Chapter 136

Trial

136.010

NOTES OF DECISIONS

If there is no plea, there is no issue for trial. State v. Walton, (1907) 50 Or 142, 91 P 490, 13 LRA(NS) 811.

There is no issue of fact on a plea of guilty. State v. Lewis, (1925) 113 Or 359, 230 P 543, 232 P 1013.

FURTHER CITATIONS: State v. Childers, (1897) 32 Or 119, 49 P 801; State v. Walton, (1909) 51 Or 574, 91 P 495; State v. Crosby, (1959) 217 Or 393, 342 P2d 831.

136.020

NOTES OF DECISIONS

If there is no plea, there is no issue for trial. State v. Walton, (1907) 50 Or 141, 91 P 490, 13 LRA(NS) 811.

136.040

NOTES OF DECISIONS

It is error to receive the verdict of a jury in the absence of the defendant where the crime charged is a felony. State v. Spores, (1871) 4 Or 198; State v. Cartwright; (1882) 10 Or 193.

One on trial for a felony has the right to be present during the entire trial, including the discharge of the jury because of inability to agree. State v. Holloway, (1910) 57 Or 162, 110 P 397, 791; State v. Chandler, (1929) 128 Or 204, 274 P 303.

The right of a defendant in a felony case to be present throughout the trial is basic. State v. Shirley, (1970) 1 Or App 635, 465 P2d 743; Hurt v. Cupp, (1971) 5 Or App 89, 482 P2d 759.

Setting the time for trial during the absence of the defendant is not ground for objection, this proceeding being no part of the trial itself. State v. Abrams, (1883) 11 Or 169, 8 P 327.

A defendant charged with a misdemeanor may waive the right to be present in person or by counsel at time of verdict. State v. Waymire, (1908) 52 Or 281, 97 P 46, 132 Am St Rep 699, 21 LRA(NS) 56.

Preliminary matters constitute no part of a felony trial, and are therefore legal even though the defendant is not present. State v. Moore, (1928) 124 Or 61, 262 P 859.

The crime of violation of the Blue Sky Law requires the personal appearance of the defendant at the trial. State v. Swain, (1934) 147 Or 207, 31 P2d 745, 32 P2d 773, 93 ALR 921.

The excusing of a prospective juror out of the presence of the defendant is an irregularity, but does not constitute grounds for reversal. State v. Savan, (1934) 148 Or 423, 36 P2d 594, 96 ALR 497.

The district attorney may comment on the defendant's absence if his comment is germane to any issue awaiting the jury's determination, as where identity is an issue in the case. State v. Black, (1935) 150 Or 269, 42 P2d 171, 44 P2d 162.

This section is to prevent defendant from being prejudiced by action taken without his presence. State v. Beeson, (1967) 248 Or 411, 434 P2d 460.

Conviction of felony was upheld although record did not expressly recite that defendant was present when verdict was received. State v. Cartwright, (1882) 10 Or 193.

Calling one juryman to box, in absence of defendant in grand larceny trial, was not reversible error. Id.

Instruction that failure of accused to appear at trial could be considered only with respect to issue as to identity was not erroneous. State v. Greeley, (1939) 160 Or 435, 86 P2d 437.

No prejudice occurred by the absence of defendant. State v. Beeson, (1967) 248 Or 411, 434 P2d 460.

FURTHER CITATIONS: State v. Carcerano, (1964) 238 Or 208, 390 P2d 923.

136.050

NOTES OF DECISIONS

In absence of a request the court need not instruct that the jury may find defendant guilty of lesser degree of crime if they have reasonable doubt as to his guilt of greater offense. State v. Foot You, (1893) 24 Or 61, 32 P 1031, 33 P 537; State v. Reyner, (1907) 50 Or 224, 91 P 301. State v. Foot You, supra, overruling State v. Cody, (1890) 18 Or 506, 23 P 891, 24 P 895.

Where the jury in a prosecution for homicide are in doubt as to the grade of the offense, they should find defendant guilty of manslaughter. State v. Zullig, (1920) 97 Or 427, 190 P 580.

In view of this section it was error for court to instruct that if defendant was guilty, he was guilty of murder in the first degree. State v. Grant, (1897) 7 Or 414.

In view of this section, it was error for court to instruct that if defendant was guilty, he was guilty as charged. State v. Hanlon, (1897) 32 Or 95, 48 P 353.

FURTHER CITATIONS: State v. Ellsworth, (1896) 30 Or 145, 47 P 199; State v. Lavery, (1899) 35 Or 402, 58 P 107; State v. Magers, (1899) 35 Or 520, 537, 57 P 197; State v. Branton, (1907) 49 Or 86, 87 P 535; State v. Farnam, (1916) 82 Or 211, 279, 161 P 417, Ann Cas 1918A, 318; State v. Reyes, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182; State v. Jones, (1965) 241 Or 142, 405 P2d 514.

136.060

NOTES OF DECISIONS

Refusal to grant separate trials to persons charged with a misdemeanor, will not be held error on appeal when the bill of exceptions does not show that the court abused its discretion. State v. Kline, (1908) 50 Or 426, 430, 93 P 237.

FURTHER CITATIONS: Latshaw v. Territory of Oregon, (1854) 1 Or 141; State v. Tremblay, (1971) 4 Or App 512, 479 P2d 507, Sup Ct review denied.

136.070

NOTES OF DECISIONS

See also cases under ORS 134.120.

1. In general
2. Discretion of court
3. Absence of witnesses

1. In general

The trial court's ruling upon a motion for a continuance will be disturbed on appeal only for manifest abuse of its discretion. State v. McDonald, (1961) 231 Or 24, 361 P2d 1001, cert. denied, 370 US 903, 82 S Ct 1247, 8 L Ed 2d 399; State v. Wolfer, (1965) 241 Or 15, 403 P2d 715; State v. Blank, (1965) 241 Or 627, 405 P2d 373; State v. Young, (1970) 1 Or App 562, 463 P2d 374, Sup Ct **review denied.**

Affidavits for continuance cannot be considered on appeal, unless they have been made a part of the record by bill of exceptions. State v. Finch, (1909) 54 Or 482, 103 P 505.

The appellate court will presume, after trial without objection of any kind, that the cause was properly continued, that a proper showing was made or that defendant consented to such postponement. State v. Chapin, (1915) 74 Or 346, 144 P 1187.

Jurisdiction to try a case at a subsequent term when court did not have time to hear it at prior term was not intended to be divested by this section. State v. Weitzel, (1936) 153 Or 524, 56 P2d 1111.

When the defendant seeks to postpone a trial in order to obtain the testimony of a young child, his affidavit must state facts indicating that the child is a competent witness. State v. Blount, (1953) 200 Or 35, 264 P2d 419, 280 P2d 414, cert. denied, 347 US 962, 98 L Ed 1105, 74 S Ct 711.

There is no other express provision for the continuance of a criminal action where the trial has been postponed on the application or by the consent of the defendant. State v. D'Autremont, (1957) 212 Or 344, 317 P2d 932.

2. Discretion of court

The court exercises discretion in passing upon an application for a continuance; and its decision will be reversed only for an abuse of discretion. State v. O'Neil, (1886) 13 Or 183, 9 P 284; State v. Hawkins, (1890) 18 Or 476, 23 P 475; State v. Howe, (1895) 27 Or 138, 44 P 672; State v. Breaw, (1904) 45 Or 586, 78 P 896; State v. Finch, (1909) 54 Or 482, 103 P 505; State v. Putney, (1924) 110 Or 634, 224 P 279.

Denial of application was not an abuse of discretion. State v. Huffman, (1900) 39 Or 48, 63 P 1; State v. Mizis, (1906) 48 Or 165, 85 P 611, 86 P 361; State v. Luper, (1907) 49 Or 605, 91 P 444; State v. Hale, (1933) 141 Or 332, 18 P2d 219; State v. Christiansen, (1935) 150 Or 11, 41 P2d 442.

A motion to postpone the trial until the birth of prosecutrix's baby to determine parentage charged to defendant was properly denied. State v. Putney, (1924) 110 Or 634, 224 P 279.

Where defendant had an opportunity to procure additional counsel it was no abuse of discretion to refuse a continuance for such purpose. State v. Nelson, (1939) 162 Or 430, 92 P2d 182.

That defense attorney was so engrossed in his private practice that he did not have time to properly defend the defendant was not sufficient reason for granting a continuance. State v. Payne, (1952) 195 Or 624, 244 P2d 1025.

3. Absence of witnesses

For a continuance on grounds of absence of witness, a reasonable expectation of procuring witness must be shown. State v. Leonard, (1869) 3 Or 157.

In an affidavit for continuance on the ground of the absence of a witness, it is not sufficient to state a belief that the attendance of such witness can be procured at the next term; the facts and circumstances upon which a reasonable belief is founded must be set out. State v. O'Neil, (1886) 13 Or 183, 9 P 284.

Where it does not appear what absent witnesses were expected to prove, nor that their testimony would be material if produced, it was not an abuse of discretion for the court to refuse to postpone the trial until these witnesses could be obtained. State v. Fiester, (1897) 32 Or 254, 50 P 561; State v. Wong Gee, (1899) 35 Or 276, 278, 57 P 914.

In the absence of application for the arrest of a witness who had left the courtroom, refusal to grant a continuance to procure his presence was not error. State v. Birchard, (1899) 35 Or 484, 59 P 468.

FURTHER CITATIONS: State v. Bowker, (1894) 26 Or 309, 38 P 124; State v. Brauhn, (1967) 247 Or 430, 430 P2d 1012; State v. Losey, (1970) 3 Or App 612, 475 P2d 430, Sup Ct **review denied.**

136.080 to 136.100

CASE CITATIONS: State ex rel. Gladden v. Lonergan, (1954) 201 Or 163, 269 P2d 491; State v. Lamphere, (1963) 233 Or 330, 378 P2d 706.

136.080

NOTES OF DECISIONS

Defendant cannot object to admission of deposition taken under this section on the constitutional ground of right to meet witnesses face to face as provided by Ore. Const. Art. I, §11. State v. Bowker, (1894) 26 Or 309, 38 P 124.

The motion for a postponement was properly denied. State v. Thompson, (1965) 240 Or 468, 402 P2d 243.

LAW REVIEW CITATIONS: 4 WLJ 182.

136.090

NOTES OF DECISIONS

Two persons may be jointly indicted for violation of this section. State v. Berry, (1955) 204 Or 69, 267 P2d 993, 995, 282 P2d 344, 347.

136.120

CASE CITATIONS: State v. Clark, (1917) 86 Or 464, 168 P 944.

136.210 to 136.280

CASE CITATIONS: State v. Anderson, (1971) 92 Or App Adv Sh 1290, 485 P2d 446, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 47 OLR 185.

136.210

NOTES OF DECISIONS

This section has been construed to be a reference to the Code of Civil Procedure as it was at the date of the enactment of this section. State v. Caseday, (1911) 58 Or 429, 115 P 287.

The error of court in overruling challenge for cause is cured by exercise of peremptory challenge against juror in question. State v. Humphrey, (1912) 63 Or 540, 128 P 824.

The question as to whether a juror is actually biased is one of fact for the determination of the trial judge. State v. Stigers, (1927) 122 Or 113, 256 P 649.

Defendant was not prejudiced when examination of

jurors was started when there were only seven jurors present. State v. Caseday, (1911) 58 Or 429, 115 P 287.

Where defendant's peremptory challenges were not exhausted, he could not complain of the overruling of his challenge for cause to any particular juror. State v. Humphrey, (1912) 63 Or 540, 128 P 824.

FURTHER CITATIONS: State v. Ganong, (1919) 93 Or 440, 184 P 233; State v. Chase, (1923) 106 Or 263, 211 P 920.

LAW REVIEW CITATIONS: 2 OLR 30; 6 OLR 396; 16 OLR 293; 21 OLR 298; 23 OLR 69, 82.

136.220

NOTES OF DECISIONS

See also cases under ORS 136.210.

This section was not affected by the temporary abrogation of capital punishment. State v. Leland, (1951) 190 Or 598, 227 P2d 785, aff'd on other grounds 343 US 790, 72 S Ct 1002, 96 L Ed 1302.

This section was not unconstitutional as denying a trial by impartial jury as provided by Ore. Const. Art. I, §11. Id.

Prior service as juror in trial of another indicted separately for an offense growing out of same transaction as one involving defendant was not sufficient to disqualify juror. Id.

FURTHER CITATIONS: State v. Payne, (1952) 195 Or 624, 244 P2d 1025; Parks v. Cupp, (1971) 5 Or App 51, 481 P2d 372.

LAW REVIEW CITATIONS: 23 OLR 69, 81.

136.230

NOTES OF DECISIONS

This section dispenses with the number of peremptory challenges designated in ORS 17.155 and allows the defendant in criminal actions double the number apportioned to the state. State v. Caseday, (1911) 58 Or 429, 115 P 287.

The right of peremptory challenge is conferred on defendant to use at his own discretion. State v. Humphrey, (1912) 63 Or 540, 128 P 824.

The error of court in overruling challenge for cause is cured by exercise of peremptory challenge against juror in question. Id.

Defendant is entitled to exercise peremptory challenges in habitual criminal proceedings. State v. Durham, (1945) 177 Or 574, 164 P2d 448.

Where defendant objects to jury on ground that fair trial was impossible in that judicial district, challenging particular jurors does not waive this objection. State v. Nagel, (1949) 185 Or 486, 202 P2d 640, cert. denied, 338 US 818, 70 S Ct 60, 94 L Ed 39.

Where defendant's peremptory challenges were not exhausted he could not complain of the overruling of his challenge for cause to any particular juror. State v. Humphrey, (1912) 63 Or 540, 128 P 824.

FURTHER CITATIONS: State v. Ganong, (1919) 93 Or 440, 184 P 233; State v. Dodson, (1961) 226 Or 458, 360 P2d 782.

LAW REVIEW CITATIONS: 14 OLR 420.

136.280

NOTES OF DECISIONS

The irregularity of court in arbitrarily substituting an alternate juror rather than drawing names for the juror was waived by defendant. State v. Henderson, (1947) 182 Or 147, 184 P2d 392.

FURTHER CITATIONS: State v. Hollingsworth, (1970) 2 Or App 186, 465 P2d 490, Sup Ct **review denied.**

136.310

NOTES OF DECISIONS

Venue cannot be proved by judicial knowledge which is not declared to the jury. State v. Jones, (1965) 240 Or 129, 400 P2d 524; State v. Cooksey, (1965) 242 Or 250, 409 P2d 335; State v. Rutherford, (1970) 1 Or App 599, 465 P2d 243, Sup Ct **review denied.**

Construction of writings is for the court. State v. Moy Looke, (1879) 7 Or 55.

If the evidence on preliminary issue of admissibility is undisputed, the correctness of finding of trial court is question of law for determination on appeal. State v. Linn, (1946) 179 Or 499, 173 P2d 305.

This section imposes on the judge the duty to determine all facts preliminary to, as well as the admissibility of, all testimony. State v. Spicer, (1970) 3 Or App 120, 473 P2d 147.

FURTHER CITATIONS: State v. Cole, (1962) 233 Or 141, 377 P2d 168.

LAW REVIEW CITATIONS: 49 OLR 208; 41 OLR 293.

136.320

NOTES OF DECISIONS

An instruction that "although the jury have the power to find a general verdict, which includes questions of law as well as questions of fact, they are bound, nevertheless, to receive as law what is laid down by the court," is but a statement of the rule provided by this section. State v. Reinhart, (1895) 26 Or 466, 38 P 822.

The court instructs the jury as to the law, and the jury applies the facts found by it to the law as given by the court. State v. Reed, (1908) 52 Or 377, 97 P 627.

While the jury determines the law as well as the facts, they must find the law and the facts under the court's direction as to the law, and should receive and accept the law as given by the court. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389, 102 P 173.

The jury do not have the moral right to disregard the directions of the court as to the law; and in determining the guilt or innocence of accused they should receive the law from the court, though they have the power to disregard the instructions and acquit accused. State v. Daley, (1909) 54 Or 514, 103 P 502, 104 P 1.

Decision of questions of fact is the function of the jury. State v. Butchek, (1927) 121 Or 141, 253 P 367, 254 P 805.

The jury shall make findings of fact regarding premeditation and deliberation. State v. Leland, (1951) 190 Or 598, 227 P2d 785, aff'd on other grounds, 343 US 790, 72 S Ct 1002, 96 L Ed 1302.

The giving of an instruction by the court was reversible error where the theory embodied in the instruction rested upon speculation. State v. Hansen, (1952) 195 Or 169, 244 P2d 990.

It was not error to refuse to instruct that jury had right and duty to pass upon the law as well as the facts. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389.

FURTHER CITATIONS: State v. Hansen, (1970) 3 Or App 378, 474 P2d 17.

136.330

NOTES OF DECISIONS

1. Writ of error coram nobis

The writ of error coram nobis is not available in Oregon to one who has been convicted of a crime. Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289.

The trial court has the inherent power to correct its own erroneous judgment of conviction upon a motion in the nature of a coram nobis. (concurring opinion) Id.

The order of proof rests in the judicial discretion of the trial judge. State v. O'Donnell, (1962) 229 Or 487, 367 P2d 445.

2. Conduct of trial

The order of proceedings at the trial may be directed by the trial court. State v. De Jonge, (1936) 152 Or 315, 51 P2d 674.

Jury was polled as provided under this section. State v. Ogilvie, (1946) 180 Or 365, 175 P2d 454.

Permitting photographers within bar of court was not reversible error. State v. Langley, (1958) 214 Or 445, 315 P2d 560, 323 P2d 301, cert. denied, 358 US 826, 79 S Ct 45, 3 L Ed 2d 66.

3. Exceptions

Exceptions, to be properly taken, must state the reason for which they are taken. State v. Poole, (1939) 161 Or 481, 90 P2d 472.

Depending on the evidence establishing intoxication, the possibility the jury would have decided another way if it had been instructed on the legal significance of intoxication in adjuding intent, is not enough for a new trial when an exception has not been taken at the trial. State v. Braley, (1960) 224 Or 1, 355 P2d 467.

FURTHER CITATIONS: State v. Baker, (1893) 23 Or 441, 32 P 161; State v. Nunn, (1958) 212 Or 546, 321 P2d 356; State v. Otten, (1963) 234 Or 219, 380 P2d 812; State v. Kendrick, (1965) 239 Or 512, 398 P2d 471; State v. Andrews, (1970) 2 Or App 595, 469 P2d 802, Sup Ct review denied; State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct review denied; Williams v. Florida, (1970) 399 US 78, 138, 26 L Ed 2d 446, 475, 90 S Ct 1893.

LAW REVIEW CITATIONS: 4 WLJ 5.

136.510

NOTES OF DECISIONS

Testimony given on a former trial of the defendant relating to the same matter is admissible where witness is outside the state. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389; State v. Meyers, (1911) 59 Or 537, 117 P 818; State v. Von Klein, (1914) 71 Or 159, 142 P 549, Ann Cas 1916C, 1054.

In libel there is no difference between civil and criminal cases in the general rule admitting evidence to show that the words were intended to be used in an actionable sense and, when ambiguous, to show to whom they were intended to apply. State v. Mason, (1894) 26 Or 273, 38 P 130, 46 Am St Rep 629, 26 LRA 779.

This section does not affect competency of husband or wife to testify for or against each other. State v. McGrath, (1899) 35 Or 109, 57 P 321.

The genuineness of papers must be clearly shown before a person can be permitted to testify to the handwriting of another. State v. Branton, (1906) 49 Or 86, 87 P 535.

The trial court may in its discretion sustain or deny a motion made by the defendant in a criminal case requesting permission to inspect his confession in the custody of the prosecution. State v. Leland, (1951) 190 Or 598, 227 P2d 785, aff'd on other grounds, 343 US 790, 72 S Ct 1002, 96 L Ed 1302.

The doctrine of res judicata or estoppel by judgment is applicable in criminal cases. State v. Dewey, (1956) 206 Or 496, 292 P2d 799.

The physician-patient privilege is limited to civil proceedings. State v. Betts, (1963) 235 Or 127, 384 P2d 198.

FURTHER CITATIONS: State v. Clements, (1887) 15 Or 237, 14 P 410; State v. McLennan, (1917) 82 Or 621, 162 P 838; State v. Broadhurst, (1948) 184 Or 178, 196 P2d 407, cert. denied, 337 US 906, 69 S Ct 1046, 93 L Ed 897; State v. Sullivan, (1962) 230 Or 136, 368 P2d 81, cert. denied, 370 US 957, 82 S Ct 1610, 8 L Ed 2d 823; State v. Day, (1964) 236 Or 461, 389 P2d 30; State v. Little, (1967) 249 Or 297, 431 P2d 810; Brown v. Johnston, (1971) 258 Or 284, 482 P2d 712.

LAW REVIEW CITATIONS: 4 OLR 126, 131; 36 OLR 136; 42 OLR 258; 46 OLR 233; 4 WLJ 170, 179, 182.

136.520

NOTES OF DECISIONS

In a prosecution for criminal libel, the jury cannot presume that the statement was false without evidence to that effect and thus overcome the stronger presumption of this section. State v. Pierce, (1932) 140 Or 1, 12 P2d 320.

FURTHER CITATIONS: State v. Capitan, (1970) 2 Or App 338, 468 P2d 533; State v. Waterhouse, (1957) 209 Or 424, 307 P2d 327.

LAW REVIEW CITATIONS: 4 OLR 126, 132; 47 OLR 185, 423; 49 OLR 24.

136.530

NOTES OF DECISIONS

Testimony given on a former trial of the defendant relating to the same matter is admissible where the witness is outside the state. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389; State v. Meyers, (1911) 59 Or 537, 117 P 818; State v. Von Klein, (1914) 71 Or 159, 142 P 549, Ann Cas 1916C, 1054.

This section has no reference to the use to be made of testimony after it is given. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389, 102 P 173.

There is a direct conflict between this section and ORS 44.230 which cannot reasonably be reconciled. State v. Lonergan, (1954) 201 Or 163, 269 P2d 491.

A defendant is entitled to have prisoners appear on his behalf and to confront them. Id.

This section is intended to make the general rule concerning the taking of depositions inapplicable to criminal trials. State v. Lamphere, (1963) 233 Or 330, 378 P2d 706.

Testimony given at the preliminary hearing, although the recollection of a participant at the hearing, was admissible. State v. Crawley, (1966) 242 Or 601, 410 P2d 1012.

Testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant was admissible. State v. Rawls, (1969) 252 Or 556, 451 P2d 127.

LAW REVIEW CITATIONS: 42 OLR 205; 4 WLJ 182; 7 WLJ 268-278.

136.540

NOTES OF DECISIONS

See also annotations under Ore. Const. Art. I, §12.

1. In general

2. Admissibility
3. Preliminary determination of admissibility
4. Involuntary confessions
5. Confessions not involuntary
6. Corroboration

1. In general

A confession is an acknowledgment of guilt made after commission of the offense. State v. Reinhart, (1894) 26 Or 466, 38 P 822; State v. Weston, (1921) 102 Or 102, 201 P 1083.

If the preliminary question as to admissibility was decided in the absence of the jury, either party is entitled to have the jury hear the witnesses tell about the circumstances which relate to voluntariness of the confession. State v. Morris (concurring opinion), (1917) 83 Or 429, 451, 163 P 567; State v. Jordan, (1934) 146 Or 504, 26 P2d 558, 30 P2d 751. **But see** State v. Brewton, (1964) 238 Or 590, 395 P2d 874.

The Oregon procedure of submitting the question of voluntariness to the jury without a prior independent finding by the trial judge that the confession was voluntary is violative of the due process clause of the Fourteenth Amendment. State v. Brewton, (1964) 238 Or 590, 395 P2d 874, vacating 220 Or 266, 344 P2d 744; State v. Keller, (1965) 240 Or 442, 402 P2d 521; State v. Smith, (1965) 242 Or 223, 408 P2d 942. State v. Brewton, supra, **distinguished in** State v. Unsworth, (1965) 240 Or 453, 402 P2d 507, cert. denied, 382 US 1014.

The right to counsel does not prevent admission of statements made by defendant to police officers in the absence of defendant's attorney when he has not asked for his attorney and the record indicates the statements were voluntary and true. State v. Kristich, (1961) 226 Or 240, 359 P2d 1106. **But see** State v. Neely, (1965) 239 Or 487, 395 P2d 557, 398 P2d 482.

Books kept by the defendant for his employer, which he falsified to conceal his stealings, are not a "confession" and need not be corroborated by other evidence to sustain a conviction. State v. Reinhart, (1894) 26 Or 466, 38 P 822.

It is discretionary with court to allow jury to hear evidence as to whether confession was voluntary. State v. Jordan, (1934) 146 Or 504, 26 P2d 558, 30 P2d 751. **But see** State v. Brewton, (1964) 238 Or 590, 395 P2d 874.

When the defendant testifies relative to the circumstances surrounding the taking of a confession, it is not only proper for the state to cross-examine him about such matters but also to refute his testimony by calling witnesses; in so doing, the defendant is not being impeached upon a collateral matter. State v. Jordan, (1934) 146 Or 504, 26 P2d 558, 30 P2d 751.

The "Massachusetts" rule for determining the admissibility of confessions seems to be the better rule. State v. Brewton, (1964) 238 Or 590, 395 P2d 874, vacating 220 Or 266, 344 P2d 744.

This exclusion derives from the common law rule of evidence which excludes involuntary confessions. State v. Neely, (1964) 239 Or 487, 395 P2d 557, 398 P2d 482.

A prima facie voluntary confession cannot be used for the purpose of impeachment. State v. Smith, (1965) 242 Or 223, 408 P2d 942.

If no testimony is presented indicating a confession is voluntary, it is prima facie involuntary. Id.

A plea of guilty is a judicial confession and comes within the established rule that the U. S. Constitution stands as a bar against the conviction of any person in an American court by means of a coerced confession. Dorsciak v. Gladden, (1967) 246 Or 233, 427 P2d 177.

Ordinarily, in order to determine that confession was voluntary, before interrogation commences, defendant must be asked if he affirmatively waives his rights. State v. Williams, (1969) 1 Or App 30, 458 P2d 699.

Personal motivation of defendant to make a statement against his interest does not establish that statement has been coerced. State v. Evans, (1970) 1 Or App 489, 463 P2d 378, Sup Ct **review denied.**

Any objections the defendant might have raised to admitting testimony of admissions and confessions made by him before he was taken before a magistrate were waived when he testified. State v. Dotson, (1964) 239 Or 140, 396 P2d 777; Freeman v. Gladden, (1964) 239 Or 144, 396 P2d 779; State v. Unsworth, (1965) 240 Or 453, 402 P2d 507, cert denied, 382 US 1014.

An instruction on confessions following the language of this section was not objectionable. State v. Caseday, (1911) 58 Or 429, 449, 115 P 287.

No objection was made to introduction of the admissions in the trial court. State v. Baker, (1968) 249 Or 549, 438 P2d 978.

The statements of defendant were not coerced so that fear overcame his knowledge and the Miranda warnings, but voluntary and within the constitutional concept of due process. State v. Pressel, (1970) 2 Or App 477, 468 P2d 915, Sup Ct **review denied.**

2. Admissibility

This section has not abrogated the rule of the common law as to the inadmissibility of confessions induced by the influence of hope. State v. Wintzingerode, (1881) 9 Or 153; State v. Moran, (1887) 15 Or 262, 14 P 419.

A confession is inadmissible if extorted by fear or induced by hope. State v. Moran, (1887) 15 Or 262, 14 P 419; State v. Roselair, (1910) 57 Or 8, 109 P 865.

A confession must have been voluntary in order to be admissible. State v. Roselair, (1910) 57 Or 8, 109 P 865; State v. Morris, (1917) 83 Or 439, 163 P 567.

The state has the burden of showing that the confession was voluntarily made. State v. Green, (1929) 128 Or 49, 273 P 381; State v. Jordan, (1934) 146 Or 504, 26 P2d 558, 30 P2d 751; State v. Bouse, (1953) 199 Or 676, 264 P2d 800; State v. Ely, (1964) 237 Or 329, 390 P2d 348; State v. Keller, (1965) 240 Or 442, 402 P2d 521; State v. Turner, (1965) 241 Or 105, 404 P2d 187; Dorsciak v. Gladden, (1967) 246 Or 233, 425 P2d 177.

A confession may not be used to prove that a crime has been committed. State v. Watts, (1956) 208 Or 407, 409, 301 P2d 1035; State v. Colling, (1962) 230 Or 595, 371 P2d 563.

The Sixth Amendment of the United States Constitution as made obligatory on states by the Fourteenth Amendment requires that before law enforcement officers interrogate a person who is the focal suspect of a crime, such person must effectively be informed of his right to remain silent and of his right to counsel. In the absence of such knowledge an accused can in no way be deemed to have intelligently waived his constitutional rights, and in the absence of such waiver a confession obtained by such interrogation is inadmissible. State v. Neely, (1965) 239 Or 487, 395 P2d 557, 398 P2d 482; State v. Allen, (1965) 239 Or 524, 398 P2d 477; State v. Keller, (1965) 240 Or 442, 402 P2d 521; State v. LeBrun, (1965) 240 Or 530, 402 P2d 515; State v. Plieth, (1965) 240 Or 575, 403 P2d 14; State v. Turner, (1965) 241 Or 105, 404 P2d 187; State v. Williams, (1967) 248 Or 85, 432 P2d 679. State v. Neely, supra, **distinguished in** State v. Unsworth, (1965) 240 Or 453, 402 P2d 507, cert. denied, 382 US 1014 and State v. Randolph, (1965) 241 Or 479, 406 P2d 791.

The Escobedo and Neely cases do not relate to all self-incrimination but to self-incrimination induced by police interrogation. State v. Hammon, (1965) 241 Or 130, 404 P2d 851; State v. Beaver, (1967) 248 Or 101, 432 P2d 509; State v. Stevenson, (1968) 249 Or 488, 439 P2d 630.

As used in Neely, "focal suspect" means a person upon whom the inquiry into an unsolved crime has focused to the point where he has been taken into police custody. State

v. Evans, (1965) 241 Or 567, 407 P2d 621; State v. Travis, (1968) 250 Or 213, 441 P2d 597.

The Escobedo and Neely cases do not require exclusion of a voluntary statement obtained from a prisoner who has received and has understood the requisite advice concerning his rights. State v. Atherton, (1965) 242 Or 621, 410 P2d 208, cert. denied, 384 US 1025; State v. Rosenburger, (1965) 242 Or 376, 409 P2d 684.

For application of the rule in Escobedo, cases "finally decided" are cases in which the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari elapsed or a petition for certiorari finally denied all before April 28, 1965. Guse v. Gladden, (1966) 243 Or 406, 414 P2d 317; Haynes v. Cupp, (1969) 253 Or 566, 456 P2d 490; North v. Cupp, (1969) 254 Or 451, 461 P2d 271, cert. denied, 397 US 1054.

The Neely and Escobedo cases will not be given retrospective application to cases finally decided before June 22, 1964. Elliott v. Gladden, (1966) 244 Or 134, 411 P2d 287, cert denied, 384 US 1020; North v. Cupp, (1969) 254 Or 451, 461 P2d 271, cert. denied, 397 US 1054; State v. Caldwell, (1970) 2 Or App 199, 465 P2d 489, Sup Ct **review denied**; State v. Evans (1970) 2 Or App 441, 468 P2d 657, rev'd on other grounds, 258 Or 439, 483 P2d 1300.

Volunteered statements not the result of any questioning or inducement are admissible. State v. Brotherton, (1970) 2 Or App 157, 465 P2d 749, Sup Ct **review denied**; State v. Monteith, (1970) 4 Or App 90, 477 P2d 224; State v. Larson, (1970) 3 Or App 343, 472 P2d 829, Sup Ct **review denied.**

In a retrial of a case where the original trial commenced prior to the announcement of the effective decision in Escobedo, Neely or Miranda, the rule of those cases is nonretroactive. State v. Evans, (1971) 258 Or 439, 483 P2d 1300, rev'g 2 Or. App 441, 468 P2d 657; State v. Gairson, (1971) 5 Or App 464, 484 P2d 854.

This statute does not implicitly make all confessions admissible which were not acquired by threats. State v. Thomson, (1954) 203 Or 1, 278 P2d 142.

In a trial for manslaughter, it is sufficient if the independent evidence on the issue of death and criminal agency makes out a question for the jury. State v. Fischer, (1962) 232 Or 558, 376 P2d 418.

Where there is no coercive conduct by the police officer, and no attempt to take unfair advantage of the suspect, the police may investigate the crime and use the evidence so obtained. State v. Shannon, (1965) 241 Or 450, 405 P2d 837.

It is not necessary that defendant be informed that the source of his rights is the U. S. Constitution. State v. Edwards, (1966) 244 Or 317, 417 P2d 766.

When defendant testifies to facts stated in written confession, he waives his right to object to the admission of the confession. State v. Frazier, (1966) 245 Or 4, 418 P2d 841.

A confession that is inadmissible as part of the state's case in chief cannot be used to impeach defendant. State v. Brewton, (1967) 247 Or 241, 422 P2d 581, cert. denied, 387 US 943.

Requirement of Miranda (that defendant be advised that, if he is indigent, counsel will be provided) was not sufficiently anticipated by Escobedo and Neely to justify application of requirement after dates of Escobedo and Neely but prior to Miranda. North v. Cupp, (1969) 254 Or 451, 461 P2d 271, cert. denied, 397 US 1054.

Reinstatement of appeal means case is not "finally decided" for purposes of Escobedo exclusionary rule. State v. Caldwell, (1970) 2 Or App 199, 465 P2d 489, Sup Ct **review denied.**

If by reason of extreme intoxication a confession cannot be said to be the product of a rational intellect and a free will, it is not admissible. State v. Smith, (1970) 4 Or App 261, 476 P2d 802.

The questioning was investigatory and not accusatory. State v. Dayton, (1965) 242 Or 269, 409 P2d 189; State v. Taylor, (1968) 249 Or 268, 437 P2d 853; State v. Brown, (1971) 5 Or App 412, 485 P2d 444.

There was no evidence the statements were made in response to questioning, and they are admissible. State v. Dean, (1965) 241 Or 124, 404 P2d 797.

Defendant was too intoxicated to make a voluntary statement and the statements he made were inadmissible. Unsworth v. Gladden, (1966) 261 F Supp 897. Superseding State v. Unsworth, (1965) 240 Or 453, 402 P2d 507.

The confession was the product of an invalid arrest. State v. Jones, (1967) 248 Or 428, 435 P2d 317.

3. Preliminary determination of admissibility

The court must determine preliminarily the question as to whether the confession was made voluntarily. State v. Moran, (1887) 15 Or 262, 14 P 419; State v. Rogoway, (1904) 45 Or 601, 78 P 987, 81 P 234, 2 Ann Cas 431; State v. Roselair, (1910) 57 Or 8, 109 P 865; State v. Humphrey, (1912) 63 Or 540, 553, 128 P 824; State v. Sanford, (1966) 245 Or 397, 421 P2d 988; State v. Welch, (1970) 4 Or App 374, 476 P2d 822, Sup Ct **review denied.**

The determination of the court that a confession of accused was voluntary will not be disturbed on review, unless there is clear and manifest error. State v. Rogoway, (1904) 45 Or 601, 78 P 987, 81 P 234, 2 Ann Cas 431; State v. Blodgett, (1907) 50 Or 329, 92 P 820; State v. Humphrey, (1912) 63 Or 540, 553, 128 P 824; State v. Spanos, (1913) 66 Or 118, 134 P 6.

Whether the historical facts are sufficient to sustain a finding of voluntariness which meets state and federal constitutional concepts of due process is a question which falls within the scope of the appellate review. Ball v. Gladden, (1968) 250 Or 485, 443 P2d 621, cert. denied, 391 US 955; Jensen v. Gladden, (1968) 259 Or 499, 443 P2d 626; Frye v. Gladden, (1970) 1 Or App 629, 465 P2d 716.

Preliminary inquiry as to admissibility of confession should be held out of presence of jury. State v. Jordan, (1934) 146 Or 504, 26 P2d 558, 30 P2d 751.

Where the trial court admits such evidence, this is, in effect, a finding by the court that the defendant was informed of his rights prior to questioning and that he waived such rights. State v. Dayton, (1965) 242 Or 269, 409 P2d 189.

It cannot be said that a juvenile cannot waive constitutional rights as a matter of law. State v. Patterson, (1971) 5 Or App 438, 485 P2d 429.

There was sufficient evidence to support the trial court's finding that the defendant had been advised of his rights. State v. Ervin, (1965) 241 Or 475, 406 P2d 901; State v. Sanford, (1966) 245 Or 397, 421 P2d 988; State v. Goetjen, (1970) 1 Or App 533, 464 P2d 837.

The statements were admissible. State v. Earp, (1968) 250 Or 19, 440 P2d 214, cert. denied, 393 US 891; State v. Smith, (1969) 253 Or 280, 453 P2d 942.

The facts found support a finding of voluntariness. Ball v. Gladden, (1968) 250 Or 485, 443 P2d 621; Jensen v. Gladden, (1968) 250 Or 499, 443 P2d 626; State v. Ruiz, (1968) 251 Or 193, 444 P2d 32; State v. Brammeier, (1970) 1 Or App 612, 464 P2d 717, Sup Ct **review denied**; State v. Karcher, (1969) 252 Or 564, 451 P2d 110; State v. Woods, (1970) 3 Or App 232, 471 P2d 850, Sup Ct **review denied.**

Holding preliminary hearing as to admissibility of confession in presence of jury was not reversible error when confession was admitted. State v. Jordan, (1934) 146 Or 504, 26 P2d 588, 30 P2d 751.

Whether defendant had been effectively advised of all his

rights where he signed the second statement was a question of fact to be determined by the trial judge preliminary to ruling on the confession's admissibility. State v. Keller, (1965) 240 Or 442, 402 P2d 521.

4. Involuntary confessions

Involuntary confession is inadmissible although reliability is supported by independent verification of some of disclosures made in confession. State v. Garrison, (1911) 59 Or 440, 117 P 657.

A confession, to be involuntary by reason of inducements which preceded it, must be shown to be "produced by" such treatment or inducements. State v. Ellis, (1962) 232 Or 70, 374 P2d 461.

The voluntariness of a confession is suspect if it stems from an interrogation substituted for procedure requiring the accused to be taken before a magistrate without delay. Dorsciak v. Gladden, (1967) 246 Or 233, 425 P2d 177.

Where original confession was involuntary it was error to admit subsequent confession without a further showing that motives for original confession had ceased to operate. State v. Wintzingerode, (1881) 9 Or 153.

Confession was involuntary where officer said to defendant: "It would be better for you, Harry, to tell the whole thing." Id.

Confession made where defendant thought he could obtain freedom by confessing and bribing the district attorney was involuntary, although person inducing this belief was not one in authority. State v. Green, (1929) 128 Or 49, 273 P 381.

Confession was involuntary where there was induced an expectation of leniency if defendant confessed and a fear of long sentence if he refused to confess. State v. Linn, (1946) 179 Or 499, 173 P2d 305.

The statements were not voluntarily given. Frye v. Gladden, (1970) 1 Or App 629, 465 P2d 716.

5. Confessions not involuntary

Although made while defendant was in custody, a confession may be voluntary. State v. Scott, (1912) 63 Or 444, 128 P 441; State v. Humphrey, (1912) 63 Or 540, 128 P 824; State v. McPherson, (1914) 70 Or 371, 141 P 1018; State v. Stevenson, (1920) 98 Or 285, 193 P 1030.

That defendant was without legal counsel when he made confession does not render confession inadmissible. State v. Layton, (1944) 174 Or 217, 148 P2d 522.

A confession may be voluntary though made after violence used or threats made for a purpose other than to induce a confession. State v. Ellis, (1962) 232 Or 70, 374 P2d 461.

The age of a juvenile does not rule out the possibility of intelligent waiver of his Fifth and Sixth Amendment rights. State v. Casey, (1966) 244 Or 168, 416 P2d 665.

A defendant who requests counsel when first taken before a magistrate can nevertheless, subsequently, after complete and appropriate warning, voluntarily waive his right to remain silent and answer questions put to him by the police. State v. Freeman, (1971) 5 Or App 372, 484 P2d 867.

The evidence supports the trial court's findings that the confession was voluntarily made. State v. Stout, (1965) 241 Or 607, 407 P2d 897; State v. Williams, (1969) 1 Or App 30, 458 P2d 699.

A confession made in answer to questions assuming guilt was voluntary. State v. Morris, (1917) 83 Or 429, 163 P 567.

Evidence that defendant was questioned during night and had to sleep in chair was insufficient to render confession involuntary. State v. Layton, (1944) 174 Or 217, 148 P2d 522.

Confession was held voluntary although there was some evidence of threats. State v. Henderson, (1947) 182 Or 147, 184 P2d 392.

No error was made in admitting confession obtained after threats and verbal and physical abuse had been heaped upon defendant by victim's father who was provoked by defendant's offer to make a financial settlement for the crime. State v. Nagel, (1949) 185 Or 486, 202 P2d 640, cert. denied, 338 US 818, 70 S Ct 60, 94 L Ed 39.

6. Corroboration

The corroboration of a confession is sufficient if there is other evidence of the corpus delicti. State v. Howard, (1921) 102 Or 431, 203 P 311; State v. Schleigh, (1957) 210 Or 155, 310 P2d 341; State v. Paquin, (1962) 229 Or 555, 368 P2d 85.

The "other proof" need not be so cogent that it alone would warrant a finding of guilty. State v. Paquin, (1962) 229 Or 555, 368 P2d 85; State v. Keller, (1965) 240 Or 442, 402 P2d 521.

The "other proof" need not identify the defendant as the guilty person, but must indicate that "the crime has been committed." Id.

Confession is insufficient unless there is circumstantial evidence of the corpus delicti that is clear, unequivocal, cogent and convincing. State v. Watts, (1956) 208 Or 407, 301 P2d 1035; State v. Washington, (1969) 1 Or App 96, 458 P2d 694, 459 P2d 455; State v. Conkle, (1970) 4 Or App 392, 478 P2d 427, Sup Ct **review denied.**

A requested instruction that every material allegation of the indictment must be supported by evidence other than the testimony or admissions of defendant goes further than the provisions of this section. State v. Howard, (1921) 102 Or 431, 203 P 311.

Gruesome exhibits may be used to corroborate the defendant's confessions. State v. Leland, (1951) 190 Or 598, 227 P2d 785, aff'd on other grounds, 343 US 790, 72 S Ct 1002, 96 L Ed 1302.

The weight to be accorded the corroborative testimony is a question for the trier of facts. State v. Moss, (1964) 237 Or 189, 390 P2d 936.

There must be some other proof of each element of the crime before the confession can be used as evidence. State v. Washington, (1969) 1 Or App 96, 458 P2d 694, 459 P2d 455.

Statements of extraneous facts by the accused may afford some proof of the corpus delicti. State v. Washington, (1971) 5 Or App 347, 483 P2d 465.

Confession was insufficient where there was not other proof that crime had been committed. State v. Elwell, (1922) 105 Or 282, 209 P 616; State v. Pugh, (1935) 151 Or 561, 51 P2d 827.

Requested instructions that the state must prove its charge by evidence sufficient to convince the jury beyond a reasonable doubt of the killing independent of confession of defendant were properly refused. State v. Wilkins, (1914) 72 Or 77, 142 P 589.

Evidence apart from confession was sufficient to establish that a robbery had been committed. State v. McCarthy, (1938) 160 Or 196, 83 P2d 801.

Evidence apart from confession was sufficient to establish that criminal act was the cause of death. State v. Bodi, (1960) 223 Or 486, 354 P2d 831.

That the fire was started on the outside of the building by some person was sufficient to establish the corpus delicti without the confession. State v. Breen, (1968) 250 Or 474, 443 P2d 624.

Evidence observed by the police officer corroborated defendant's admission that he had been driving on the highway, which was one element of the charge. State v. Brown, (1971) 5 Or App 412, 485 P2d 444.

FURTHER CITATIONS: State v. Brinkley, (1909) 55 Or 134, 104 P 893, 105 P 708; State v. Nunn, (1958) 212 Or 546, 321 P2d 356; State v. Rollo, (1960) 221 Or 428, 351 P2d 422; State v. Hutchison, (1960) 222 Or 533, 353 P2d 1047; State v. O'Donnell, (1962) 229 Or 487, 367 P2d 445; State v. Crater, (1962) 230 Or 513, 370 P2d 700; State v. Freeman, (1962)

232 Or 267, 374 P2d 453; State v. McKenzie, (1962) 232 Or 633, 377 P2d 18; State v. Hammack, (1962) 233 Or 128, 377 P2d 161; State v. English, (1963) 233 Or 500, 378 P2d 997; State v. Nichols, (1964) 236 Or 521, 388 P2d 739; State v. Commedore, (1964) 237 Or 348, 391 P2d 644; State v. Schwensen, (1964) 237 Or 506, 392 P2d 328; State v. Adams, (1965) 240 Or 179, 400 P2d 556; State v. Thomas, (1965) 240 Or 181, 400 P2d 549; State v. Allen, (1965) 241 Or 95, 404 P2d 207; Richardson v. Williard, (1965) 241 Or 377, 406 P2d 156; State v. Abel, (1965) 241 Or 465, 406 P2d 902; State v. Ottman, (1965) 242 Or 190, 408 P2d 211; State v. Matthews, (1965) 242 Or 394, 409 P2d 176; State v. Gage, (1965) 242 Or 300, 409 P2d 332; State v. Cook, (1966) 242 Or 509, 411 P2d 78; State v. Crawley, (1966) 242 Or 601, 410 P2d 1012; State v. Collis, (1966) 243 Or 222, 413 P2d 53; Lugo v. Gladden, (1966) 244 Or 7, 414 P2d 324; Avent v. Gladden, (1966) 243 Or 594, 415 P2d 164; State v. Gullings, (1966) 244 Or 173, 416 P2d 311; State v. Dill, (1966) 244 Or 188, 416 P2d 651; State v. Hill, (1967) 245 Or 510, 422 P2d 675; State v. Hanson, (1967) 250 Or 188, 433 P2d 828; State v. Allen, (1967) 248 Or 376, 434 P2d 740; State v. Morris, (1967) 248 Or 480, 435 P2d 1018; Boothe v. Bennet, (1968) 249 Or 31, 436 P2d 746; Mansfield v. Gladden, (1968) 249 Or 504, 439 P2d 611; State v. Atkins, (1968) 251 Or 485, 446 P2d 660; City of Eugene v. Reed, (1970) 2 Or App 196, 464 P2d 842, Sup Ct **review denied;** State v. Austin, (1970) 1 Or App 556, 465 P2d 256; State v. Darnell, (1970) 3 Or App 524, 475 P2d 424; State v. Lee, (1971) 5 Or App 431, 485 P2d 660.

LAW REVIEW CITATIONS: 2 OLR 163; 26 OLR 62; 37 OLR 84; 42 OLR 213-215, 219.

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CASE CITATIONS: State v. Allen, (1965) 239 Or 524, 398 P2d 477; State v. Williams, (1967) 248 Or 85, 432 P2d 679; State v. Sunderland, (1970) 4 Or App 1, 468 P2d 900, 476 P2d 563, Sup Ct **review denied.**

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NOTES OF DECISIONS

1. In general
2. Determination as to whether witness is accomplice
3. Accomplice
4. Corroborative evidence; sufficiency
5. Corroboration by particular circumstances
6. Instructions

1. In general

Whether or not the evidence corroborates the testimony of accomplice is for determination of jury. State v. Bunyard, (1914) 73 Or 222, 144 P 449.

A verdict is not sustainable, unless the accomplice testimony is corroborated by other evidence of commission of the crime and the prisoner's implication therein. State v. Long, (1925) 113 Or 309, 231 P 963.

The heart of the rule is that there must be evidence, independent of the evidence of the accomplice, which would lead reasonable minds to a belief that the defendant criminally participated in the crime charged. State v. Oster, (1962) 232 Or 389, 376 P2d 83.

It was error for court to refuse to direct an acquittal when there was no corroborative evidence that crime had been committed. State v. Long, (1925) 113 Or 309, 231 P 963.

2. Determination as to whether witness is accomplice

Where different inferences can be drawn from the evidence, the question of whether a witness is an accomplice is for the jury. State v. Carr, (1896) 28 Or 389, 42 P 215; State v. Stacey, (1936) 153 Or 449, 56 P2d 1152; State v. German, (1939) 162 Or 166, 90 P2d 185.

The question as to whether a witness is an accomplice is one for the court's determination where the facts are all admitted and no issue thereon is raised by the evidence. State v. Carr, (1896) 28 Or 389, 42 P 215.

One who consents that an act of sodomy be committed on his person, if capable of consent, is an accomplice. State v. Stanley, (1965) 240 Or 310, 401 P2d 30.

Where there is a dispute on the facts, it is a question for the fact finder to determine whether the complaining witness was or was not an accomplice. State v. Kuykendall, (1970) 3 Or App 362, 473 P2d 670, Sup Ct **review denied.**

Whether juvenile prosecuting witness was an accomplice was a question for the jury. State v. Nice, (1965) 240 Or 343, 401 P2d 296; State v. Smith, (1970) 1 Or App 583, 465 P2d 247.

Whether the bookkeeper and cashier of a corporation was an accomplice of officer who converted money of customer should be determined, not from what he was empowered to do, but from what he actually did. State v. German, (1939) 162 Or 166, 90 P2d 185.

3. Accomplice

One engaged in gathering evidence for the prosecution of a crime, a "feigned accomplice," is not to be considered an accomplice. State v. Busick, (1919) 90 Or 466, 471, 177 P 64; State v. Wheelhouse, (1971) 92 Or App Adv Sh 1837, 486 P2d 1292.

Only those who could be punished for the crime for which accused is tried are accomplices. State v. Turnbow, (1921) 99 Or 270, 193 P 485, 195 P 569; State v. Stacey, (1936) 153 Or 449, 56 P2d 1152; State v. Coffey, (1937) 157 Or 457, 72 P2d 35; State v. McCowan, (1955) 203 Or 551, 380 P2d 976; State v. Barnett, (1968) 249 Or 226, 436 P2d 821, 34 ALR3d 852; State v. Winslow, (1970) 3 Or App 140, 472 P2d 852; State v. Polk, (1971) 5 Or App 605, 485 P2d 1241. State v. Barnett, supra, **distinguished in** State v. Smith, (1970) 1 Or App 583, 465 P2d 247.

A prostitute is not an accomplice of a man who receives her earnings in violation of statute. State v. McCowan, (1955) 203 Or 551, 380 P2d 976; State v. Hargon, (1970) 2 Or App 553, 470 P2d 383.

A person who knowingly, voluntarily and with common intent with the principal offender, unites in the commission of a crime is an accomplice. State v. Stanley, (1965) 240 Or 310, 401 P2d 30; State v. Kuykendall, (1970) 3 Or App 362, 473 P2d 670, Sup Ct **review denied.**

The dealer in a card game is an accomplice with those who bet money or value at such game. State v. Light, (1889) 17 Or 358, 21 P 132.

In a trial for incest the participant not on trial is an accomplice. State v. Jarvis, (1890) 18 Or 360, 23 P 251.

In the crime of adultery, a participant in the act is the accomplice of the one on trial. State v. Scott, (1895) 28 Or 331, 335, 42 P 1.

A person who knowingly offers as a bribe to a juror money provided by another is an accomplice. State v. Carr, (1896) 28 Or 389, 395, 42 P 215.

In cases of statutory rape the prosecutrix is not an accomplice. State v. Knighten, (1901) 39 Or 63, 64 P 866, 87 Am St Rep 647.

A receiver of the stolen property is not an accomplice of those who committed larceny. State v. Moxley, (1909) 54 Or 409, 103 P 655, 20 Ann Cas 593.

Neither a purchaser nor his agent in effecting a purchase of intoxicating liquors is an accomplice of the seller. State v. Edlund, (1916) 81 Or 614, 160 P 534.

Prosecutrix in fornication prosecution is not an accomplice. State v. Mallory, (1919) 92 Or 133, 180 P 99.

A witness who has participated in the commission of the crime, though actuated by threats, coercion or fear of im-

mediate danger to life and limb, is nevertheless an accomplice. State v. Weston, (1923) 109 Or 19, 219 P 180.

A bribe giver is not an accomplice of the public officer receiving bribe. State v. Coffey, (1937) 157 Or 457, 72 P2d 35.

In a prosecution for perjury based upon false testimony given in a window breaking case, other window breakers were not accomplices. State v. Reynolds, (1940) 164 Or 446, 100 P2d 593.

Receipt of stolen property does not in itself render the receiver an accomplice even if he knew of the theft. State v. Duggan, (1958) 215 Or 151, 333 P2d 907.

A woman who consents to an abortion upon herself is not an accomplice. State v. Barnett, (1968) 249 Or 226, 436 P2d 821, 34 ALR3d 852.

The buyer of a narcotic drug purchased in violation of statute is not an accomplice of the seller. State v. Nasholm, (1970) 2 Or App 385, 467 P2d 647, Sup Ct **review denied.**

The wife of one of participants who did not counsel, aid, or abet, or in any manner participate in the commission of a crime, was not an accomplice. State v. Roberts, (1887) 15 Or 187, 13 P 896.

In sodomy prosecution, it was error for court to instruct that boy who guarded door during the act was not accomplice. State v. Start, (1913) 65 Or 178, 132 P 512.

The bookkeeper and cashier of a corporation was not an accomplice of a corporate officer who converted money of a customer. State v. German, (1939) 162 Or 166, 90 P2d 185.

Juvenile thief was accomplice of defendant in committing crime of receiving and concealing stolen property. State v. Smith, (1970) 1 Or App 583, 465 P2d 247.

4. Corroborative evidence; sufficiency

Circumstantial evidence suffices as corroborating evidence. State v. Brake, (1921) 99 Or 310, 195 P 583; State v. Brazell, (1928) 126 Or 579, 269 P 884; State v. Reynolds, (1939) 160 Or 445, 86 P2d 413; State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295; State v. Duggan, (1958) 215 Or 151, 333 P2d 907; State v. Cain, (1962) 231 Or 616, 373 P2d 1004; State v. Clipston, (1964) 237 Or 634, 392 P2d 772; State v. Caldwell, (1965) 241 Or 355, 405 P2d 847; State v. Duncan, (1967) 248 Or 288, 434 P2d 336.

Evidence adequate to support a conviction is not essential to constitute corroboration; it is sufficient to meet the requirements of the statute if it fairly and legitimately tends to connect the defendant with the commission of the crime. State v. Brake, (1921) 99 Or 310, 195 P 583; State v. Reynolds, (1939) 160 Or 445, 86 P2d 413; State v. Duggan, (1958) 215 Or 151, 333 P2d 907; State v. Oster, (1962) 232 Or 389, 376 P2d 83; State v. Oster, (1962) 232 Or 396, 376 P2d 87; State v. Caldwell, (1965) 241 Or 355, 405 P2d 847; State v. Banks, (1971) 92 Or App Adv Sh 1661, 486 P2d 584.

It is not necessary that every material fact be corroborated. State v. Owen, (1926) 119 Or 17, 224 P 516; State v. Doster, (1967) 247 Or 336, 427 P2d 413.

The rule of the appellate courts, where it is objected that there is no sufficient corroborative evidence, is to take the strongest statement of the case against the defendant that the evidence would warrant the jury in finding if the facts were specially found. State v. Reynolds, (1939) 160 Or 445, 86 P2d 413; State v. Duggan, (1958) 215 Or 151, 333 P2d 907; State v. Caldwell, (1965) 241 Or 355, 405 P2d 847.

The tendency of the corroborating evidence to connect the defendant with the crime must be independent of any testimony of the accomplice. State v. Reynolds, (1939) 160 Or 445, 86 P2d 413; State v. Caldwell, (1965) 241 Or 355, 405 P2d 847; State v. Banks, (1971) 92 Or App Adv Sh 1661, 486 P2d 584.

Evidence relating to commission or circumstances of commission of the crime is insufficient to constitute corroboration. State v. Brake, (1921) 99 Or 310, 195 P 583.

The sufficiency of corroborating evidence depends upon the particular facts of each case. State v. Estabrook, (1939) 162 Or 476, 91 P2d 838.

The corroboration must go not only to the fact that the crime was committed, but also to the fact that the defendant was implicated in it. State v. Duggan, (1958) 215 Or 151, 333 P2d 907.

The testimony of two accomplices must be corroborated by independent evidence in order to sustain a conviction. State v. Brown, (1925) 113 Or 149, 231 P 926; State v. Banks, (1971) 92 Or App Adv Sh 1661, 486 P2d 584.

The corroborative evidence was sufficient. State v. Howell, (1964) 237 Or 382, 388 P2d 282; State v. Duncan, (1967) 248 Or 288, 434 P2d 336; State v. Carroll, (1968) 251 Or 197, 444 P2d 1006.

Identification by voice and physical features was sufficient corroboration. State v. Carcerano, (1964) 238 Or 208, 390 P2d 923, cert. denied, 380 US 923; State v. Graf, (1971) 92 Or App Adv Sh 1820, 487 P2d 92.

5. Corroboration by particular circumstances

Intimate association with accomplice at about the time of a crime may be sufficient corroboration. State v. Brake, (1921) 99 Or 310, 195 P 583; State v. Reynolds, (1939) 160 Or 445, 86 P2d 413.

Mere opportunity is not sufficient corroboration. State v. Brake, (1921) 99 Or 310, 195 P 583; State v. Oster, (1962) 232 Or 389, 376 P2d 83; State v. Clipston, (1964) 237 Or 634, 392 P2d 772.

Presence of the defendant at the scene of the crime may be sufficient corroborative evidence. State v. Tranchell, (1926) 119 Or 329, 249 P 367; State v. Wilson, (1928) 127 Or 294, 271 P 742.

There was corroboration if the association with defendant's accomplices was not likely to have occurred unless there had been concert between them. State v. Clipston, (1964) 237 Or 634, 392 P2d 772; State v. Caldwell, (1965) 241 Or 355, 405 P2d 847; State v. Jones, (1970) 2 Or App 42, 465 P2d 719.

Proof that the prisoner was in the town about the time of the alleged commission of the crime is not alone sufficient. State v. Odell, (1879) 8 Or 30.

Possession of the fruits of the crime is sufficient corroboration. State v. Brake, (1921) 99 Or 310, 195 P 583.

Membership or official position in an organization alleged to have instigated the crime does not in itself suffice. State v. Reynolds, (1939) 160 Or 445, 86 P2d 413.

When the evidence is such that a reasonable conclusion may be reached that defendant was in possession of and expected to share in the fruits of the crime, this, together with opportunity, is sufficient. State v. Oster, (1962) 232 Or 389, 376 P2d 83.

Corroboration was not sufficient. State v. Kelliher, (1907) 49 Or 77, 88 P 867; State v. Keep, (1917) 85 Or 265, 166 P 936.

Corroboration was sufficient. State v. Pointer, (1923) 106 Or 589, 213 P 621; State v. Young, (1932) 140 Or 228, 13 P2d 604; State v. Broadhurst, (1948) 184 Or 178, 196 P2d 407, cert. denied, 337 US 906, 69 S Ct 1046, 93 L Ed 897.

Proof that defendant was in town about the time of alleged commission of crime with other evidence was sufficient corroboration. State v. Moore, (1947) 180 Or 502, 176 P2d 631, 177 P2d 413, cert. denied, 332 US 763, 68 S Ct 68, 92 L Ed 349.

Where the evidence showed that the defendant and his accomplice were together at or near the place where the larceny of the animal was committed, and the circumstances were unusual, there was sufficient corroboration. State v. Townsend, (1890) 19 Or 213, 215, 23 P 968.

In prosecution for forgery, testimony as to handwriting of defendant was sufficient to corroborate accomplice. State v. Tice, (1897) 30 Or 457, 48 P 367.

In a prosecution for incest, statements by defendant were sufficient corroboration. State v. Russell, (1913) 64 Or 247, 129 P 1051.

Defendant's visits to scene of crime, association with confederates and the use of his personal property in making liquor was sufficient corroboration. State v. Brown, (1925) 113 Or 149, 231 P 926.

In prosecution for unlawful possession of liquor, evidence which merely showed finding of liquor on defendant's premises, thus proving only commission of crime by someone, was insufficient. State v. Buoy, (1929) 113 Or 217, 232 P 623.

In prosecution for breaking glass in building, the possession of a memorandum containing names of accomplices was not sufficient corroboration. State v. Reynolds, (1939) 160 Or 445, 86 P2d 413.

6. Instructions

When a witness for the state testifies he knowingly and voluntarily assisted a person in the commission of a crime, it then becomes the duty of the trial court to instruct the jury that such witness is an accomplice and his evidence must be corroborated as required by this section. State v. Gowin, (1965) 241 Or 544, 407 P2d 631.

An instruction that accomplice's testimony should be viewed with distrust, was not objectionable. State v. Stacey, (1936) 153 Or 449, 56 P2d 1152; State v. Dugger, (1939) 161 Or 355, 88 P2d 990.

Instruction that rule of this section is not applied if jury has a doubt as to whether witness was accomplice, was reversible error. State v. Wong Si Sam, (1912) 63 Or 266, 127 P 683.

A conviction was reversed on appeal where the trial court refused a requested instruction in the language of this section. State v. Bunyard, (1914) 73 Or 222, 144 P 449.

FURTHER CITATIONS: State v. Canton, (1915) 76 Or 51, 147 P 927; State v. Morris, (1917) 83 Or 429, 163 P 567; State v. Wederski, (1962) 230 Or 57, 368 P2d 393; State v. Bowers, (1962) 230 Or 602, 371 P2d 667; State v. Day, (1964) 236 Or 461, 389 P2d 30; State v. Dill, (1966) 244 Or 188, 416 P2d 651; Boothe v. Bennet, (1968) 249 Or 31, 436 P2d 746; State v. Wood, (1968) 252 Or 58, 448 P2d 509; State v. Galan, (1969) 1 Or App 196, 460 P2d 368.

LAW REVIEW CITATIONS: 17 OLR 118; 18 OLR 253; 49 OLR 211.

136.605

NOTES OF DECISIONS

Literally applied, this section prevents further prosecution when the motion for acquittal is granted. State v. Washington, (1969) 1 Or App 96, 458 P2d 694, 459 P2d 455.

There was sufficient evidence, to deny the motion for acquittal. **In burglary not in a dwelling,** State v. Gardner, (1961) 225 Or 376, 358 P2d 557; **in robbery while armed with a dangerous weapon,** State v. Hambleton, (1964) 238 Or 79, 390 P2d 184; **in illegal possession of narcotics, marihuana,** State v. Tuck, (1969) 1 Or App 516, 462 P2d 175, Sup Ct **review denied;** cert. denied, 402 US 982; State v. Livingston, (1970) 2 Or App 587, 469 P2d 632.

If a defendant elects not to stand on his motion and presents evidence in defense, the appellate court must consider all the evidence and if sufficient to sustain the conviction, denial of a motion for acquittal was not error. State v. Gardner, (1962) 231 Or 193, 372 P2d 783; State v. Lamphere, (1963) 233 Or 330, 378 P2d 706.

FURTHER CITATIONS: State v. Sanders (1962) 232 Or 631, 376 P2d 668; State v. Gross, (1964) 237 Or 71, 390 P2d 612; State v. Moore, (1964) 238 Or 117, 393 P2d 180; State v. Cartwright, (1966) 246 Or 120, 418 P2d 822; State v. Newton, (1970) 1 Or App 419, 463 P2d 372; State v. Brawley, (1970) 4 Or App 229, 476 P2d 942, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 37 OLR 85.

136.610

NOTES OF DECISIONS

A verdict that the jury find the defendant guilty of larceny only, and which assesses the value of the property stolen, is a valid special verdict. State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128.

Unless the facts found are sufficient to establish the crime charged, a special verdict amounts to an acquittal. State v. Stephanus, (1909) 53 Or 135, 99 P 428, 17 Ann Cas 1146.

Ore. Const. Art. I, §11, prevails over this section. State v. Larson, (1969) 252 Or 624, 450 P2d 754.

FURTHER CITATIONS: State v. Palmer, (1962) 232 Or 300, 375 P2d 243.

LAW REVIEW CITATIONS: 47 OLR 428.

136.620

NOTES OF DECISIONS

A verdict convicting of "involuntary manslaughter" was sufficient as a general verdict. State v. Setsor, (1912) 61 Or 90, 119 P 346.

FURTHER CITATIONS: State v. Tom Louey, (1884) 11 Or 326, 8 P 353; State v. Savage, (1900) 36 Or 191, 60 P 610, 61 P 1128; State v. Shuster, (1918) 90 Or 243, 175 P 862.

136.630

NOTES OF DECISIONS

Unless the facts found are sufficient to establish guilt, a special verdict amounts to an acquittal. State v. Stephanus, (1909) 53 Or 135, 141, 99 P 428, 17 Ann Cas 1146.

Stipulation reciting facts leaving the court to pronounce judgment thereon, held to have been treated by the parties as a special verdict. State v. Maddock, (1911) 58 Or 542, 115 P 426.

FURTHER CITATIONS: State v. Hudson House, Inc., (1962) 231 Or 164, 371 P2d 675.

ATTY. GEN. OPINIONS: Paying for psychiatric examinations in commitments of sexually dangerous persons, 1966-68, p 451.

136.650

NOTES OF DECISIONS

See also cases under ORS 136.660.

A person charged with murder in either degree may be convicted under such indictment of manslaughter. State v. Farnam, (1916) 82 Or 211, 161 P 417; State v. Charlie Sing, (1925) 114 Or 267, 229 P 921.

Assault with intent to commit rape is not a lesser degree of burglary, even when rape was the felony with the intent to commit which the breaking and entering was made. State v. Ryan, (1888) 15 Or 572, 16 P 417.

A conviction of a lower degree is an acquittal of all the higher degrees, and the accused cannot after reversal be retried for any degree of the crime higher than the one of which he was convicted. State v. Steeves, (1896) 29 Or 85, 107, 43 P 947.

Neither sodomy nor attempted rape is an element of the other. State v. Weitzel, (1937) 157 Or 334, 69 P2d 958.

An indictment for first degree murder necessarily involves all other grades of homicides which the evidence tends to establish, and where the evidence creates a slight doubt as to which degree is involved, the court must charge on all degrees. State v. Wilson, (1948) 182 Or 681, 189 P2d 403.

Where evidence shows a homicide was committed in the perpetration of one of the felonies enumerated in the statute defining first degree murder, and creates no doubt as to some other degree, instruction as to different degrees of homicide is improper. Id.

Where indictment charged larceny from a building of personal property, giving its value, it was error to refuse to instruct the jury that it could convict of simple larceny, even though the building in which the crime occurred was not a building, for simple larceny is a crime of lesser degree than larceny from a building. State v. Hanlon, (1897) 32 Or 95, 48 P 353; State v. Reyner, (1907) 50 Or 224, 91 P 301.

Where indictment charged assault with intent to kill, conviction of assault with deadly weapon was upheld, as former includes latter. State v. Lavery, (1899) 35 Or 402, 58 P 107.

Where indictment charged larceny from an office, conviction of simple larceny was upheld, for larceny aggravated by the circumstance of the place in which the personal property feloniously taken is kept includes simple larceny. State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128.

FURTHER CITATIONS: State v. Grant, (1879) 7 Or 414; State v. Wintzingerode, (1881) 9 Or 153; State v. Branton, (1907) 49 Or 86, 87 P 535; State v. Humphrey, (1912) 63 Or 540, 128 P 824.

LAW REVIEW CITATIONS: 49 OLR 318.

136.660

NOTES OF DECISIONS

See also cases under ORS 136.650.

Where attempted larceny from the person is charged, a conviction of simple assault is permissible. State v. Houghton, (1905) 46 Or 12, 75 P 822.

Since attempt to commit a crime is by this section made a part of the substantive crime, where indictment charges attempt and evidence, though not clear, tended to show consummation, defense of consummation does not lie for the reason that an acquittal for attempt bars a prosecution for commission of the substantive crime. State v. Harvey, (1926) 119 Or 512, 249 P 172.

Defendant cannot complain of conviction of a lesser or included offense rather than the greater offense. State v. Eyle, (1963) 236 Or 199, 388 P2d 110, 9 ALR3d 628.

Assault with intent to commit rape is an included offense in the charge of rape. State v. Gustafson, (1967) 248 Or 1, 432 P2d 323.

Where defendant was indicted for assault with intent to kill and convicted for assault with deadly weapon, conviction was upheld. State v. Kelly, (1902) 41 Or 20, 68 P 1.

Indictment charged robbery by force and violence to the person. This was sufficient allegation of assault, for which a conviction was had. State v. Carroll, (1936) 155 Or 85, 62 P2d 830.

Under an indictment for negligent homicide, it was not error to refuse to instruct that a verdict of guilty of reckless driving could be returned. State v. Coffman, (1943) 171 Or 166, 136 P2d 687.

The indictment was sufficient to support a verdict of involuntary manslaughter. State v. Thomas, (1965) 240 Or 181, 400 P2d 549.

On trial on indictment for assault with intent to kill, it is not prejudicial error to fail to instruct on lesser included offense of attempted manslaughter which carries a greater maximum penalty than the lesser included offense (assault with a dangerous weapon) of which defendant was convicted. State v. Speer, (1970) 1 Or App 514, 464 P2d 709, Sup Ct **review dismissed.**

FURTHER CITATIONS: State v. Leonard, (1914) 73 Or 451, 144 P 113; State v. Nortin, (1943) 170 Or 297, 133 P2d 252; State v. Dixon, (1958) 212 Or 572, 321 P2d 305; State v. Haynes, (1964) 239 Or 132, 396 P2d 694; State v. Matt, (1970) 1 Or App 624, 463 P2d 874, Sup Ct **review denied.**

136.700

NOTES OF DECISIONS

A verdict finding defendant guilty of "involuntary manslaughter" is a general verdict and sufficiently describes the crime. State v. Setsor, (1911) 61 Or 90, 119 P 346.

136.810

NOTES OF DECISIONS

A judgment vacating a verdict and sentence and dismissing the indictment is not an order arresting judgment. State v. Foster, (1961) 229 Or 293, 366 P2d 896.

It is only after the motion for arrest of judgment is allowed that a duty arises under ORS 136.830 and 136.840 to consider the evidence. Id.

When a post-conviction proceedings is remanded for resentencing, a motion in arrest of judgment to reexamine the proceedings prior to verdict is not in order. State v. Cloran, (1963) 233 Or 400, 377 P2d 911.

Allegations of an indictment or complaint will be construed with less strictness when their sufficiency is first challenged by a motion in arrest of judgment. State v. Anderson, (1965) 242 Or 457, 410 P2d 230.

FURTHER CITATIONS: State v. Childers, (1897) 32 Or 119, 49 P 801; State v. Fowler, (1960) 225 Or 201, 357 P2d 279; State v. Cole, (1962) 233 Or 141, 377 P2d 168; State v. Cloran, (1962) 233 Or 400, 374 P2d 748; State v. Mims, (1963) 235 Or 540, 385 P2d 1002; State v. Katzberg, (1967) 247 Or 296, 428 P2d 170; City of Portland v. Olson, (1971) 4 Or App 380, 481 P2d 641.

136.820

CASE CITATIONS: State v. Fowler, (1960) 225 Or 201, 357 P2d 279.

136.830

NOTES OF DECISIONS

It is only after the motion for arrest of judgment is allowed that a duty arises under this section and ORS 136.840 to consider the evidence. State v. Foster, (1961) 229 Or 293, 366 P2d 896.

FURTHER CITATIONS: State v. Cloran, (1962) 233 Or 400, 374 P2d 748; State v. Nichols, (1964) 236 Or 521, 388 P2d 739.

136.840

NOTES OF DECISIONS

It is only after the motion for arrest of judgment is allowed that a duty arises under ORS 136.830 and this section to consider the evidence. State v. Foster, (1961) 229 Or 293, 366 P2d 896.

136.851

NOTES OF DECISIONS

1. Under former similar statute

A motion for a new trial was properly denied when the jury was not influenced by reason of a newspaper clipping found in the jury room. State v. Weitzel, (1937) 157 Or 334, 69 P2d 958.

It was not error for the trial court to pass upon a motion for a new trial, for when the court passed upon such a motion, it was not passing upon a question of fact which it was the province of the jury to consider. State v. Merten, (1944) 175 Or 254, 152 P2d 942.

The trial court had the inherent power to correct its own erroneous judgment of conviction upon a motion in the nature of a coram nobis. State v. Huffman, (concurring opinion) (1956) 207 Or 372, 297 P2d 831.

Relief from conviction in violation of constitutional right was by coram nobis when habeas corpus did not provide a remedy. State v. Huffman, (1956) 207 Or 372, 297 P2d 831, overruling Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289.

On a motion for a new trial, affidavits of jurors were not to be receivable to show that one of the jurors had told the others that defendant had been guilty of criminal conduct on previous occasions. State v. Auspland, (1917) 86 Or 121, 167 P 1019.

FURTHER CITATIONS: Anderson v. Gladden, (1963) 234 Or 614, 383 P2d 986; State v. Penland, (1971) 92 Or App Adv Sh 1766, 486 P2d 1314, Sup Ct **review denied.**