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The State of Utah v. Verl Farnsworth : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

THE STATE OF UTAH,

Plaintiff,

—vs.—

VERL FARNSWORTH,

Defendant.

Case No.

~~45221~~

11126

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court
of Salt Lake County, Utah
The Honorable Bryant H. Croft, *Judge*

MITSUNAGA AND ROSS

By Jimi Mitsunaga

731 East South Temple

Salt Lake City, Utah

Attorney for Appellant

VERNON B. ROMNEY

Attorney General

State Capitol Building

Salt Lake City, Utah

Attorney for Plaintiff

FILED

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Clark, Supreme Court, Utah

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In the Supreme Court of the State of Utah

THE STATE OF UTAH,

Plaintiff,

—vs.—

VERL FARNSWORTH,

Defendant.

Case No.
45221

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The defendant, Verl Farnsworth, was convicted of second degree murder by a jury in a trial before the Honorable Bryant H. Croft, Judge.

DISPOSITION OF THE CASE BY LOWER COURT

The defendant was sentenced to the indeterminate term as provided by law for the crime of second degree murder.

RELIEF SOUGHT ON APPEAL

The defendant requests the court to reverse the decision of the lower court and to set aside the conviction of murder in the second degree. In the alternative, the appellant seeks a new trial based upon the errors committed by the trial court.

STATEMENT OF FACTS

On May 27, 1967 Verl Farnsworth, the defendant shot and killed James Roger Farnsworth, his son, at the residence located at 1215 Stewart Street, Salt Lake City, Utah.

On May 27, 1967 Ralph W. Whittaker, Salt Lake City Police Department was hailed down by neighbor, Mrs. Wilson, to investigate the shooting that occurred just minutes before (TR. 89). He walked into the residence at 1215 Stewart Street, Salt Lake City Utah, and observed the son on the living room floor and defendant sitting in a chair (TR. 92). He also observed the wife of the defendant and mother of the victim in the living room. Thereupon he took possession of a 22 double action hand gun that was near the defendant. He took the defendant out to the patrol car, placed him under arrest and placed handcuffs on him (TR 74). He observed that there were two shots spent in the weapon. Thereafter, he received another weapon from another member of the Salt Lake

City Police Department which was a 22 caliber hand gun single action made in West Germany. He observed that the gun was uncocked and one round had been expended (TR 96-97). At the time of the officer's entrance the defendant made the statement that he had shot the boy, that he was not sorry and hoped that he did not die for his wife's sake (TR. 98).

Zelda Wilson, a neighbor living across the street and three houses down from the scene of the accident, testified as to hearing loud arguing and voices. She specifically indicated that she heard the defendant say "I'll kill you" (TR. 134). After these words were uttered she observed the defendant come outside the residence obtained a weapon from his car parked in the driveway and the defendant fired one shot in the air (TR. 134). Prior to observing this incident, she had observed the defendant at a local grocery store and indicated that she detected a strong odor of alcohol and that it was her opinion that the defendant was under the influence of alcohol when he was observed at the store (TR 144).

Robert Stewart, pathologist, testified that he conducted a post-mortem examination on May 27, 1967 at St. Mark's Hospital (TR. 84). A slug was removed from the victim and the death was immediately due to damage to the heart and lungs caused by the bullet (TR. 88).

The defendant Neil Alan Farnsworth testified on his own behalf. TR. 171. The defendant testified approximately two years ago he got into an argument with his son wherein he received a broken tooth and injury to his ribs resulting in the child's loss of work. TR. 171. On the 15th day of May, 1977, the day prior to the day of the shooting, defendant arrived home at approximately 1:00 to 1:30 p.m. TR. 171. At that point he indicated that he got into an argument with the victim regarding the victim's request to have something to eat before the mother was ready to go, and supper for the rest of the family. Thereafter defendant left the residence and returned home for a short time at approximately 8:00 p.m. only to leave again and returned at approximately noon on the 17th of May, 1977. TR. 171.

Upon his return to his home the defendant observed the victim and another small son watching television with his wife. TR. 174. Defendant inquired as to whether the wife was ready to go to the store and sat down in a chair. TR. 175. Thereupon the victim and the defendant had a conversation regarding the victim looking for employment. The defendant inquired if the victim was obtaining employment wherever the victim became angry and indicated that he was going to knock the defendant's brains out. At the time of this conversation defendant was sitting down in a chair. TR. 176. The argument ultimately culminated in a physical argument of the victim's Yamaha bike and the defendant.

essentially saying that if the son did not work that he was to leave. Whereupon the son indicated that he was not getting out of the house and that the defendant was not going to put him out. At that point threats were made against the defendant. The defendant told the son that. TR. 177. At the time this particular conversation took place the defendant was still sitting in the chair and the victim was standing near the chair with his arms locked up. Simultaneously, the son went to the bedroom and the defendant went out to the car where he got the gun from the front seat of his vehicle- TR. 177. After getting the weapon he fired the weapon into the ground figuring that it would scare the victim when he walked through the door. TR. 177. Upon walking in the door he was confronted by the son who also had a pistol aimed directly at the defendant. At that point the son said "I've got a gun on you and you haven't got the guts to shoot" TR. 178. Defendant testified at that point he figured "it was either him or me" and he shot. TR. 178. In doing so the defendant did not take aim nor did he attempt to shoot any particular portion of the body. TR. 179. After the shot was fired the defendant said to his wife, "Call the police." He sat down in the chair and laid the gun down on the arm of the chair. He remained in that position until the police arrived. TR. 179.

Defendant testified that he had the gun for a period of two years and usually kept it at home. However, during the incidents with the kidnapping and killing of his

station attendants he took it to work (TR 180). Defendant further testified that he knew that the victim kept his gun in the house, however, he was not sure where the weapon was kept. He further was aware that the victim's weapon was a single action hand weapon and that in order to fire the same one must cock the hammer before you can pull the trigger (TR. 181). At the time that the shooting occurred he testified that he didn't have time to observe the position of the hammer of the victim's gun. He further was aware that the victim's gun was loaded (TR.188). Defendant testified that he did not intend to kill his son and that the only reason he shot the son was because he felt that his son was going to shoot him (TR.182). Moreover, at the time the defendant got the weapon he intended only to scare his son.

On cross-examination the defendant's story was essentially the same. The prosecution pointed out several inconsistent statements made by the defendant to the officers who immediately arrived at the scene and who transported the defendant en route to the hospital (TR. 182). The prosecution cross-examined the defendant as to prior threats to other people with his weapon (TR. 183). The court over ruled the defendant's objection thereto as being prejudicial and irrelevant. On rebuttal the prosecution called Sherry Farnsworth, daughter of defendant, who testified that the son got the weapon after she heard the shot fired by the defendant outside the residence (TR. 227).

After the defendant was arrested at the scene, he was transported to the Salt Lake City Police Department by Officer Whittaker. En route Officer Whittaker stopped the vehicle to advise the defendant of his rights under Miranda, using the Miranda card (TR 191). The defendant began to speak about the circumstances of the incident and the officer asked the defendant that if by talking he was waiving his rights to an attorney, whereupon the defendant stated "I guess I ought to talk to a lawyer before I make a formal statement, but I'll tell you what happened." Nothing further was said regarding the request for counsel. After the defendant had arrived at the jail he was again interrogated by Officer Leonard Elton, Salt Lake City Police Department, who obtained a tape recording from the defendant. The defendant moved the trial court to have a hearing outside the presence of the jury to determine the constitutionality of the statement given by the defendant in order that the prosecution could use the same for rebuttal. (TR. 188). Defendant was called in connection with the defense counsel's request to exclude the statement and the defendant testified in substance that he advised the officers that he guessed he ought to have an attorney but that he would give the officer a statement (TR 197). Defendant further testified that he did not know the difference between a formal or informal statement (TR. 198). Moreover, defendant testified that prior to the time the tape was taken he advised the officers that he did not have an attorney and the officer replied, "Well, we'll appoint you an attorney so we'll have an attorney

there.” (TR. 199). Moreover, the defendant testified that he did not intend to waive his right to have an attorney present and although he understood they were taking his statement, he did not understand the fundamental part of waiving his right (TR 199).

On cross examination defendant testified in response to the prosecutor’s question that he did not ask for one “attorney” at that time (TR. 200). The tape of the defendant was entered without objection by defense at this time for the purpose of the motion to suppress (TR. 202). The trial court ruled that the admissions by the defendant are admissible for impeachment purposes (TR 206).

Thereafter Officer Elton was recalled as a rebuttal witness and testified as to certain statements made to him during the time of interrogation (TR. 121-123).

The defendant was convicted by a jury of second degree murder and sentenced to the Utah State Prison for an indeterminate term. Other pertinent facts will be brought out during the argument.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN RULING THAT THE DEFENDANT’S STATEMENTS WERE ADMISSIBLE AFTER DEFENDANT HAD INDICATED A DESIRE TO TALK TO AN ATTORNEY.

The appellant took the witness stand in his own behalf. After the appellant rested the prosecution, over appellant's objection as to the admissibility of said statements, used the appellant's prior oral statements to impeach the appellant's testimony. The defendant contends that the trial court erred permitting the prosecution to use the defendant's prior statements for impeachment.

A hearing was held outside the presence of the jury regarding the admissibility of the defendant's prior statements (TR 191). Officer Whittaker testified that he arrested the defendant and while en route to the police station advised the defendant of his rights by reading the Miranda card (TR. 192). After the defendant was advised, the officer testified as follows:

"A. Oh, he started to talk about the circumstances of the incident again and I asked him if in so doing he was waiving his rights to an attorney and he said, 'I guess I ought to talk to a lawyer before I make a formal statement, but I'll tell you what happened.' "

Thereafter, at the police station, a tape was made (TR 198).

The defendant was called in his own behalf at the hearing to suppress the statement. He testified that he was unaware of the difference between a formal or informal statement (TR 198). Further, he told the office

“that I guess I ought to have an attorney, but I would give him a statement” (TR 197). Further, the defendant didn’t understand the fundamental part of waiving his rights (TR 199).

Under the rule in *Miranda v. Arizona*, 384 U.S. 436, 16 L ed. 2d 694, 89 S. Ct. 1602, the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody . . . As for the procedural safeguards to be employed, . . . the following measures are required. Prior to any questions, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” 384 U.S. at 444, 16 L ed 2d at 706.

Once these warnings have been given, the defendant’s response determines the steps the police can thereafter pursue. Ordinarily the defendant will either request counsel, or he will waive the right of counsel, or he will make some statement which is neither a request for nor a waiver of counsel.

If the defendant specifically requests counsel, this response affirmatively guarantees defendant's right to counsel before any any questioning can take place. Any answers by the defendant to the questions put by police are not admissible because they violate his right of counsel (6th Amendment).

"An individual need not make a pre-interrogation request for a lawyer. . . . [But] such [a] request affirmatively secures his right to have one . . ." 386 U.S. at 470, 16 L. ed. 2d a 720.

". . . If the individual states that he wants an attorney, the interrogation must cease until the attorney is present." 386 U.S. at 474, 16 L ed 2d at 723.

". . . if he indicates in any manner and at any stage of he process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444 16 L ed 2d at 706.

If the defendant expressly waives or if he neither requests nor waives his right to counsel, questions may be asked of the defendant. However, in court, there is no presumption of waiver. Instead there is a heavy burden on the prosecution to demonstrate (1) that the defendant waived his rights *and* (2) that the defendant knowingly and intelligently waived his privilege against self incrimination. If that heavy burden is met, the prosecution can use answers made by the defendant in interrogation. In each case (of waiver or of neither waiver

nor request), the admissibility of the fruits of the interrogation is dependent upon the prosecution's meeting of its heavy burden to demonstrate the effectiveness of the waiver.

"The defendant may waive effectuation of these rights provided the waiver is made voluntarily, knowingly, and intelligently." 384 U.S. at 444, 16 L ed 2d at 706.

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver."

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to retained or appointed counsel. . . ." 384 U.S. at 475 16 L ed 2d 724.

In *Miranda* there is some language concerning what *could* constitute waiver but there is also some language about what *will not* constitute waiver.

"An express statement that the individual is willing to make a statement and does not want an attorney could constitute a waiver, but a valid waiver will not be presumed simply from the

silence of the accused after warnings are given or simply from the fact that confession was in fact eventually obtained . . ." 284 U.S. at 475, 16 L ed 2d at 724.

"The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." 384 U.S. 445, 16 L ed 2d at 707.

". . . [H]is failure to ask for a lawyer does not constitute a waiver." 384 U.S. at 470, 16 L ed 2d at 72.

"If the defendant makes any volunteered statements, i.e., statements made not in response to any question put to the defendant by the police, these statements are admissible in evidence because they do not infringe on the defendant's rights against self incrimination."

"The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefits of warnings and counsel, but whether he can be interrogated . . . Volunteer statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 473 16 L ed 2d at 726.

"To summarize . . . the following measures are required: He must be warned prior to any questions required that he has the right to the presence of an attorney. Opportunity to exercise

[this right] must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive [this right] and agree to answer questions or make a statement. But unless such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." 384 U.S. at 478, 479; 16 L ed 2d at 726.

In the present case, the Miranda Warnings were given the defendant almost immediately upon arrest. The defendant's response to these warnings, as testified to by the arresting officer was, "I guess I ought to talk to a lawyer before I make a formal statement, but I'll tell you what happened." (TR 193). This response fits in the category of request for counsel or at least that of a non-request or non-waiver of counsel.

It is possibly a request for counsel because in *Miranda* the U.S. Supreme Court held that:

"... [i]f [a suspect] indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-445.

In the case of *Frazier v. Cupp*, U.S., 22 L ed 2d 684, the defendant was charged with homicide. After he was given a somewhat abbreviated description of his constitutional rights, he was questioned. The defendant

was reluctant to talk and after starting to tell his story, "he again showed signs of reluctance and said, 'I think I better get a lawyer before I talk anymore. I am going to get into trouble more than I am now.'" 22 L ed 2d 68. The Court affirmed the conviction because the case was post-Escobedo but pre-Miranda and said *Miranda* in that instance was to be applied at the discretion of the State Supreme Courts. As dicta however, the court said:

"Petitioner argues that his statement about getting a lawyer was sufficient to bring Escobedo have stopped the questioning and obtained counsel into play and that the police should immediately for him. We might agree were *Miranda* applicable in this case [for the reasons set forth in the *Miranda* quotation above] . . ." *Frazier v. Cupp*, U.S. at, 22 L ed 2d at 68.....

If, however, the statement by the defendant is not a request for counsel, it is necessarily (1) an express waiver, or (2) a statement which is neither a specific request nor an express waiver. Defendant's contention is that it was at least a non-request non-waiver statement because the defendant did not expressly state that he did not want an attorney. In fact there is testimony that the defendant had wanted an attorney present during the tape recording (T. 199-200).

In any case, even if the right to counsel is expressly waived:

“[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his . . . right to . . . counsel.” *Miranda*, 384 U.S. at 475, 16 L ed at 724.

The prosecution in this case did not meet its burden. The evidence supporting this burden simply goes to the question of whether or not the defendant specifically requested counsel.

In the case of *Swenson v. Bosler*, 386 U.S. 258 at 260, 18 L ed 2d 33 at 36, 87 S. Ct. 996 (1967) the Court said that “it is now settled ‘that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.’” (citing) *Cornley v. Cochran*, 369 U.S. 506, 8 L ed 2d 70, 76, 82 S. Ct. 884.”

A case specifically in point is *Sullins v. U.S.*, 389 F. 2d 985 (CA 10 1965) where four persons were arrested and then given the Miranda warnings. The defendants contended that they had specifically asked for counsel. The testifying police officers denied that they had requested counsel at any time but the officers did testify that at no time had any one of the defendants expressly said that he did not want to consult a lawyer before questioning. The court said:

“The testimony of the officers that none of the accused specifically declined consultation with a lawyer before answering questions is fatal to the admissibility of their inculpatory statements, for the Court said in *Miranda v. United States*, that not only does ‘a heavy burden’ rest upon the Government to show a waiver of the constitutional privilege against self-incrimination and the right to retained or appointed counsel but also that *waiver is never to be presumed from failure to ask for counsel.*” 389 F.2d at p. 988.

The next question to be discussed is whether statements made by the defendant can be used to impeach his own testimony. The majority of jurisdictions and the better reasoned law prohibits such use. In *People v. Underwood* (Cal 1964) 389 P.2d 937, the defendant was charged with and convicted of rape, robbery and kidnapping. The prosecution attempted to impeach defendant’s testimony by using admissions that he had made to the police during admittedly improper interrogation. The court said:

“[i]t is . . . established in California and many other jurisdictions that involuntary *confessions* may not be used for purposes of impeaching the testimony of an accused. (Cases cited.) We believe a similar rule should operate to exclude involuntary *admissions* when they are offered for that purpose, and it has been so held in a number of jurisdictions. (*People v. Hiller*, 2 Ill. 2d 323, 118 N.E. 2d 11, 13; *State v. Palmer*, 232 La. 468, 94 So. 2d 439, 444-445, *State v. Burnett*, 357 Mo. 106, 206 S.W. 2d 345, 347-348; see 89 ALR 2d 478,

479.) . . . [W]e should not permit an accused's credibility to be attacked by the use of an involuntary statement which would be inadmissible as affirmative evidence. . . ." 389 P.2d at p. 941.

In *Johnson v. U.S.*, 344 F.2d 163 (CADC 1964) the defendant was not represented by counsel at the time of his interrogation which produced a confession. As the court said,

"in general, evidence which is inadmissible to prove the case in chief is inadmissible for all purposes unless the defendant himself introduces the evidence or is in some manner estopped from objecting to its use. The evidence is not rendered admissible merely because the defendant testifies in his own behalf." at 164, 165.

The basis for this rule is strongly stated in *Harrold v. Territory of Oklahoma*, 169 F. 47, 50 (8th Circuit, 1909)

"The privilege granted to an accused person of testifying on his own behalf would be a poor end and useless one indeed if he could exercise it only on condition that every incompetent confession [or statement] induced by the promises, or wrung from him by the unlawful secret inquisitions and criminating suggestions, of arresting or holding officers, should become evidence against him."

The result should be the same whenever the confession or statement is obtained in violation of the defendant's right to counsel.

As specifically stated in *Miranda*, 384 U.S. at 44, 16 Led 2d at 706,

“The prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards affective to secure the privilege against self-incrimination.”

Therefore, the court erred in allowing the prosecution to use statements made by the defendant which were obtained by violating his right to counsel before questioning to impeach the defendant's testimony because defendant affirmatively requested counsel, or the prosecution failed to meet its heavy burden to demonstrate that the defendant knowingly and intelligently waived his right to counsel.

POINT II

THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT'S INSTRUCTION ON INVOLUNTARY MANSLAUGHTER WHERE THE FACTS JUSTIFY THE SAME.

The defendant requested an instruction on involuntary manslaughter. This instruction was submitted on the theory that the jury could find, under the facts, that the defendant committed an unlawful act not amounting to a felony. The defendant claimed self defense and under this claim, the acts of the defendant would not amount to a felony.

This court very recently announced in *State v. Gillian*, filed January 8, 1970, stated:

“One of the foundational principles in regard to the submission of issues to juries is that where the parties so request they are entitled to have instructions given upon their theory of the case; and this includes on lesser offenses if any reasonable view of the evidence would support such a verdict. This is in accord with authorities generally,³ and with the adjudications of this court, as stated in a number of cases dealing with instructing on lesser offenses: In the case of *State v. Johnson*⁴ it is said:

‘That the defendant is entitled to have the jury instructed on his theory of the case if there is any substantial evidence to justify giving such an instruction.

Of similar import is *State v. Newton*:⁵”

“If the jury accepted her version of the occurrence, that it was in such a state of emotional upset that she got the pistol and fired it into the room several times intending only to scare Miller, her offense could be found to be involuntary manslaughter in that it was a killing which resulted ‘in the commission of an unlawful act not amounting to a felony’; or upon a different view of the facts could be found to be voluntary manslaughter as a killing ‘upon a sudden quarrel or in the heat of passion,’⁶ and the fact that another man accidentally became the victim would not necessarily make the crime one of a higher degree. Without

further extenuation, it is also true that if the jury believed that there was an intent to kill, it may not have believed beyond a reasonable doubt some other element required to make the crime murder in the first degree, in which event it would be murder in the second degree.⁹”

Thus, under the most recent pronouncement of this court, the trial court should, under law, have granted the defendant's requested instruction on involuntary manslaughter.

POINT III

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION, OVER THE DEFENDANT'S OBJECTION TO CROSS EXAMINE THE DEFENDANT'S PRIOR ACTS OF VIOLENCE INVOLVING PERSONS OTHER THAN THE VICTIM.

On cross examination of the defendant, the prosecution, over the Defendant's objection illicit testimony that the defendant had threatened to shoot the dog and cat (TR 184) and had threatened to kill other members of the family (TR 185). Moreover, the prosecution was permitted to ask questions regarding threats made by the defendant some two years ago (TR 185).

As rebuttal, Sherry Farnsworth was called and testified as to the incident wherein the defendant said he was

going to take care of them (cat) and he was going to shoot them (TR 225). No objection was made by defense counsel.

The defendant contends that procedure used by the prosecution was highly prejudicial and inflammatory. The incident regarding the threats of the defendant directed to the dog and cat can only be construed as pointing out to the jury that the defendant is not a lover of animals and therefore must be a bad person. It clearly does not go to the state of mind of the defendant with regard to the victim. This testimony was further imbedded in the jury's mind when the prosecution was permitted to bring up the incident by the use of a rebuttal witness, Sherry Farnsworth.

Evidence is not admissible if its effect is merely to disgrace the defendant or show his propensity to commit crime. *State v. Dickerson*, 12 Utah 2d 8, 361 P. 2d 412 (1961) This case was cited with approval in *State v. Gillian*, filed 8 January 1970.

The defendant submits that the testimony regarding the threats to dogs and cats was prejudicial. It cannot be stated with any assurance that there would not have been a different result in the absence of the error in cross examining the defendant about the incidents it must be regarded as prejudicial. *State v. Dickerson*, supra. Moreover, the question regarding a threat to the victim made

some two years prior falls within the realm of “unproven accusation” which was calculated to degrade the defendant in the eyes of the jury.

POINT IV

THE EVIDENCE DOES NOT JUSTIFY THE JURY VERDICT OF SECOND DEGREE MURDER.

The Defendant respectfully submits that, under the circumstances of the killing, the jury verdict is unsupportable by the evidence. The defendant contends that reasonable minds could not differ as to the facts leading up to the fatal shot.

The facts, in a light most favorable to the jury verdict does not support the verdict of murder in the second degree. The defendant’s testimony clearly shows that the victim was making threats against his personal safety and well-being. Prior contacts with the victim lead to the defendant having his teeth broken and injury to his ribs (TR. 170). This was undisputed. On the day of the shooting, the victim made threats against the defendant while standing near the chair where the defendant was seated. Although, there is some dispute as to when the victim went into the bedroom for his gun, the defendant stated that each went for his about the same time (TR. 177). The defendant got his gun from his care parked outside of the house. He fired one shot to “scare the

victim.” When he re-entered the house, the victim had his gun leveled at the defendant; whereupon the defendant figured “it was him or me.” (TR.178). The defendant fired, without taking aim. Further, the defendant did not observe the position of the hammer on the victim’s gun.

In view of the situation which confronted the defendant at the time of the firing, it cannot be said that what he did was not necessary to protect his own life. The initial arguments were provoked by the victim who was the larger of the two. It was the defendant’s house. No more than one shot was fired to remove the peril facing the defendant.

Under the standard set for by this court, the evidence does not justify the verdict of second degree murder. At the very least, voluntary manslaughter may be supportable by the evidence.

CONCLUSION

Based upon the arguments raised, the appelllant respectfully requests that the conviction be reversed and the case remanded. In the alternative, the appellant submits that conviction for second degree murder be vacated and that a lesser crime be found under the facts of the case.

Respectfully submitted,

JIMI MITSUNAGA

731 East South Temple
Salt Lake City, Utah

Attorney for Defendant