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IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - -

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

GARY ALFRED MITCHESON,

Defendant-Appellant.

Case No. 14629

- - - - - - - - - - -

RESPONDENT'S BRIEF

- - - - - - - - - -

APPEAL FROM A JUDGMENT OF THE SEVENTH DISTRICT COURT OF CARBON COUNTY, HONORABLE EDWARD [illegible] JR., JUDGE

FILED

NOV 12 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,		
Plaintiff-Respondent,	:	Case No. 14629
-vs-	:	
GARY ALFRED MITCHESON,		
Defendant-Appellant	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Murder in the Second Degree in the shooting death of Richard Herrera at Price, Utah, on February 7, 1976.

The case was tried in the District Court of Carbon County, State of Utah, before the Honorable Edward Sheya, sitting with a jury; on April 23, 1976 a verdict of guilty of Murder in the Second Degree was returned against the appellant. From that verdict, appellant appeals.

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DISPOSITION IN THE LOWER COURT

Appellant was sentenced to the Utah State Prison to serve a term of five years to life by the Honorable Edward Sheya.

RELIEF SOUGHT ON APPEAL

Respondent submits that the conviction was proper and should be affirmed.

STATEMENT OF THE FACTS

On December 15, 1975, Ernie Herrera, younger brother of the shooting victim, Richard Herrera, sold his 1967 Chevrolet Van to Alfred Mitcheson, father of appellant Gary Mitcheson (T.11-12). According to Ernie Herrera, the mag wheels were not included in the sale, the consideration for which was a reduction in the selling price from $600.00 to $300.00; however, Ernie Herrera agreed to loan the mag wheels to appellant for use on the van. The mag wheels were mounted on the Mitcheson van the same day as the sale (T.12-13).

On several subsequent occasions in January 1976, Ernie Herrera requested that his mag wheels be returned, but his requests were ignored (T.14). Finally Ernie Herrera, his brother Richard, and several friends

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appeared at the home of Alfred Mitcheson and began removing the mag wheels from the van that Ernie Herrera had sold to Mitcheson (T.22,219-220). Officer Tilton, responding to a call from Alfred Mitcheson, arrived at the Mitcheson home and ordered Ernie Herrera, Richard Herrera, and their friends, Mike Manzanares and Louis Grant, to put the wheels and tires back on the van, suggesting that they go to court to resolve any issue over the ownership of the mag wheels and tires (T.22, 219-222).

Late in the evening of February 6, 1976, another confrontation took place at the Taco Time drive-in in Price, Utah, during which the decedent struck appellant (T.28,222-223). After the participants separated and left the drive-in, another meeting occurred at the residence of Jerry Giraud approximately two hours later. Appellant, his sister, and several friends observed Richard Herrera's car parked at the Giraud residence. They parked their cars and appellant told his sister Debbie to "go in and tell Richard if he wanted to fight me, come outside and fight me." (T.225). Eventually, appellant entered the Giraud residence but the decedent refused to fight (T.226). However, arrangements were made for the two to fight at two o'clock that afternoon (T.226).

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Appellant and Wendell Johnson dropped off their other friends in town; the two drove to Alfred Mitcheson's home, where appellant picked up the rifle with which Richard Herrera was to be shot. Appellant told his father he was staying at Debbie's house that night. He drove back to town, met Albert DiCaro, arranged for a card game at Debbie's house, and arrived at his sister's house sometime after 2:00 a.m. (T.227-228).

Meanwhile, the decedent, Richard Herrera, gathered some of his friends to go to Debbie's house and remove from the van the mag wheels and tires which he claimed were his brother Ernie's (T.51, 160-161, 167-168). At approximately 3:30 a.m. the decedent and his several friends proceeded to the house at 432 South Fourth East, where appellant's sister Debbie lived (T.161). Before they could remove the tires, Miss Mitcheson came out onto the lighted front porch and ordered the group to get off her property (T.162). As Richard Herrera and his friends stood in the front yard, appellant grabbed his rifle, opened the front door and fired his gun from the doorway, instantly striking Richard Herrera, who died moments later from a gaping neck wound (T.162,258-259).

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ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTION BASED ON THE DEFENSE OF JUSTIFICATION.

Appellant, by his Requested Jury Instruction No. 15, requested that the trial court present one of the theories of his case, use of deadly force in defense of his habitation, to the jury for its consideration. The trial court refused to give the requested instruction, and exception was taken by defense counsel (T.328).

The requested instruction was a verbatim expression of Utah Code Ann. § 76-2-405, 1953, as amended, which provides:

> "A person is justified in using force against another when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation; however, he is justified in the use of force which is intended to cause death or serious bodily injury only if:
>
> (1) the entry is made or attempted in a violent and tumultuous manner and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling or being therein and that the force is necessary to prevent the assault or offer of personal violence or;

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(2) He reasonably believes that the entry is made or attempted for the purpose of committing a felony therein and that such force is necessary to prevent the commission of the felony."

Respondent acknowledges that under appropriate circumstances, failure to give this instruction would be reversible error, in accordance with the holdings of the line of cases cited by appellant. However, the circumstances which would warrant such an instruction are not present in the instant case.

According to State v. Newton, 105 Utah 561, 144 P.2d (1943), each party is entitled to have his theory of the case which is supported by competent evidence submitted to the jury. In State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947), this court held that an appropriate instruction on a theory of the case is required if there be any substantial evidence to justify giving such an instruction. In the final case cited by appellant, State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969), the court reaffirmed the propriety of the substantial evidence test.

Under this standard the trial record needed to contain substantial evidence which would tend to put the events of the early hours of February 7th within the parameters of Utah Code Ann. § 76-2-405, 1953, as amended. An analysis of the events as related to the

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statutes demonstrates clearly that justification in defense of habitation was neither a viable nor a supportable defense in the instant case. Even if, arguendo, this court accepted that for purposes of this statute, appellant's habitation that evening was his sister's home, although he was merely staying the night, appellant could not surmount other obstacles:

1. As the decedent and his friends were huddled in the vicinity of the van in the yard of the home, it was unreasonable for appellant to assume that the home itself was about to be invaded. What was reasonable to assume was that the persons in the yard had come to remove the mag wheels and tires, as they had tried to do on a previous occasion. No violent overtures were made by any members of the Herrera group toward the home or toward any of the persons therein.

2. Although the Herrera group may have been trespassing on the Mitcheson property by refusing to leave the yard, the record supplies no evidence to meet the statute requirement that there be an unlawful entry into or attack upon the habitation. The home and not the yard was the habitation.

3. Because deadly force was used, the statute requires in those cases that the entry or attempted entry be made in a "violent or tumultuous manner". Again appellant could offer no evidence to support this

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theory since there was neither an entry nor an attempted entry.

4. In addition to the violent entry requirement, the statute further demands that such entry be made or attempted in order to physically harm persons therein or to commit a felony within the habitation. Although the decedent, Richard Herrera, had agreed to fight the appellant later in the day, appellant was unable to offer competent evidence that the decedent was attempting to violently enter the residence to harm anyone or to commit a felony therein. The attempted removal of the wheels and tires from a van in the yard of the home would not meet the statutory requirement of felony "therein".

In light of this analysis, respondent's position is that appellant failed to meet the substantial evidence standard by being outside the parameters of Utah Code Ann. § 76-2-405, 1953, as amended, making inapplicable and inappropriate Prepared Jury Instruction No. 15.

Other jurisdictions have considered this issue of presenting theories to the jury, and their comments are helpful here. In State v. Rio, 38 Wash.

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2d 446, 230 P.2d 308 (1951), the Supreme Court of Washington held that the court is not required to submit instructions to the jury on every theory requested by a defendant; and although the court will not pass on the weight or credibility of defendant's evidence, assuming that it is all true, defendant still must make a prima facie case as a matter of law to entitle him to instructions on the theory requested. In the instant case, no prima facie case was established.

In a 1974 Nevada case, Singleton v. State, 522 P.2d 1221, the court held that an instruction need not be given where there is no proof in the record to support it.

These decisions support the trial court's refusal to include the justification instruction in its charge to the jury, as there was no competent, substantial evidence tending to support that proposition.

CONCLUSION

Because appellant had failed to offer any substantial evidence supporting his theory of justification in the defense of habitation, the trial

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court properly refused to give appellant's requested Jury Instruction No. 15.

Respectfully submitted,

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