

1975

# Utah v. John Henry Taylor : Brief of Appellant

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY  
THE SUPREME COURT OF THE STATE OF UTAH **J. Reuben Clark Law School**

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STATE OF UTAH, :

Plaintiff-Respondent, :

-v- :

Case No. 14148

JOHN HENRY TAYLOR, :

Defendant-Appellant. :

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APPELLANT'S BRIEF

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Appeal from the Judgment of the  
District Court of Salt Lake County  
Honorable Jay E. Banks, Judge

---

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**FILED**

NOV 11 1976

*Clerk, Supreme Court, Utah*

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THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :

Plaintiff-Respondent, :

-v- :

Case No. 14148

JOHN HENRY TAYLOR, :

Defendant-Appellant. :

---

APPELLANT'S BRIEF

---

STATEMENT OF THE NATURE OF THE CASE

The appellant appeals from three convictions of murder in the second degree, one conviction of attempted murder in the first degree, and one conviction of attempted murder in the second degree, entered against him by jury verdicts in the District Court of Salt Lake County, Judge Jay E. Banks presiding.

DISPOSITION IN THE LOWER COURT

This was a jury trial in the District Court of Salt Lake County, Judge Jay E. Banks presiding, on the 28th, 29th, and 30th days

of April and the 1st, 2nd, and 5th days of May, 1975. On the 5th day of May, 1975, the jury found the appellant guilty on three counts of murder in the second degree, one count of attempted murder in the first degree, and one count of attempted murder in the second degree. On the 14th day of May, 1975, appellant was sentenced to serve consecutive indeterminate terms of five years to life in the Utah State Prison for each conviction.

#### RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal by this court because (1) the jury instructions failed to set forth all applicable factual situations of the crime of manslaughter; (2) because the crime of manslaughter, as well as the crimes of murder and attempted murder, requires intentional conduct; (3) that the jury instructions setting forth the essential elements of the crime of manslaughter failed to include the necessary element of intentional conduct; and (4) because the erroneous instructions for the crime of manslaughter prejudiced the appellant in his conviction of the crimes of murder and attempted murder.

#### STATEMENT OF THE FACTS

On or about the 29th day of August, 1974, the appellant awoke realizing he had rent and other bills to pay (R. 413). To obtain some money, he put two guns in his truck, intending to sell them in town (R. 413). Without anything to eat (R. 428), he drove to a bar called "The Club" at Fifth West and Second South in Salt Lake City and began

drinking a fifth of whiskey at approximately 12:00 o'clock noon (R. 350, 351, 366, 414). He remained at The Club until 10:30 p.m. (R. 433) during which 10-1/2 hours he consumed approximately two fifths of whiskey (R. 350, 351, 366), an unascertainable number of 10 ounce glasses of beer (R. 375), and about ten pills including Valium (R. 352), Methamphetamine (R. 371), and Secanol (R. 451). Due to the excessive use of alcohol and drugs, the appellant became so intoxicated that he was slurring his speech (R. 346, 375), staggering while trying to walk (R. 346, 375), and swearing and using other boisterous language (R. 345, 377). While sitting at the bar, he even fell off a bar stool (R. 337).

At 10:30 p.m. the appellant and a friend walked down the street to another bar called the "Fourth Quarter Lounge" (R. 242). After ordering a drink at the Fourth Quarter Lounge, the appellant and a Mr. Bolling engaged in a heated argument (R. 191, 211, 216, 228) which resulted in Mr. Bolling attacking the appellant and hitting him over the head with a bar stool (R. 107, 191). In order to prevent the fight from continuing, the bartender ran from behind the bar and grabbed the stool from Mr. Bolling (R. 108, 217, 228). Regardless of the efforts of the bartender, the appellant and Mr. Bolling were still very angry with each other (R. 109, 254). The appellant's friend cautioned him to settle down (R. 249). After announcing "I'll see you all later," the appellant left the Fourth Quarter Lounge.

When the appellant returned to the Fourth Quarter Lounge twenty to thirty minutes later, he was very upset, angry, and carrying a shotgun and a pistol (R. 184, 234, 236). Talking and swearing in an excitable voice, he said "I'm back." (R. 144, 237). He then approached, shot, and wounded Mr. Bolling who was holding a pool cue stick (R. 144); threatened a Mr. Gregg but did not shoot him (R. 146); shot and killed a Mr. Hairston while Hairston was reaching for a walking cane (R. 147); threatened a Mary Robertson who was standing frozen behind the bar but did not shoot her (R. 149); shot and killed a Mr. Gray when Gray arose from a chair (R. 150); shot and wounded the bartender who was reaching for something in a drawer (R. 444); and shot and killed a Mr. Holt when Holt held a bar stool out in front on himself (R. 151, 200).

The appellant then left the Fourth Quarter Lounge, climbed into his truck, and drove away at a high rate of acceleration (R. 152, 263). Arriving home, he drove over the curb, parked his truck on the front lawn, tripped over the front steps, and fell unconscious on the living room floor (R. 388, 389). The next morning, the appellant called the police and told them that he might be the man they were looking for (R. 301, 304). He remembered having the guns in his hands while at the Fourth Quarter Lounge (R. 299), but did not remember killing anyone (R. 300, 321). The appellant also testified that he ordinarily became angry when intoxicated, especially when physically attacked (R. 438).

As a result of this incident, charges were brought against



the appellant and he was tried and convicted of three counts of the crime of murder in the second degree, one count of the crime of attempted murder in the first degree, and one count of the crime of attempted murder in the second degree (R. 597). During trial, the appellant requested the court to instruct the jury on all applicable factual situations of the crime of manslaughter included in Utah Code Ann. §§ 76-5-205 (1) (a) (b) (c) (1973). The court refused to instruct on the factual situations of the crime of manslaughter included in §§ 76-5-205 (1) (a) (c) (1973) and instructed only on the factual situation of the crime of manslaughter included in § 76-5-205 (1) (b) (R. 585, 586, 588, 589, 590). The appellant further requested that the court instruct the jury that intentional conduct was an essential element of the crime of manslaughter. The court also refused this request (R. 585, 586, 588, 589, 590).

Refusal of the lower court to instruct the jury as requested misdirected the jury and prevented it from considering all applicable factual situations and essential elements of the crime of manslaughter in arriving at their verdict and constituted reversible error.

## ARGUMENT

### POINT I

REFUSAL OF THE LOWER COURT TO INSTRUCT  
ON UTAH CODE ANN. §§ 76-5-205 (1) (a) (c)  
CONSTITUTES REVERSIBLE ERROR.

The jury instructions in this case concerning the essential

elements of the crime of manslaughter stated:

Before you can convict the defendant of the crime of criminal homicide, manslaughter, . . . you must find from the evidence, beyond a reasonable doubt, all the following elements of that crime: that on or about the 29th day of August, 1974, in Salt Lake County, State of Utah, the defendant, John Henry Taylor, caused the death of [deceased] under the influence of extreme mental or extreme emotional disturbance for which there is a reasonable explanation or excuse. (Instructions 24, 27, 30.)

These instructions are correct in stating one type of conduct which constitutes the crime of manslaughter, i.e., when the actor causes the death of another while under the influence of extreme mental or emotional disturbance. However, the Utah manslaughter statute makes it clear that two other types of conduct also constitute the crime of manslaughter.

Utah Code Ann. §§ 76-5-205 (1) (a) (b) (c) (1973) defines manslaughter:

- (1) Criminal homicide constitutes manslaughter if the actor:
  - (a) Recklessly causes the death of another; or
  - (b) Causes the death of another under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse;
  - (c) Causes the death of another under circumstances where the actor

reasonably believes the circumstances provide a moral or legal justification or extenuation for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.

In other words, there are three possible types of conduct which constitute the crime of manslaughter. The lower court in this case allowed the jury to consider only one type of conduct in determining whether the appellant was guilty of manslaughter, whether he:

- (b) Caused the death of another under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation or excuse. (Utah Code Ann. § 76-5-205 (1)(b) (1973).)

Therefore, the jury was limited in considering whether the appellant committed the crime of manslaughter because of either of the other two types of conduct which also constitute the crime of manslaughter, i.e., whether the appellant:

- (a) Recklessly caused the death of another (Utah Code Ann. § 76-5-205 (1)(a) (1973)); or
- (c) Caused the death of another under circumstances where the actor reasonably believed the circumstances provided a moral or legal justification or extenuation for his conduct although the conduct was not legally justifiable or excusable under the circumstances. (Utah Code Ann. § 76-5-205 (1)(c) (1973).)

From the evidence presented at trial, the jury reasonably could have concluded the appellant's conduct was reckless and was within Utah Code Ann. § 76-5-205 (1) (a) (1973).

The word "recklessly" is defined in § 76-2-103 (3) (1973):

A person engages in conduct:

- (3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint. (Emphasis added.)

Therefore, conduct is reckless when the actor is aware of but consciously disregards an unjustifiable risk.

The appellant knew he became angry when drunk, especially after being physically attacked (R. 438). Therefore, the jury reasonably could have concluded the appellant was aware of the risk to others he would create by becoming extremely intoxicated in public with two loaded guns at his disposal and that he consciously disregarded this risk when he voluntarily spent 10-1/2 hours drinking whiskey and beer, consuming drugs, and using deadly weapons in a crowded bar. Therefore, the jury reasonably could have concluded the appellant was aware of but consciously

disregarded an unjustifiable risk and recklessly caused the death of three others and attempted to cause the death of two others.

The appellant was aware that he had two guns in his hands when he returned to the Fourth Quarter Lounge after an altercation in which he was involved had there taken place (R. 299). With the appellant being aware of the risk created to others by the fact that he was holding deadly weapons while in a state of intoxication and anger, the jury reasonably could have concluded the appellant consciously disregarded this risk by proceeding to shoot five people in just a matter of seconds.

Therefore, the lower court committed prejudicial and reversible error by refusing to instruct the jury on reckless conduct as provided for in Utah Code Ann. § 76-5-205 (1) (a) (1973).

The jury reasonably could have concluded also that the appellant's conduct conformed to that conduct included within Utah Code Ann. § 76-5-205 (1) (c) (1973):

Causes of death of another under circumstances where the actor reasonably believes the circumstances provide a moral or legal justification or extenuation for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.

The jury reasonably could have concluded the appellant reasonably believed his conduct was justified although it was not. The appellant had been drinking whiskey and beer, consuming drugs, and

had been hit over the head with a bar stool. He returned with two guns for what under such circumstances he could reasonably have believed to be self-defense because of threats to his person.

Victim No. 1, the person who had earlier hit him over the head with a bar stool, was holding a pool cue stick when he was shot. Victim No. 2 was reaching for a cane when he was shot. Victim No. 3 was shot when he stood up from a chair on which he was previously sitting. Victim No. 4 was shot while he was reaching for something from a drawer. Victim No. 5 was shot after he picked up a bar stool.

Although the appellant's conduct would not have been legally justifiable or excusable under the existing circumstances, the jury reasonably could have concluded the appellant reasonably believed his conduct was justifiable because of his mental capacity under the circumstances.

When reasonable minds could differ as to certain facts, the trial court must instruct the jury on all applicable law relating to those facts. Reasonable minds could differ as to the facts of this case relative to all three subsections of the new manslaughter statute. Therefore, the lower court erred by refusing to instruct the jury on all three subsections of the new manslaughter statute. This reversible error precluded the jury from considering all alternatives upon which it could have found the appellant guilty of manslaughter rather than murder.

In State v. Newton, 105 Utah 561, 144 P.2d 290 (1943), the

defendant was convicted of involuntary manslaughter upon an instruction concerning the "right-of-way" statute with respect to traffic regulation. The trial judge refused to include portions of the right-of-way statute in his instructions to the jury because he felt the portions of the statute omitted from the instructions were inapplicable considering the evidence presented. At one point this court said:

If there had been any evidence produced by defendant or by any of the witnesses which might indicate that the qualifications as to the right-of-way were applicable, the appellant would have been entitled to an instruction covering that part of the statute which was omitted from the instruction in question. 144 P.2d at 292. (Emphasis added.)

In State v. Green, 78 Utah 580, 6 P.2d 177 (1931) and State v. Harris, 1 Utah 2d 182, 264 P.2d 284 (1953), the role of the trial judge was defined with respect to that of the jury. This court has said:

The right of an accused to trial by jury, assured by the provisions of our State Constitution, means that all issues of fact shall be submitted to them and that the Court should neither expressly nor by implication indicate his opinion upon the facts or as to the weight of the evidence. 264 P.2d at 286. (Emphasis added.)

## POINT II

INTENTIONAL CONDUCT IS AN ESSENTIAL  
ELEMENT OF THE CRIME OF MANSLAUGHTER.

In Utah prior to 1973, criminal homicide committed under

circumstances not amounting to murder was defined as manslaughter.

Manslaughter was divided into two types, voluntary and involuntary manslaughter.

Utah Code Ann. § 103-28-5 (1933),  
§ 76-30-5 (1953), "Manslaughter"  
defined: Manslaughter is the unlawful  
killing of a human being without malice.  
It is of two kinds:

- (1) Voluntary, upon a sudden quarrel  
or in the heat of passion;
- (2) Involuntary, in the commission of  
an unlawful act not amounting to a  
felony, or in the commission of a  
lawful act which might produce  
death, in an unlawful manner or  
without due caution and circum-  
spection.

A. Intentional conduct was an essential element  
of voluntary manslaughter under Utah Code  
Ann. § 76-30-5 (1953).

Prior to 1973, Utah case law concerning voluntary man-  
slaughter made intentional conduct an essential element for this crime.

In State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936), this court reversed the  
trial court's finding that an unintentional killing may constitute voluntary  
manslaughter:

This statutory definition [§ 103-28-5 (1)  
(1933)] is but declaratory of the common  
law, to constitute voluntary manslaughter  
the killing must be willful or intentional,  
or there must exist an intention at least  
to do great bodily harm. The intention  
may be inferred from the use of a deadly  
weapon. 60 P.2d at 956. (Emphasis added.)



In other words, to convict the defendant of voluntary manslaughter, the offense for which the defendant was convicted, the jury were permitted by the charge to do so without finding that the killing was either willful or intentional, thus misdirecting the jury with respect to the elements of the offense for which the accused was convicted. 60 P.2d at 959. (Emphasis added.)

The Cobo decision conclusively shows that an essential element of voluntary manslaughter was an intentional conduct.

A similar case to Cobo was State v. Gallegos, 16 Utah 2d 102, 396 P.2d 414 (1964). There the court held that even though the word intentional was not used by the trial court in directing the jury on voluntary manslaughter, the element of intent was adequately included in the jury instructions for voluntary manslaughter because they did include the word voluntary. The court concluded:

The word 'voluntary' . . . clearly requires either that the killing or the act causing the death be intentional and not accidental, even though there was no express definition to that effect of the word, 'intentionally.' 396 P.2d at 416. (Emphasis added.)

It is clear that in Utah prior to 1973, intentional conduct was an essential element of voluntary manslaughter, Cobo, Gallegos, *supra*, even though the word "voluntary" could replace intentionally in jury instructions due to the similarity of their meanings. Gallegos, *supra*.

If this case had been tried prior to 1973, it is clear from Cobo and Gallegos, supra, that the trial court would have been required to instruct the jury that the defendant could be found guilty of voluntary manslaughter only if he intentionally or voluntarily killed his victim.

- B. Intentional conduct is likewise an essential element of manslaughter under Utah Code Ann. §§ 76-5-205 (1) (a) (b) (c) (1973).

Although the words "voluntary manslaughter" are not present in the Utah Code today, it is clear that the culpable mental state required for the commission of the crime of manslaughter is one of intent.

Utah Code Ann. § 76-5-205 (1) (a) (1973) provides that criminal homicide constitutes the crime of manslaughter if the actor recklessly causes the death of another. Reckless does not mean negligent because § 76-5-206 (1) (2) (1973) provides for the crime of negligent homicide as a class A misdemeanor, and § 76-5-205 (1) (a) and (2) provide for a reckless homicide under the manslaughter statute as a second degree felony. This implies that reckless conduct requires a more culpable mental state than does negligent conduct.

A further indication that reckless means intentional under the 1973 Utah Code is the fact that reckless conduct occurs when the actor is aware of but consciously disregards a substantial and unjustifiable risk. Webster's New International Dictionary (2d ed. 1954), p. 567 defines conscious as:

[W]orking with critical awareness  
in accompaniment of creative  
impulse; deliberate; intentional.  
(Emphasis added.)

An awareness and conscious disregard, according to Webster's, would  
be an intentional act. And Utah Code Ann. § 76-2-103(1) (1973) pro-  
vides:

A person engages in conduct:

- (1) Intentionally, or with intent or  
willfully with respect to the  
nature of his conduct or to a  
result of his conduct, when it  
is his conscious objective or  
desire to engage in the conduct  
or cause the result. (Emphasis  
added.)

Perhaps the most definite statement of what culpable mental  
state is meant by a conscious disregard of an unjustifiable risk is found  
in Chicago, R. I. & P. Ry. Co. v. Lacy, 78 Kan. 622, 97 P. 1025  
(1908), wherein the court said:

. . . True the courts and text-writers  
quite generally agree that recklessness  
amounting to an utter disregard of  
consequences will be held to supply the  
place of specific intent. And a reckless  
indifference or disregard of the natural  
or probable consequences of doing or  
omitting to do an act, which is generally  
termed wanton negligence, carries with  
it the same liability as an injury  
inflicted by willfulness. 97 P. at 1028.  
(Emphasis added.)

According to Lacy, a conscious disregard of consequences

will be held to supply the place of specific intent or a willful act.

The Second Restatement of Torts gives an adequate definition of reckless disregard of the safety of others. Section 500 states in pertinent part:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do. . . . (Emphasis added.)

Being aware of an unjustifiable risk is an element of the definition of recklessness. When an actor is aware of an unjustifiable risk, a plain duty to act arises. Yet, according to Lacy, supra, and the Second Restatement of Torts, when the actor consciously disregards his duty to act when he is aware that such a duty exists, his conduct is intentional. Therefore, reckless conduct is intentional, and Utah Code Ann. § 76-5-205 (1) (a) (1973) restates an essential element of the old voluntary manslaughter statute, i.e., intentional conduct.

Section 76-5-205 (1) (b) provides that criminal homicide constitutes manslaughter if the actor:

Causes the death of another under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.

The appellant maintains that this definition likewise contains the essential element of intentional conduct, the same element of intent required to convict a person of voluntary manslaughter prior to 1973.

Traditionally, voluntary manslaughter consisted of an intentional homicide committed under extenuating circumstances which would mitigate the crime from murder to manslaughter. In Utah, one mitigating circumstance was the fact that when the defendant killed his victim, he was in a state of passion engendered in him by adequate provocation. Cobo, supra; People v. Calton, 5 Utah 451, 16 P. 902, rev'd on other point in 130 U.S. 83 (1888). Hence, the words "heat of passion" were employed by Utah and many other states as a term denoting the heretofore mentioned mitigating circumstance.

The framers of the new 1973 manslaughter statute found that the words "heat of passion" were an inadequate definition of the modern concepts of this crime, so they substituted an explanation stating rather what is meant by "heat of passion." This explanation is currently found in subsection (b) of the new manslaughter statute. The Model Penal Code, from which subsection (b) was taken verbatim, gives reasons for the change in wording:

We thus treat on a parity with provocation cases in the classic sense, situations where the provocative circumstance is something other than injury inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance . . . This is, we think, to state in fair and realistic terms the criteria by which men do and should appraise the mitigating import of mental or emotional distress when it is a factor in so

grave a crime as homicide . . .  
[T]he offense is murder if the actor  
kills purposely or knowingly, unless  
there is mental or emotional dis-  
turbance deemed to rest on reason-  
able explanation or excuse within the  
meaning of paragraph (1)(b) of this  
Section. M.P.C. Tent. Dr. #9,  
p. 41, 45. (Emphasis added.)

Accordingly, when the actor kills purposely or knowingly in  
a condition of extreme mental or emotional disturbance, the crime is  
manslaughter, not murder. The essential element of intent to kill has  
remained even though the words "heat of passion" have been eliminated  
and other words have been substituted in their place.

It is evident that Utah legislators accepted these comments  
found in the Model Penal Code as a basis for changing the wording of the  
old voluntary manslaughter statute.

The causing of the death of another,  
when one is acting under the influence  
of extreme mental or emotional dis-  
turbance, for which there is a reason-  
able explanation or excuse, will cover  
situations formerly handled under  
voluntary manslaughter in this state.  
J. Barney, Utah Criminal Code Outline  
and Commentary, p. 174 (1973).  
(Emphasis added.)

Therefore, subsection (b) of the new manslaughter statute proscribes  
intentional conduct.

Subsection (c) of the new manslaughter statute states that  
criminal homicide constitutes manslaughter if the actor:

Causes the death of another under circumstances where the actor reasonably believes the circumstances provide a moral or legal justification or extenuation for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.

This statement found in Utah's manslaughter statute is another extenuating circumstance, in addition to heat of passion, that has been recognized in many jurisdictions as one whose effect is to reduce the crime of murder to that of voluntary manslaughter. A concise statement indicating that subsection (c) prohibits only intentional conduct in a modern manslaughter statute is found in W. LaFave, A. Scott, Criminal Law, p. 583 (1972):

A modern tendency, not yet far advanced, is to add other extenuating circumstances in the category of voluntary manslaughter so as to include such intentional homicides as those committed in an imperfect right of self defense or defense of others, or of crime prevention, or of the defense of coercion or necessity, in which the killing, although not justifiable, is not bad enough to be murder. (Emphasis added.)

One fact situation which fits nicely with the purview of subsection (c) is found in the cases of Commonwealth v. Colandro, 231 Pa. 343, 80 A. 571 (1911); Allison v. State, 74 Ark. 444, 86 S.W. 409 (1905); and State v. Thomas, 184 N.C. 757, 114 S.E. 843 (1922). In each of these cases, the defendant was found guilty of manslaughter,

not murder, when he intentionally killed the deceased believing that it was necessary to protect himself but when the circumstances did not justify the killing. The facts of the present case are strikingly similar to those presented in Colandro, Allison, and Thomas, supra. The appellant in the present case was provoked by being hit over the head with a bar stool and thereafter he retaliated by shooting the person who provoked him along with others who had not. Even though the jury found that the appellant was aware of his actions and his conduct was intentional, Colandro, Allison, and Thomas, supra, would make his crime man-slaughter, not murder. Likewise, subsection (c) of the new manslaughter statute contemplates that the intentional conduct of appellant in the present case constitutes manslaughter, not murder.

At least one state has included the substance of subsection (c) of the new manslaughter statute in its voluntary manslaughter statute making it clear that the circumstances explained therein are within the purview of voluntary manslaughter, an intentional homicide, rather than a negligent homicide. Ill. Ann. Stat. ch. 38 § 9-2 (1969) states in pertinent part:

- (b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code [Self-defense]



but his belief is unreasonable. (Emphasis added.)

In Illinois, the type of conduct found in subsection (c) of the new Utah manslaughter statute constitutes the intentional crime of voluntary manslaughter. Therefore, the type of conduct found in subsection (c) of the new manslaughter statute constitutes an intentional homicide in Utah.

- C. Refusal of trial judge to instruct intentional conduct was an essential element of the crime of manslaughter was reversible error.

Intentional conduct is an essential element for the commission of the crime of manslaughter under Utah Code Ann. §§ 76-5-205 (1) (a) (b) (c) (1973). Prior to 1973, intentional conduct was also an essential element of the crime of voluntary manslaughter. Cobo, Gallegos, *supra*. Therefore, when the trial judge refused to instruct that intentional conduct was an essential element of manslaughter, this constituted a reversible error. Cobo, *supra*.

Recent case law in other jurisdictions would also warrant a reversal of the appellant's conviction on the ground that the lower court erred in refusing to instruct the jury that intent was an essential element for a conviction of a conscious wrongdoing. In State v. Cutnose, 532 P.2d 896, cert. denied, 532 P.2d 888 (N.M. App. 1974), the defendant was convicted for aggravated assault contrary to New Mexico law. Although not mentioned in the statutes that defined aggravated

assault, the mental state required to violate them was that of a conscious wrongdoing. The trial court failed to instruct the jury of the intent required to warrant a conviction of aggravated assault. In reversing the conviction, the court said:

If the statute sets forth the required intent, instructions in the language of the statute are sufficient. *State v. Gonzales*, 86 N.M. 556, 525 P.2d 916 (ct. App. 1974). However, the language of § 40A-3-2(A), *supra*, was insufficient to inform the jury that conscious wrongdoing was a required element. . . . Because the jury was not instructed on the required criminal intent, the convictions for violations of § 40A-3-2(A) and 40A-22-21 (a) (1), *supra*, are reversed. 525 P.2d at 899. (Emphasis added.)

In *State v. Clingerman*, 213 Kan. 525, 516 P.2d 1022 (1973), Instruction No. 11 concerned felonious intent while Instruction No. 4 explained the essential elements of robbery but omitted the element of intent. The Kansas Supreme Court, in reversing the defendant's conviction for robbery, said:

The elements of intent required for various statutory crimes vary according to the particular crime. Where intent is a required element of the crime it must be included in the charge and in the instructions of the court covering the separate elements of that particular crime. 516 P.2d at 1026.

The lower court's refusal to include intent as an essential element of the crime of manslaughter constituted reversible error.

### POINT III

REFUSAL OF TRIAL JUDGE TO PROPERLY  
INSTRUCT ON CRIME OF MANSLAUGHTER  
WAS REVERSIBLE ERROR WHEN APPELLANT  
WAS CONVICTED OF CRIMES OF MURDER  
AND ATTEMPTED MURDER .

This court held, in the cases of Gallegos, supra, and State v. Valdez, 30 Utah 2d 54, 513 P.2d 424 (1973):

[I]t is generally held, under ordinary factual situations that where a jury finds the defendant guilty of a greater offense, the giving of an erroneous instruction of a lesser offense is not prejudicial. 513 P.2d 424. (Emphasis added.)

In Valdez, this court relied on 41 C.J.S. Homicide § 427c (2), p. 297 as authority for its position. It is essential that the court recognize the totality of the general rule just stated because included in 41 C.J.S. Homicide § 427c (2), p. 298, the same section of Corpus Juris Secundum quoted in Valdez as the authority for this ruling, the general rule continues:

However, where the evidence authorizes and requires the giving of an instruction on manslaughter, the giving of an erroneous instruction on that offense constitutes prejudicial and reversible error on a conviction of murder. (Emphasis added.)

In this case, the evidence required the giving of an instruction on manslaughter. A manslaughter instruction was indeed given, but it was erroneous in that it failed to include all conduct which

constitutes the crime of manslaughter. It further failed in omitting the essential element of intentional conduct. Because of erroneous instructions on the crime of manslaughter, the jury was misdirected in believing that it could not find the appellant guilty of the crime of manslaughter if it felt that his conduct was intentional or that of the unlawful acts found in subsections (a) and (c) of the new manslaughter statute.

In this case, the giving of erroneous instructions on the crime of manslaughter constituted prejudicial and reversible error on the appellant's convictions of murder and attempted murder.

#### CONCLUSION

From the evidence presented at trial, reasonable minds could have differed whether the appellant had violated subsections (a) and (c) of the new manslaughter statute. The lower court's refusal to include these subsections in its instructions indicated to the jury that the evidence did not warrant a finding that they applied to appellant's conduct. Thus, the lower court erroneously decided an issue of fact which should have gone to the jury with proper instructions, and in so doing the lower court committed reversible error. Newton, Green, Harris, *supra*.

The instructions concerning manslaughter prejudiced the jury into believing that if they found that the appellant's conduct was intentional, they could only find him guilty of murder and not manslaughter. It is well established in Utah law that manslaughter is an

intentional homicide, and any instruction directing the jury to think otherwise constitutes a reversible error. Cobo, Gallegos, supra. The appellant urges this court to follow the general rule that the giving of an erroneous manslaughter instruction constitutes a prejudicial and reversible error in the conviction of murder or attempted murder. 41 C.J.S. Homicide § 427 c (2).

The appellant's convictions should be reversed, and this case should be remanded for a new trial with proper instructions.

DATED this 19~~th~~ day of November, 1975.

Respectfully submitted,

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By

  
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#### CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Brief was served on counsel for the respondent, Vernon B. Romney, Utah State Attorney General, by delivering three (3) copies thereof to his office at 236 State Capitol Building, Salt Lake City, Utah 84114, on the 21<sup>st</sup> day of November, 1975.



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