came again the Attorney for the Commonwealth and Jerry Hargrave, who stands convicted for a felony, to-wit: attempt to kill and murder Shirley Mae Gill, as charged in the indictment, was again led to the bar in the custody of the jailer of this Court, and came also Russell L. Watson, Jr., attorney for the accused.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open court with a written report, which report he presented to the Court in open court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for accused.

Thereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case.

Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer, and such additional facts as were presented by the defendant, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant be, and he hereby is, sentenced to confinement in the penitentiary of the Commonwealth for the term of four (4) years, and that the Commonwealth of Virginia do recover against the said defendant its costs by it about its prosecution in this behalf expended.

And it is further ordered that as soon as possible after the entry of this order the defendant 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 orders that the prisoner be allowed ninety-three (93) days credit for the time spent in jail awaiting trial.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorney was likewise personally present and capably represented the defendant.

The Court instructed counsel for the defendant to advise the defendant of any right of appeal that he might have.

And the prisoner is remanded to jail to await transfer to the penitentiary.

Ruth M. Bailey, Clerk

* * * *

FORMA PAUPERIS AFFIDAVIT

I hereby declare that I intend to seek an appeal from my convictions in this Court on September 22, 1972 to the Supreme Court of Appeals, and that I am financially unable to pay such costs or to bear the expense of a copy of the transcript of the evidence taken on July 28, 1972 and September 22, 1972.

I further certify to the Supreme Court of Appeals that I am financially unable to pay my attorney fees, costs and expenses as to the afore said appeal.

JERRY HARGRAVES

* * * *

WRIT OF ERROR

This writ of error, however, is limited to the consideration of assignment of error No. 1 which reads as follows:

"1. The trial Court erred in overruling Defendant's motion to strike the evidence in this case because the evidence presented by the Commonwealth was insufficient to convict the accused of the crime as charged."

A Copy,

Teste: H. G. Turner, Clerk

* * * *

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* * * *

Transcript of the evidence and other incidents of the above when heard on July 28, 1972 and September 22, 1972, before the Honorable Oliver A. Pollard, Jr., Judge.

APPEARANCES:

J. Thompson Wyatt, Esq.
Attorney for the Commonwealth

Russell L. Watson, Jr., Esq.
Attorney for the Defendant

* * * *

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* * * *

SHIRLEY MAE GILL, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WYATT:

Q. Please state your name, and your age and address, please, ma'am?

A. Shirley Mae Gill 9 East Carter Street, thirty-two.

Q. What's your address?

A. 9 East Carter Street.

Q. Carter, East Carter?

A. Yes.

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Q. You know the defendant, Jerry Hargrave?

A. Yes.

Q. Where does he live?

A. 9 East Carter.

Q. You all live in the same house?

A. Yes.

Q. Any other members of your family or his family live there?

A. My children.

Q. Your children?

A. Uh, huh.

Q. Well, now, you and he lived there together, you mean you and he close enough friends for that?

A. Yea, we been close in for four years.

Q. Common law wife?

A. Yes.

Q. Four years? Have you got any children?

A. Yes, one by him.

Q. How old is that child?

A. Seven.

Q. You been friends for four years, but the children is seven years old?

A. What you say?

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Q. You been friends for four years, but the child is seven years old?

A. Yes.

Q. Well, now, on June the 21st were you at the home on Carter Street?

A. Yes.

Q. And your -- Jerry lives there?

A. Yes.

Q. Well, what time did this thing happen?

A. It was a little after eleven.

Q. Huh?

A. Little after eleven.

Q. Nighttime or daytime?

A. Nighttime.

Q. Well, what -- what led up to it, just what happened, say, for instance, fifteen minutes before eleven, something like that, what happened, what brought about --

A. He came in the house asking for his coat and I wouldn't give it to him.

Q. Now, you are talking a little too fast, he came in and asked for his coat?

A. Yes.

Q. Go ahead, but talk slower?

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A. And I wouldn't give it to him.

Q. All right?

A. And then he left out the house and came back with the rifle.

Q. Came back with a rifle? What happened then?

A. He shot.

Q. Huh?

A. He shot it.

Q. How many times he shoot the rifle?

A. Once.

Q. Hit you?

A. No, it didn't, it hit the washing machine.

Q. How far was he when he shot the rifle?

A. About ten feet.

Q. Huh?

A. About ten feet.

Q. Ten feet, was the light on in the room?

A. Yes.

Q. How did he hold the rifle, did he have it on his shoulder or in his hands?

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A. In his hand.

Q. Did he ever put it up to his shoulder?

A. No.

Q. Well, do you know where the rifle did hit?

A. It hit the washing machine.

Q. Huh?

A. It hit the washing machine.

Q. Uh huh, you say the bullet did hit the washing machine, did you see the bullet hit it?

A. Griffin seen it.

Q. Huh?

A. Griffin, Arthur Griffin.

Q. He did, he saw it? Well, now, what did he do after he shot and hit the washing machine, what did he do then?

A. I don't know what he did, I left out the house.

Q. You left?

A. Yes.

Q. You don't know whether he left or not?

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Q. What did he say, did he give you any reason -- you talked to him did -- besides telling you to tell the truth, did he say anything about why he shot at you, .

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or anything like that?

A. No, he didn't.

Q. Never has explained it?

A. No.

Q. Well, now, were you facing him when he pulled the trigger to the --

A. No, I was sitting in the chair by the washing machine.

Q. How far away from the washing machine?

A. The washing machine was sitting like this, and I was sitting behind the -- in front the washing machine.

Q. I reckon Mr. Griffin showed you where the dent was on the machine?

A. Yes.

Q. How far was that from your body?

A. It wasn't too far.

Q. Could you reach it?

A. No -- yea, I could reach the washing machine.

Q. Well, now, sit in your chair, now reach --

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A. I could hear back there --

Q. Reach out as far as where that rifle was?

A. It about from here to this chair.

Q. Well, wouldn't it -- it missed you about three feet?

A. Yes.

Q. Is that right? It was about three foot, you know,
long as your arm?

A. Uh, huh.

Q. And it missed by -- it missed you by about three feet?

A. Yes.

Q. Did he say anything at the time he fired the gun?

A. Yea, he told me to give him his coat.

Q. Give him his coat, did he say anything about killing
you?

A. No, he didn't.

Q. Did you ever -- had you ever seen this rifle before?

A. No.

Q. Anybody in the room see this thing

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besides you?

A. No, my kids was in the bed.

Q. Well, how about Thomas L. Brown here, was he a witness?

A. I don't know, (laughing) he supposed to be down here
about his wife.

Q. Was he in the room when it happened?

A. No, he wasn't.

Q. Fannie Gee, was she in the room when it happened?

A. No.

Q. Was -- you heard -- they testified in Police Court,
didn't they?

A. Yea, we went down loco.

Q. Now, before you were living with him, had he ever threatened to do you any bodily harm before?

A. No.

Q. If he had tried to actually shoot you, why couldn't he hit you, is there -- have you ever seen him shoot that rifle before, shoot at rats or anything like that?

A. No.

Q. Did you ever see that rifle before.

A. No.

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Q. You don't -- you don't know whether he shot once or more, do you?

A. No, I don't.

MR. WYATT: Do you want to cross examine now?

That's all.

MR WATSON: Okay.

CROSS EXAMINATION

BY MR. WATSON:

Q. Miss Gill, you lived with this man for about four years, is that correct?

A. Yes.

Q. And had you had an argument with him that day, or that week, concerning his going with your sister?

A. Yes, both of us had been drinking.

Q. Both of you had been drinking the day that this occurred, is this correct?

A. Yes.

Q. How much had you been drinking?

A. About three or four cans of beer.

Q. Can you hold your beer?

A. Yes.

Q. Can you get drunk over two or three cans?

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A. Yes.

Q. It doesn't take too much to get you high, is this correct?

A. No, it don't.

Q. Do you remember making a statement to him that you'd rather see him in jail first than to have him going with your sister?

A. Yes.

Q. You did tell him that? What's this about the coat, why wouldn't you give him his coat?

A. Because I din't want him to move out the house.

Q. And he wanted to break up with you, is that right?

A. Yes.

Q. And you testified that the alleged bullet was approximately three feet from you, is that correct?

A. Yes.

Q. Well, did the bullet go through the washing machine?

A. It a dent in -- in the washing machine machine from the bullet.

Q. It's a dent in the washing -- but was any bullet in the house?

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A. | Griffin find the shell.

Q. Anybody else in the house have a twenty-two rifle?

A. I don't think so.

Q. Does your brother have a twenty-two?

A. He probably did.

Q. What's your brother's name?

A. Larry Russell.

Q. Isn't it true that your brother has a twenty-two
pistol?

A. I don't know that.

Q. You have never heard your brother shoot from the
upstairs window?

A. Yes, I have.

Q. Well, whose gun did he use?

A. I don't know who gun he use.

Q. I see! Did you see a shell?

A. Griffin pick the shell up.

Q. Did you see one though?

A. Yea, I saw the shell.

Q. After Griffin picked it up?

A. Yes.

Q. After the officer got it?

A. Uh huh.

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Q. You didn't -- did you see a shell drop out of the gun
when it was fired?

A. I was too scared to look at the gun.

Q. Was there any injury to you?

A. I had a little burn up there, nothing but a little
burn.

- Q. Where did that come from?
- A. From the rifle.
- Q. But it didn't hit you?
- A. No, it just skim.
- Q. It hit the washing machine though, and not --
- A. Yea, it probably backed up.
- Q. Was anybody else in the house?
- A. I think his brother was in there.
- Q. And was your sister?
- A. And my sister was in there.
- Q. Where were they?
- A. They was in the bedroom.
- Q. Did they come in the room when the shot was fired?
- A. No, because I got -- I went out the other door.
- Q. No further -- no further questions.

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REDIRECT EXAMINATION

BY MR. WYATT:

- Q. What are your brother and sister's names?
- A. Laverne Russell and Larry Russell.
- Q. All right, Larry Russell, thank you, ma'am.

BY THE COURT:

Q. Just a minute, Miss Gill, I'm a little bit confused about where this bullet went in relation to where you were sitting, you say it hit the washing machine, and it was three feet from you, now, do you mean three feet out to the side of you, or behind you, or what?

- A. I was sitting in front the washing machine.

Q. And you're saying that where the bullet struck, then, was three feet behind you?

A. Yes.

Q. And not to the side of you?

A. No.

Q. So, you don't know whether the bullet came closer to you than that or not, do you?

A. No, I don't.

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Q. And you say you had a burned place on your right shoulder?

A. Yes.

Q. You didn't have it before the gun went off, did you?

A. No.

Q. All right, no further questions.

REXCROSS EXAMINATION

BY MR. WATSON:

Q. Do you know which side of you the gun -- the bullet went, was it on your left or on your right?

A. On my right.

Q. It went over your --

A. Yea, right across my shoulder.

Q. But you didn't require any medical attention?

A. No, I haven't.

Q. No further questions.

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MR. WYATT: We rest.

THE COURT: All right Mr. Watson.

MR. WATSON: Your Honor, I move to strike the evidence.

THE COURT: What didn't we prove this time?

MR. WATSON: She testified that the man was ten feet from her, took a rifle and shot at her, and missed her, if he intended to kill her, there's no reason he couldn't have hit her.

THE COURT: Mr. Watson,

MR. WATSON: If he was within ten

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feet of her.

THE COURT: The evidence before the Court is that the defendant came in with a rifle, got within ten feet from her, did not put the rifle to the shoulder, held it in his hands, discharged the rifle, she had a burned place on her shoulder she did not have before that happened, and that a bullet or something entered the washing machine three feet behind her. Now exactly what are you arguing that the Commonwealth has failed to prove?

MR. WATSON: I'm saying that if he intended to kill her, he could have hit her from a of ten feet

THE COURT: How do you know?

MR. WATSON: Ten feet proposition. The evidence that she presented was that it hit the washing machine, it didn't hit her, something struck her, she thought, that came off the washing machine.

THE COURT: She said she didn't know.

MR. WATSON: There is no evidence as to any bullet, a twenty-two automatic bullet, I contend, Your Honor, would go into that washing machine.

THE COURT: Mr. Watson, your objection is overruled.

MR. WATSON: Plenty of reason to -- to want to put him in jail, it might be a case of assault possibly, but I don't see any attempted murder.

THE COURT: But when you point a rifle at somebody and shoot it, what do you usually intend to do, Mr. Watson?

MR. WATSON: Your Honor, if he was within seven or ten -- ten feet of the person and you miss them by three feet,

THE COURT: Who said --

MR. WATSON: not intending to kill her.

THE COURT: Did you hear the evidence?

MR. WATSON: Yes, sir.

THE COURT: Where do you get the bullet less than three feet, I want to know?

MR. WATSON: She testified that the bullet missed her.

THE COURT: She testified that it hit a washing machine three feet behind her, and

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she doesn't know where the bullet went.

MR. WATSON: Well, there's been no testimony as to how close the bullet came to her.

MR. WYATT: It is supposed to have hit her on the shoulder, she said.

THE COURT: I don't see what your're talking about, Mr. Watson.

MR. WATSON: It has to be some physical evidence other than her accusation.

THE COURT: Overruled, Mr. Watson.

MR. WATSON: Yes, sir.

THE COURT: And I hope you're not serious in your motion, I take it that you are, I'm very much surprised, go ahead.

MR WATSON: We didn't have any evidence.

THE COURT: No evidence? Under the circumstances, I see no choice but to find him guilty as charged in the indictment. Mr. _____, I'd like a pre-sentence report on him on the same day, September 22nd.

HEARING CONCLUDED.

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